Chapter II

Fundamental Concepts

1. The Content and Function of the Uti Possidetis Principle

The content and the function of *uti possidetis* as it stands at the present, refers to inviolability of previous administrative borders, both within and outside the colonial context. This means that *uti possidetis* does not cover the frontiers of the existing states, although the impact of this principle remains practically the same for both situations. For a better understanding of today's *uti possidetis,* an overview of the historical development and transformation of the principle is needed. This overview starts with the Medieval times[1], Latin American independence of the 19th century, nationalist movements in the Balkans and the two world wars, ending up with the process of decolonization in the 1960s. The application of this principle after the end of Cold War will be discussed in the sixth chapter of this study, with specific reference to the former Yugoslavia.

The existence of two forms of *uti possidetis* best reflects the historical development of the principle. One form is called *uti possidetis juris*, while the other is *uti possidetis de facto*[2]. The first form is applicable at present, while the latter belongs to the past history and its origin is

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1 In the realm of interstate relations, the area of military operations, the term *uti possidetis* was first used by Richelieu. As an architect of the *raison d' etat*, he proposed that an armistice be concluded along the *uti possidetis* line, in a time when the Congress of Cologne was still meeting. If accepted, this would have meant that the military of the warring parties had to have stayed in the frontlines as of the time of the armistice. The proposal had been made in an apparent hope to paving the way for calling to order the Congress of Westphalia, held between 1644-1648. See, Kenneth Colegrove,'Diplomatic Procedure Preliminary to the Congress of Westphalia'. *American Journal of International Law* Vol. 13 No. 3 (July, 1919) pp. 450-482 at 475.

2 Steven Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States'. *American Journal of International Law* Vol. 90 No. 4 (October 1996) pp. 590-624 at 594-595.

traceable as far back as the Medieval period. In fact, the latter form belongs to the period when Roman law was transmitted into the realm of interstate relations. The division of territories in these times had been based on an analogy with private property: Pope Alexander VI was well known for his issuance of bulls (deeds) naming the title holder of a given territory (usually various Christian rulers of the time). In some cases, the title allocated in this way stretched over vast territories of a continent, sometimes covering areas in Europe[3].

In Roman Law, from where the principle was taken, there existed a quite different and opposite meaning of the *uti possidetis* principle than in the realm of international relations. The *Pretorian* Edicts of Republican (Classical) Rome, regulating the issue of private property, made a distinction between the possession of things and the ownership over them. Possession and ownership in Roman Law were considered as two different and separate issues. When the possession of things was gained in good faith, that is, not by use of force or by fraudulent means, the Roman magistrates applied the famous rule '*uti possidetis, ita possidetis*' (as you possess, so you possess). This rule did not allow for any judgement as to the ownership: the issue of ownership over things was to be decided through the regular procedure before the courts of law[4]. The gradual evolution of *uti possidetis* from private to international, as well as its transformation into a rule of wider application, has gone in two directions. One area of impact dealt with the practical implications of the application of *uti possidetis* (the transformation of *uti possidetis* from a rule pertaining to the claims over private property into that concerning

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[3] Jesse S. Reves, 'International Boundaries'. *American Journal of International Law*, Vol. 38 No. 4 (October 1944) pp. 533-545 at 539-541; Frederich von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law'. *American Journal of International Law* Vol. 29, Issue 3 (July 1935) pp.448-471 at 452.

[4] For the Roman Law, see, in W. Michael Reisman, 'Protecting Indigenous Rights in International Adjudication'. *American Journal of International Law* Vol. 89 Issue 2 (April 1995) pp. 350-362, at 352, footnotes 8 and 9. In this study, the author gives an overview of a theory founded by Moore confirming that *uti possidetis* had been taken into the realm of interstate relations from the Roman (private) Law by the late Medieval lawyers.

state or territorial sovereignty), while the other had to do with the possible status of a situation coming under the domain of *uti possidetis* (the transformation of possession as a factual and provisional situation over things in private law into a permanent legal status of sovereign rights over certain state territory). This gradual transformation of *uti possidetis* should not be surprising if the timing of this process is taken into account. The process developed at a time when the use of unlimited force between states with the view of gaining territories was not considered as illegal and illegitimate[5]. This state of affairs lasted until the Second World War.

Uti possidetis juris, as it stands at present, has been the result of development of two other principles: 1) self-determination and 2) non-interference in internal affairs of other countries. Both of these have their origin in Latin America at the beginning of the 19th century. The birth of *uti possidetis* and its first formal application in Latin America reflects the nature of the relations among Europeans themselves, on one side, and between them and the Latin American countries following the Napoleonic Wars (1815), on the other. Europe continuously interfered with the affairs of the Latin American countries in the search for *terra nullius* (no-man's land), later to become colonies[6]. This interference was

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[5] Frantz Despagnet, *Cours de Droit International* (Paris: Sirey, 1910) pp. 117-132; 575; 579-584; Thomas Joseph Lawrence, *Les Principes de Droit International* (Oxford: Imprimerie de la Universite, 1920) pp. 766; Thomas Baty, 'Can an Anarchy be a State?' *American Journal of International Law* Vol. 28 Issue 3 (July 1934) pp. 444-455 at 444, 446, 454; Karl Strupp, 'Les Regles General du Droit de la Paix'. *Recueil de Cours de l' Academie de Droit International*, Tome 47 (I), 1934 pp. 473-474; Lauterpacht (ed.), *Oppenheim's International Law*, Vol. II, Seventh Edition (London: Longman, 1952) pp. 598-599; Sarah Joseph, 'Resolving Conflicting Claims of Territorial Sovereignty and External Self- Determination'. (Part 1) *The International Journal of Human Rights* Vol. 3 No. 1 (Spring 1999) pp. 40-61 at 49-50.

[6] A theory enunciated by the well-known lawyer *Emerich de Vattel*, set out three major epochs of *terra nullius* corresponding to our analysis of *uti possidetis*. These epochs can be briefly summarised as the sixteenth century Roman Law concept, when terra *nullius* referred to all non-Roman territory; the seventeenth and eighteenth tenet, where non-Christian territory was considered *terra nullius*; and finally the nineteenth century claim

especially obvious following the Latin American independence (April 1810 – December 1824). Thereafter, the Europeans transferred the balance of power practice into Latin America[7]. In order to divert frequent European interference, the Latin American leaders, after independence, accepted the *uti possidetis juris* principle in their mutual relationships (except Brazil until recent years). So, the territorial delimitation of the new sovereignties was based on the *uti possidetis juris* form, not *uti possidetis de facto*. This meant that the jurisdictions of these countries were confined along the former colonial administrative borders and there were no *terra nullius* in that part of the world. In this regard, the principle of *uti possidetis* preceded by a decade the *Monroe Doctrine*, proclaimed by the US President in 1823, concerning the non-interference in internal affairs of the American continent[8]. At the same time, the acceptance of *possidetis juris uti* by Latin American states was designed to prevent further conflicts over borders among these countries This issue is closely connected with the previous one for the Europeans usually used the border complexities and disputes in Latin America as an excuse to interfere and pit the local leaders against each other. At the end, neither European interference nor the conflicts over borders ceased, especially during the first decades of the 19th century[9]. There is no Latin

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that territory not belonging to a 'civilised state' would be considered *terra nullius.* As cited by Joshua Castellino, 'Territoriality and Identity in International Law: The Struggle for Self- Determination in the Western Sahara', *Millennium: Journal of International Studies* Vol. 28 No. 2 (1999), pp. 523-551 at 547. The case of Latin America belongs to first category of *terra nullius*, while the rest of colonies fall under the heading of 'territory not belonging to civilised state'.

7 Norman Rich, *Great Power Diplomacy: 1814-1914.* (New York: McGraw–Hill, Inc. 1992) pp.28-44; 167-184; 347-364.

8 Paul de Lapradelle, *La Frontiere. Etude de Droit International* (Paris: Imprimerie du Centre Issoudun, 1928) pp. 76-87; George Schwarzenberger, 'Title to Territory: Response to a Challenge'. *American Journal of* I*nternational Law* Vol. 51 Issue 2 (April 1957) pp. 308-324 at 320.

9 The last contest over borders, which was settled in 1992, had been between El Salvador and Honduras, with Nicaragua intervening. For an overall account of the history of conflicts over borders in the region of Latin America since the 19th century, see, Alejandro Alvarez, 'Latin America and International Law'. *American Journal of*

American country, with the exception of Argentina's armed conflict with Great Britain over the Falkland Islands in 1982, that has been immune from conflicts over borders. At the same time, to prevent frequent European interference within the region, Latin American states convened three congresses (held in 1826, 1847-48 and 1884). At the end of these congresses, the Latin American states foresaw the creation of a confederation among themselves as well as the need to avoid conflicts over borders and a unified stance against the European interference[10]. All these arrangements ended up in failure but the Latin American contribution, *inter alia*, to the development of rules on the territorial

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International Law Vol. 3 Issue 2 (April 1909) pp. 269-353; James Brown Scott, 'The Swiss Decision in the Boundary Dispute between Colombia and Venezuela'. *American Journal of International Law* Vol. 16 Issue 3 (July 1922) pp. 428-431; Chandler P. Anderson, 'The Costa Rica-Panama Boundary Dispute', *American Journal of International Law* Vol. 15 Issue 2 (April 1921) pp. 236-240; L.H. Woolsey, 'The Bolivia – Paraguay Dispute'. *American Journal of International Law* Vol. 24 Issue 1 (January 1930) pp. 573-577; L.H. Woosley, 'Boundary Disputes in Latin America'. *American Journal of International Law* Vol. 25 Issue 2 (April 1931) pp.324-333; F.C. Fisher, 'The Arbitration of the Guatemalan–Honduras Boundary Dispute'. *American Journal of International Law* Vol. 27 Issue 3 (July 1933) pp. 403-427; L.H. Woolsey, 'The Equator-Peru Boundary Controversy'. *American Journal of International Law* Vol. 31 Issue 1 (January 1937) pp. 97-100; Josef L. Kunz, 'Guatemala vs. Great Britain: In Re Belice', *American Journal of International Law Vol.* 40 Issue 2 (April 1946) pp. 383-390; C.G. Fenwick, 'The Honduras - Nicaragua Boundary Dispute'. *American Journal of International Law* Vol. 51 Issue 4 (October 1957) pp. 761- 765; Georg Maier, 'The Boundary Dispute between Ecuador and Peru'. *American Journal of International Law* Vol. 63 Issue 1 (January 1969) pp. 28-46; Alan J. Day (ed.), *Border and Territorial Disputes*. (Detroit: Gale Research Company, 1982) pp. 332-388; Gideon Rottem, 'Land, Island and Maritime Frontier Dispute'. *American Journal of International Law* Vol. 87 Issue 4 (October 1993) pp. 618-626.

[10] Alejandro Alvarez, 'Latin America and International Law', pp. 221-230; 278-281; 286-287; 291; Paul de Lapradelle, *La Frontiere. Etude de Droit International*, pp. 76-87.

limits of the extension of new sovereignties remained considerable, although this has not been noticed until very recently[11].

As it has already been pointed out, the *uti possidetis* principle, at the outset, has had a regional character, as did the *Monroe Doctrine* on the principle of non-interference in the internal affairs of sovereign states. Both became principles of general application only after the end of the Second World War following the process of decolonization. In the period between 1815-1945, the rules on territorial sovereignty in Europe were based on a different set of criteria. This was especially true for some parts of Europe – the Balkans. The philosophy and practice of the so-called 'spheres of interest', born in the Congress of Vienna (1815), was also extended to the Balkans. This meant that no consideration, apart from geostrategy, would be given to the ethnic composition of the territories to be partitioned. No consideration, apart from the use of brute force, was given to the previous administrative borders of the Ottoman and Austro-Hungarian empires respectively. The basic premise of the European borders in the Balkan region after the Balkan wars was the preservation of stability and security, thus excluding any real interest in the nations affected by the new territorial rearrangements[12].

After the end of the Second World War, following the example of Latin America, the African leaders, having won the struggle against colonialism, insisted upon the respect of pre-existing colonial administrative borders[13]. In the case of Africa, the principle of *uti*

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[11] Alejandro Alvarez, 'Latin America and International Law', pp. 344-353; Philip Jessup, 'Diversity and Uniformity in the Law of Nations'. *American Journal of International Law* Vol. 58, Issue 2 (April 1964) pp. 341-358 at 347.

[12] Arthur W. Spencer, 'The Balkan Question - Key to a Permanent Peace'. *The American Political Science Review*, Vol. 8 Issue 4 (November 1914), pp. 563-582 at 563; 569-570; 575; 577; 580-581; Jesse S. Reves, 'International Boundaries', pp. 533-545 at 545; Michael Roux, *Les Albanais en Yugoslavie. Minorite Nationales, territoire et development* (Paris: Fondation de la Maison des Science de l' Home, 1992) pp. 175-185; 187-191.

[13] *See*, also, Rupert Emmerson, *From Empire to Nation*. (Cambridge: Harvard University Press, 1960),Chapters VI and XVI.

possidetis juris cannot be properly understood without some comprehension of history related to the Berlin Congo Conference (1884-1885), which is inaccurately thought of as a meeting that divided Africa[14]. In fact, Africa had been divided before this date. The Final Act of the Berlin Congo Conference, signed on February 26, 1885, provided for the free movement of goods and persons within territories that were under the sovereignty of the then colonial powers (Britain, France, Germany, Portugal and Belgium), as well as for the banning the slave trade[15]. The sovereign rights of these powers over their respective territories were designed not on the basis of the effective administrative control, as it used to be the case in Europe, but relying on the astronomic criteria of certain longitudes and latitudes. The starting point of the criteria of territorial delimitation were the coasts of Africa and not its hinterland. Any state that would thereafter take into possession a piece of African land had to notify other colonial powers in order to prevent mutual conflicts over territories. Colonial powers were not allowed to set up any effective administration in these lands. Given a colonial power's minimal effective control along the coasts of Africa sufficed to secure its rights over other powers, to regulate movement of goods and persons, as well as to prevent the slave trade. Any extension of the European administration to the African hinterland was deemed as an expensive and difficult task not worth pursuing by European colonists. Article 35 of the General Act of the Conference spoke of the creation of a basic line of control along the coasts of the continent only. From these coasts, the administrative control and the protection of the above colonial rights were to be exercised[16]. This European approach has been used for the sole purpose of modifying and mitigating the exclusive nature of territorial sovereignty, that is, the function of conflict - prevention over territory among the colonial powers. Dividing Africa into 'spheres of influence' among the Europeans had yet another impact *vis-à-vis* the local population. To regulate relations with local populations, various

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[14] See, more on this, in Daniel de Leon, 'The Conference at Berlin on the West- African Question ', *Political Science Quarterly* Vol. 1 No 1 (March 1886) pp. 103- 139.

[15] Norman Rich, *Great Power Diplomacy: 1814-1914*, pp. 237-242.

[16] *The General Act of the Berlin Congo Conference*. In Arthur Berriedale Keith, *The Belgian Congo and the Berlin Act* (Oxford: Clarendon Press, 1919) pp. 314-315.

protectorates, neutral and 'buffer' zones and suzerainties were set up. There was no attempt made whatsoever to establish a form of modern political organization. With the collapse of colonial rule, most of the abstract lines running along given longitudes and latitudes, dividing the colonial 'spheres of influence', were converted into international boundaries based on the principle of *uti possidetis juris*. This meant the acceptance and recognition of the previous colonial administrative borders existing at the time of independence of these countries[17]. Here lies the difference with Latin America. Whereas in the case of Africa some institutions were set up, aimed at regulating the division of 'spheres of influence' as well as the relations with the local population, in Latin America no such institutions existed. In the latter case, *uti possidetis juris* meant that the new borders would be respected, not based on the existence of some international arrangements establishing quasi sovereign institutions but on the internal administrative acts of the Spanish (and Portugese) crowns.

Despite the fact that forty *per cent* of African borders are straight lines dividing scores of different ethnic groups, in most cases they proved to be stable and viable[18]. African leaders have very often claimed that their borders are artificial and imposed arbitrarily by the foreign powers. However, since independence these leaders have subscribed to the fact that today's borders are the only viable solution for the continent. The Organization of African Unity (OAU) stressed in 1964, a year after its formation, that the borders of Africa reflect a 'tangible reality', while its leaders made a commitment to the effect of respecting the borders existing at the time of independence (*uti possidetis juris*). Those African countries that expressed territorial claims based on other than *uti possidetis juris* principle, such as ethnic or historic claims, have lost their case and were ostracized. The cases of Morocco and Somalia are

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[17] Friedrich Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System'. *World Politics* Vol. 39 Issue 1 (October 1986) pp. 27-52 at 36-41.

[18] Jeffrey Herbst, 'The Creation and Maintenance of National Boundaries in Africa'. *International Organization* Vol. 43 Issue 4 (Autumn 1989) pp. 673-692, at 674.

the most conspicuous examples[19]. By the same token, those ethnic groups attempting secession from the parent state were prevented from it by the whole international community, such as in the case of Katanga (Zaire/Congo) and Biafra (Nigeria) in the 1960s. On the other side, colonial powers that tried to forcefully hinder their former colonies from becoming independent, such as in the cases of Algeria or Guinea Bissau, were barred from this via the so-called *premature recognition of the new states and movements fighting for national liberation*, a concept designed primarily to help the process of independence of former colonies[20]. To gain international recognition, in the African case, it sufficed that a country (former colony) possessed a government that was in control of its capital alone. The premature recognition by other states, in essence, stemmed from the practice and philosophy of the Berlin Congo Conference, which required that the colonial powers have only some minimal control along the coasts of Africa without a need to extend that control deep inside their respective 'spheres of influence'. The sovereign rghts of the colonial powers followed the abstract lines of certain longitudes and latitudes over the African continent[21]. The OAU

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[19] Ravi L. Kapil, 'On the Conflict Potential of Inherited Boundaries in Africa', *World Politics* Vol. 18 Issue 4 (January 1966) pp. 656-673 at 633-634; Patricia Berko Wild, 'The Organization of African Unity and the Algeria-Maroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes Among African States'. *International Organization* Vol. 20 Issue 1 (Winter 1996), pp. 18-36 at 19-20; 27; 29-36; Saadia Touval, 'The Organization of African Unity and African Borders'. *International Organization* Vol. 21 Issue 1 (Winter, 1967) pp. 102-127 at 105-119; Robert O. Matthews, 'Interstate Conflicts in Africa'. *International Organization* Vol. 24 No. 2 (Spring 1970) pp. 335-360 at 339-342.

[20] Heather Wilson, *International Law and the Use of Force by National Liberation Movements.* (Oxford: Clarendon Press, 1988) pp. 119 -120 at footnote 101.

[21] 'We (the colonial powers) have engaged… in drawing lines upon maps where no white man's feed ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never new where exactly these mountains and rivers and lakes were'. Lord Salisbury, British prime minister of the late 19th century, as quoted in Joshua Castellino, 'Territoriality and Identity in International Law: The Struggle for Self-Determination in the Western Sahara', pp. 523-551 at 529.

and its African leaders adopted the same philosophy and practice as their colonizers: the rules of the OAU, like those created by the Congo Berlin Conference, were designed to preserve the external borders and relations among the new sovereign states of Africa; internally, it sufficed that a given country maintained a minimal administrative control, quite symbolic and centred mostly around the capital city[22]. In other words, an African colony was said to have attained independence when it had moved from the status of being under foreign rule to the status of conducting foreign relations with full authority, notwithstanding the domestic (internal) situation[23]. This means that the international law of the 1880s created to mitigate and regulate quarrels over borders served as a model for the laws of 1960s and 1970s, when anti-colonial self-determination movements gained international legitimacy. Other rules or principles, apart from *uti possidetis*, such as those regarding ethnic self-determination, if applied would have only complicated matters further, taking into consideration the existing ethnic diversity in Africa. It would have certainly been too difficult, if not entirely impossible, to find out the ethnic 'selves' entitled to self-determination, meaning full independence[24]. The African concept of self-determination has remained, like that in Latin America, based on territory, not ethnicity. The claims for self-determination, meaning independence of various indigenous populations in these two continents, have not been recognized, either by scholars[25] or states[26], meaning that the principle of

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[22] Jeffrey Herbst, 'The Creation and Maintenance of National Boundaries in Africa', pp. 673-692 at 687-689.

[23] Ali A. Mazrui, 'The United Nations and Some African Political Attitudes'. *International Organiztion*, Vol. 18 Issue 3 (Summer 1964), pp. 499-520 at 499. This author has euphemistically named the very process of attaining independence in the African context as a transition 'from foreign rule to foreign relations'. Ibid. p. 499.

[24] Rupert Emerson, 'Pan-Africanism, *International Organization* Vol. 16 Issue 2 (Spring 1962), pp. 275-290 at 276-283.

[25] 'Not only do no territories 'nullius' exist on the American continent, but further, and in consequence thereof, no international value is given to the possession of certain regions held since time immemorial by native tribes not recognising the sovereignty of the country within whose limits they find themselves. Two important consequences follow from there: that the occupation of those regions by the natives is a matter of internal

uti possidetis 'bestowed an aura of historical legality to the expropriation of the lands of indigenous peoples'[27]. In practical terms this meant that the appropriation of *uti possidetis juris* in the determination of the post-colonial boundaries did not recognize the right to 'restoration of authentic communities destroyed by alien rule'[28].

Asia is different in this regard. Scholars put foreword various explanations for this difference. Among them, the history of colonialism and preserved state traditions in Asia take precedence. In Asia, the system of frontiers set up by the colonial powers (Britain and France) in most cases emulated the Western system, living untouched pre-colonial state structures. This meant that after the independence these countries inherited state borders of the already existing sovereignties with a long state tradition. The implementation of self-determination, therefore, was accomplished through full restoration of the pre-colonial forms of state organization. This was especially obvious in South-East Asia[29]. As opposed to Africa, in this part of the world, respect for *uti possidetis* was

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public law of each country and not only of International Law; and second, that the governments have, in certain cases, an international responsibility for the acts of natives within their boundaries, even though those natives do not recognise the sovereignty of the State'. Alejandro Alvarez, 'Latin American and International Law', pp. 342-343 at footnote 95.

[26] In the rulings of the International Court of Justice (I.C.J.), international borders follow the line of *uti possidetis juris*, that is, the colonial administrative divisions or loyalties belonging to pre-colonial era. This stance of the Court has been, among others, confirmed in the cases of Western Sahara (1975); El Salvador v. Honduras, with Nicaragua intervening (1992); and, recently, in the territorial dispute between Libya and Chad (1994). See, more, in W. Michael Reisman, Protecting Indigenous Rights in International Adjudication ', pp. 350-362 at 354- 357.

[27] Malcolm Shaw, 'The Heritage of States: The Principle of *Uti Possidetis* Today', *British Yearbook of International Law* 67 (1996), pp. 75-154 at 98.

[28] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice'. *International and Comparative Law Quarterly* Vol. 43 April 1994, Part 2, pp. 241-269 at 243.

[29] See, Robert L. Solomon, 'Boundary Concepts and Practices in Southeast Asia'. *World Politics* Vol. 23 Issue 1 (October 1970) pp. 1-23.

met with wide acceptance[30]. It should be noted, however, that in this case the application of the *uti possidetis* did not have the same role as in Africa, which meant that it did not set the territorial limits for the realization of self-determination. In the Asian context, *uti possidetis* had rather to do with the classical sovereignty disputes over narrow strips of territory, scarcely populated and with no need to ask for the wishes of the tiny populations. In the practice of the International Court of Justice (I.C.J.), only one case is recorded[31], upon which theoretical observations on *uti possidetis* in Asia are based[32], This means that the Asian case over the *Temple Preah of Viehar* had do with a classic border dispute in which case *uti possidetis* served only as a reference point regarding the sovereignty of Cambodia over the disputed *Temple Preah of Viehar*,

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[30] Ibid. p.46. In the practice of the I.C.J., the dispute between Thailand and Cambodia over the Temple *Preah Viehar* is the most conspicuous one (upon which theoretical observations on *uti possideti juris* in Asia are based). Cf. Gunter Wiesberg, 'Maps as Evidence in International Boundary Disputes: A Reappraisal'. *American Journal of International Law* Vol. 57 Issue 4 (October 1963) pp. 781-803 at 792-796.

[31] *Case Concerning the Temple of Preah* Vihear (Merits). Judgement of June 15, 1962. *I.C.J. Reports* (1962). In this contest between Thailand and Cambodia, the Court recognized the sovereignty of the latter over the disputed temple, based on the Annex I map that authentically depicted, in Court's view, the factual situation existing since the beginning of the 20th century. No attantion was given by the Court to the wishes of the 'population' that, in fact, were few local clergy serving the Temple. The verdict of the Court stated, *inter alia*, as follows: 'In the present case, Cambodia alleges a violation on the part of Thailand of Cambodia's territorial sovereignty over the region of the *Temple of Preah* and its precincts. Thailand replies by affirming that the area in question lies on the Thai side of the common frontier between the two countries and is under the sovereignty of Thailand. This is a dispute about territorial sovereignty…'. As quoted by the Court in the *Case Concerning the Temple of Preah Viehar* (Cambodia vs. Thailand), Merits of the Case. See, *I.C.J. Reports* (1962) p. 6.

[32] For scholarly comments on this case, see, Gunter Wiesberg, 'Maps as Evidence in International Boundary Disputed: A Reappraisal', pp. 781-803 at 792-796; Covey T. Oliver, 'Case Concerning the Temple Preah Vihear', pp. 978-983; Covey T. Oliver, 'Case Concerning the Temple *Preah Vihear*'. *American Journal of International* Law Vol. 56 No. 4 (October 1962) pp. 1033-1053.

thus excluding any question concerning the will of the local population (although the area was scarcely populated).

2. The Concept of International Stability

The concept of international stability is probably one of the most widely used concepts in the self-determination discourse, especially following the end of the Cold War. The principle of territorial integrity of states, the restrictive interpretation of self-determination, and the extreme caution in recognizing new self-determination claims following Cold War's demise, have cumulatively been justified by an appeal to the values of international (peace) and the stability of international order. However, the concept under discussion is not related to self-determination issues only. It is wider in scope and far more complex in its content than it appears at first sight. The concept of international stability should not only be seen as an end result of the self-interest and power politics pursued by states in their mutual relationships. In the era of interdependence and globalization that we live in, other principles and values, norms and institutions certainly influence the interstate relationships, no matter how confused these principles, values, norms and institutions might be. These are the factors that we to take into consideration in the following paragraphs. We start our elaboration in order to answer two general questions: 1) what is international stability and 2) what are the sources of international (in) stability?

In International Relations literature a clear cut definition of the concept of international stability *per se* is not given. Its definition is contrived from the analyses and observations made by scholars as to the nature of the international system (bipolarity vs. multipolarity); the means or institutions designed for the management of power relations within the international system (balance of power, hegemony, collective security, world government, peacekeeping and peacemaking, war, international law and diplomacy); finally, the analyses and observations concerning the very nature of international actors, e.g. states (democracies vs. non-democracies).

When defined, though, the concept of international stability in its essence captures the main features of either the international system or of its components. In both situations, the definition of the concept focuses on state-as-actor unit, rational in its actions, thus excluding other

non-state entities from this conceptualization. These non-state actors, such as national or religious groups, terrorist organizations, etc., may as well be incorporated into the definition of the concept as well.

Of the definitions focusing on a state-as-actor, those offered by *Karl Deutsch* and *J. David Singer,* are singled out as the most important. Although probabilistic in its nature, this definition purports to take as a vantage point both the total system and the individual states comprising it. From the broader, or systemic, point of view, these authors define the stability as 'the probability that the system retains all of its essential characteristics; that no single nation becomes dominant; that most of its members continue to survive; and that large-scale war does not occur'. And, from the more limited perspective of the individual actors, stability would refer to the 'probability of their continued political independence and territorial integrity without any significant probability of becoming engaged in a war for survival'[33]. This conceptualization of international stability does not account for non-state entities and their actions are not taken into account as a potential source of international instability. These non-state entities, following the end of the Cold War, proved to be a huge source of instability not only in interstate relations but also in the relations and affairs that develop within sovereign states. These non-state factors were at the end one of the major causes of the former Communist federations (Soviet Union, Yugoslavia and Czechoslovakia). The ethnic claims for self-determination triggered by the rising nationalism in the post-Cold War era threatened and continue to threaten the regional and wider stability, this being admitted by liberal[34] and realist[35] scholars alike. The case we study, the former Yugoslavia, is a metaphor for the new international system, that is, a system which is more turbulent and anarchic at present than ever before during the recent

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[33] Karl W. Deutsch and J. David Singer, 'Multipolar Power Systems and International Stability'. *World Politics* Vol. 16 Issue 3 (April, 1964) pp. 390-406 at 390-391.

[34] See, for example, Stephen Van Evera, 'Primed for Peace: Europe after the Cold War'. *International Security* Vol. 15 Issue 3 (Winter 199/91) pp. 7-57.

[35] See, for example, John J. Mearsheimer, 'Back to the Future: Instability in Europe after the Cold War', *International Security* Vol. 15 Issue 1 (Summer 1990), pp. 5- 56.

history[36]. This is not to say that the international system of the Cold War period was not anarchic. It did not have an overreaching supranational authority entrusted with securing the order and stability in the system. However, it did have some relative stability and the mechanism to maintain this state of affairs, which rested with the two superpowers who took on the role of disciplinarian within its own blocks (or spheres of influence). With the collapse of this system, new logic of anarchy ushered in focusing not only on interstate relations but also on the internal dynamics of the existing sovereign states. With the demise of the Warsaw Pact, NATO's new security role dramatically changed accordingly. This new security role of NATO had to be formally accepted in the light of new changes in the structure of the international system. Thus, meeting in Rome in November 1991, the alliance's heads of state and government adopted what they called NATO's 'new strategic concept'. The danger the alliance faced was no longer 'calculated aggression' from Moscow but 'instabilities that may arise from the serious economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries in Central and Eastern Europe'[37].

The initial debate regarding the international stability focused on the international system and its structure. Some scholars asserted that the multipolar world was less stable compared to that composed only of two powers (bipolarity)[38]. In this debate, some other scholars denied the

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[36] A thorough analysis of the Yugoslav case in the above sense can be found in Richard H. Ullman, 'The Wars in Yugoslavia and the International System after the Cold War'. In Richard H. Ullmand (ed.), *The World and Yugoslavia's Wars* (New York: Council on Foreign Relations, 1998) Chapter 2.

[37] See, North Atlantic Treaty Organization, *NATO Handbook* (Brussels: NATO Office of Information and Press, 1993), appendix II, the Alliance's Strategic Concept Agreed by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Rome on November 7 and 8, 1991.

[38] More on this debate, see, Karl Deutsch and J. David Singer, 'Multipolar Power Systems and International Stability', pp. 390-406; Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*. 4th ed. (New York: Alfred A. Knopf, 1966); Richard Rosecrance, 'Bipolarity, Multipolarity and the Future'. *Journal of Conflict Resolution*. 10

existence of bipolarity and multipolarity in international politics[39]. Some others saw the nuclear deterrent as the main source of international stability, ignoring the role of the structure of the system itself[40]. Empirical evidence relied upon by these scholars belongs mainly to the pre-WW II period. This evidence is put foreword both to support and oppose the distribution of capabilities (bilpolarity and multipolarity) as the sources of international stability in K. Waltz's terms. The debate was heated in particular after the Cold War and was triggered by John Mearsheimer's famous article *Back to the Future*[41].

Scholarly works examine various means and institutions designed for power management in international politics. They are ranked and classified, according to their order of importance in different ways. In common, they mostly relate to the following concepts: balance of power, hegemony, collective security, world government, peacekeeping and peacemaking, war, international law and diplomacy[42]. Among these

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(September 1966), pp. 314-327; Kennth N. Waltz, *Theory of International Politics* (Addison, Wesley: Reading Mass, 1979) ; John Lewis Gaddis, 'The Long Peace: Elements of Stability in the Postwar System'. *International Security*, 10 (Spring, 1986) pp. 99-192.

39 Thus, R. Harrison Wagner, proposes distinction between the tight power distribution of the Cold War and the loose distribution following it. Cf. R. Harrison Wagner, 'What Was Bipolarity'. *International Organisation*, Vol. 47 Issue 1 (Winter, 1993), pp. 77-106.

40 James M. Goldgeier and Michael McFaul, 'A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era'. *International Organisation* Vol. 46 Issue 2 (Spring 1992), pp. 467-491. For the opposite view, see, Kenneth Waltz, *Theory of International Politics*, pp.180-182.

41 The crux of the issue in this article is that bleak future of humanity following the Cold War. Mearsheimer believed that the new system of multipolarity created after the Cold War would be more war-prone. He also believed that the stability of the past 45 years shall not be seen again in the decades to follow. Among the reasons for this, Mearsheimer included the hyper-nationalism, especially in Eastern Europe. See, John Mearsheimer, 'Back to the Future: Instability in Europe after the Cold War', pp. 5-56.

42 See more on this in E.H. Carr, *The Twenty Years' Crisis: 1919-1939. An Introduction to the Study of International Relations.* (London: Macmillan, 1946; Hedley Bull, *The Anarchical Society. A Study of Order in World Politics.* (London: Macmillan, 1977; Inis

means and institutions, the balance of power takes the most prominent place in scholarly analysis as well as in interstate relations[43]. For this reason we devote some more attention to the balance of power in the following pages, while the rest of the instruments and institutions will be dealt with throughout the appropriate parts of this dissertation, with special reference to the former Yugoslavia.

Balance of power is an end result of the activities of the state-as-unitary actor acting in an essentially anarchical environment. Although there are very few differences among the scholars as to the side effects of the balancing behavior of states, such as that concerning the possibility of cooperation under the conditions of anarchy, most of the authors agree that the balances of power are formed systematically[44].

L. Claude, *Swords Into Ploughshares: The problems and Progress of International Organization* (New York: Random House, 1984); Robert Gilpin, *War and Change in World Politics*. (Cambridge: Cambridge University Press, 1981); Charles W. Kegley, *The Long Postwar Peace*. (New York: Harper Collins, 1991); Thomas J. Volgy and Lawrence E. Imwalle, 'Hegemonic and Bipolar Perspectives on the New World Order'. *American Journal of Political Science* Vol. 39 Issue 4 (November 1995) pp. 819-834.

[43] See more on the development and the history of the idea of balance of power, in Evan Luard, *The Balance of Power. The System of International Relations, 1648- 1815.* (London*:* Macmillian, 1992), pp. 1-30.

[44] Hedley Bull, though, says that balances of power may come into being through conscious efforts and policies of one or all sides. Hedley Bull, *Anarchical Society*, pp. 104-106. Among these types of the formed balances fall the Concert of Europe (1815-1919). This system of great power management of international affairs did achieve the greatest ever success in maintaining the stability in international affairs. There were wars among great powers during this time as well: Britain, France and Russia fought in the Crimea in 1854-1855 and Bismark went to war first with Austria and then with France to unify the German states in 1870-1871. Nevertheless, a certain amount of conflict may be accommodated and is accommodated by the international system without the system itself losing its overall stability. It is stability, at the end, mot conflict, that has been normal condition of the international system. See, also, Andreas Osiander, *The States System of Europe, 1640-1990. Peacemaking and the Conditions of International Stability*. (Oxford: Clarendon Press, 1994), pp. 3-4.

As we have seen earlier, the second part of the definition of international stability focuses on the state, or the second level of analysis. From this perspective it is assumed that stability exists when states continue to preserve their political independence and territorial integrity without the need to pursue the struggle for survival. Is this definition, which we label a 'classical' one, accurate enough to cover all forms of stability pertaining not only to the present but to the Cold War era as well? In trying to give an answer to this, IR scholars have focused their attention on the internal dynamics of states and their social, political and economic fabric they are made of. This line of reasoning, by and large present during Cold War years, has produced a large amount of evidence and very useful theoretical insights, known as the 'theory of democratic peace'.

The main premise of this liberal view on international stability is that democracies are war-prone but that do not go to war with each other[45]. In their mutual relationship, democratic states observe and externalize the democratic norms, rules and procedures and institutions which, in turn, prevent the recurrence of the logic of balance of power and security dilemma. The logic of anarchy and its consequences, say these authors, remain valid only among the undemocratic and authoritarian states that are, in some cases, named as the 'outer concentric circles'[46], or the 'periphery' of international society[47]. The 'theory of democratic peace' is not confined to the interstate relations only.

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[45] See, more on this in Michael W. Doyle, 'Liberalism and World Politics'. *American Political Science Review* Vol. 80 (December 1986) pp. 1151-1169; Joanne Gowa, 'Democratic States and International Disputes'. *International Organization* Vol. 49 No. 3 (Summer 1995) pp. 511-521; John M. Owen, 'How Liberalism Produces Peace'. *International Security* Vol. 19 No. 2 (Fall 1994) pp. 87-125.

[46] Barry Buzan, 'From International System to International Society: Structural Realism and Regime Theory Meet the English School'. *International Organization* Vol. 47 Issue 3 (Summer 1993) pp. 327-352 at 349-352.

[47] James M. Goldgeir, Michael McFaul, 'A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era' pp. 476-491.

Within this liberal view there has also emerged another stream of thought focusing on intra-state relations. The assumption, notes *Kelvi Holsti*, that the problem of war (conflict) is primary a problem of relations between states has to be seriously questioned[48]. In essence this assumption was earlier questioned in scholarly work, in the studies regarding the phenomena of state-building of the nations that emerged from the process of decolonization. As we shall see in the following chapter, these new states did not have to struggle for their survival in an anarchical society of states in order to secure and preserve their newly won independence and territorial integrity. Their political independence and territorial integrity were rather guaranteed and preserved by the same 'anarchical' society. This was done through the norms on sovereign equality of states, fixed territorial borders and the so-called juridical statehood[49]. The international regime providing for these norms proved to be very stable in the long run and has favored the political independence and territorial integrity of these states but to the detriment of political and economic development and the social cohesion of these countries[50]. The legitimacy of the ruling elite that took on the task of state-building following the end of decolonization derived not from the will of those governed but from the norms on equality of states, fixed territorial borders and juridical statehood. These qualities, in essence, enshrined the collective will of the majority of the members of international society[51]. However, as we shall argue later, any other approach other than the above one, supporting former administrative (colonial) borders as a basis for international statehood, would have proved more destabilising, especially had it been based on the ethnic principle.

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[48] Kalevi J. Holsti, *The State, War and the State of War* (Cambridge: Cambridge University Press, 1996) p.15.

[49] More on this, see, the eloquent study by Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and Third World* (Cambridge: Cambridge University Press, 1990).

[50] Jean François Bayart, *The State in Africa: The Politics of Belly*. (London: Longman, 1993) pp. 41-118.

[51] I. William Zartman, *Collapsed States. The Disintegration and Restoration of Legitimate Authority (*Boulder: L. Rienner Publishers, 1995) pp.1-11; 207-273.

The analysis of state building, both in theory and practice, in former colonies and its impact on the international stability has further been extended to the new states that emerged after the collapse of Communist federations following the end of the Cold War. Long before these new states emerged, the Communist federations had descended into anarchy and violence, imperiling their own citizens and threatening their neighbors through refugee flows, political instability, and random warfare. This second wave of the failed (collapsed/or weak) states, whose very existence rested with the presence of juridical statehood in international realm, produced the instability in the system (in one case even causing a serious rift among the great powers of the present-day international system: Kosovo during NATO air campaign of March – June 1999). These types of states are associated with the resurgence of ethnic nationalism and the violence it produces[52].

Ethnic nationalism, as a divisive and destabilizing force in international relations, has been treated with equal care as even the state system itself. In fact, those who studied ethnic conflicts as a source of international instability have made a parallel between the behavior of ethnic groups and the states. *Barry R. Posen* is among them. He states that ethnic (and other religious and cultural) groups enter into competition with each other, amassing more power than needed for security and thus begin to threat others. The crux of this argument is that ethnic (and other religious and cultural) groups behave, upon the collapse of the previous state structures, in the same manner as do the sovereign states under the conditions of anarchy[53]. Nevertheless, as opposed to the previous wave

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[52] They are called this way because of the weaknesses of the state institutions and the lack of political and social cohesion within these states. See, Gerard B. Helman and Steven R. Ratner, 'Collapsing Into Anarchy'. *Current* Issue 353 (June 1993); Lawrence Freedman, 'Weak States and the West'. *Society* Vol. 32 Issue 1 (November-December 1994) (http://www.Epnet.com/).

[53] See, Barry R. Posen, 'The Security Dilemma and Ethnic Conflict'. *Survival* Vol. 35 Issue 1 (Spring 1996) pp. 27-45. Identical view is expresses also by Markus Fischer, but regarding medieval times. This author says that the behaviour of communes, duchies, principalities and other actors of this period was more or less like the behaviour of modern states acting under the conditions of anarchy. Cf. Markus Fischer, 'Feudal

of the failed states, this time the role and the commitment (military and non military) on the part of international community, in terms of preserving the political independence and territorial integrity of its newly accepted members, is by far greater and more effective than in the past. As a sign of this role and commitment, the international community has added new norms and procedures concerning democracy, the rule of law and the respect for human and minority rights (apart from old ones regarding the sovereign equality of states, fixed territorial borders and juridical statehood). There was given a qualitatively new meaning to the territorial integrity of states that emerged from former Communist federations. In some cases, as in the Balkans, this new interpretation was brought to the foreground by the use of force, huge military deployments as well as economic and other assistance on the part of the international community. This was done in order to render meaningful the new concept of territorial integrity that should be seen in close connection with the internal political and economic infrastructure of these new countries. For this purpose, new institutional mechanisms and programs, such as the Stability Pact for Southeastern Europe, were set up. This means that the assumption of the 'democratic peace', that the liberal and democratic states are producers of peace and stability in the system, is gaining weight and proving to be correct, in Europe at least.

Europe, 800-1300: Communal Discourse and Conflictual Practices'. *International Organization* Vol. 46 Issue 2 (Spring 1992) pp. 427-466.

3. The End of the Cold War

The purpose of this section is not to give any account as to when the Cold War commenced or ended nor why it ended in the way it did[54]. Our aim is modest: to offer an overview about the processes triggered by the Cold War's end, first and foremost those concerning self-determination and the response of the international community to them.

The most important single event after the fall of the Berlin Wall was the attempted *coup* in the former Soviet Union in August 1991. That week of August looked as if the Second Russian Revolution would restore the Communist world and stop the trends of history. Yet, the coup failed and *Michael Gorbatchev* restored his authority. It raised hopes throughout the world. However, in 1992, negative trends suddenly slanted downwards. The dream of global harmony and exaggerated expectations of democracy, human rights and prosperity generated by the collapse of Communism, were harshly jolted, if not exploded. Someone accurately

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[54] The term 'cold war' was first coined by Walter Lippmann to describe the initial confusing period of conflict between the United States and the Soviet Union over the shape of the postwar world. After the Second World War, many people believed that it would be followed by a complex negotiations leading eventually to a peace treaty with the defeated countries and a new reconstruction of the international system. Nearly a decade passed before it became clear that such a settlement would not take place and it soon became clear that disagreements between the US and the Soviet Union governments about an eventual peace treaty were much grater then had been anticipated. See, more on this, in Walter Lippmann, *The Cold War: A Study in US Foreign Policy* (New York: Harper Torchbooks, 1972). This book first appeared as a series of newspaper articles criticising George Kennan's famous article *The Sources of Soviet Conduct*, which was written in *Foreign Affairs* in 1947 under the pseudonym 'X'. Kennan's article was, of course, wherefrom the idea of containment was first sketched out for the general public. More on this period until its end, see, the eloquent elaboration by Henry Kissinger, *Diplomacy* (New York: Simon and Schuster, 1994) pp. 423- 446, 762-804. Kissinger gives in a comprehensive manner an account of Cold War's demise (the fall of the Berlin Wall) and the reasons for it.

described this as a 'new pessimism'[55], while others predicted a world full of interstate conflicts. Statesmen, like George Bush, were more optimistic. Bush himself uttered a hopeful phrase about 'new world order' and the reality behind it seemed suddenly more chaotic just as described by scholars. And, meaner, too, whether in the murderous clashes of Hindu and Muslim in India or the epidemic scale famine caused by corrupt warlords in Somalia. Even amid the promise of new democracies in the Philippines, Nicaragua, or South Africa, the path seemed more vulnerable than it seemed. The role of the great powers as keepers of the world's peace and stability, soon dashed away. The Gulf War remained a past memory of the unity of the great powers and the UN in opposing the classical case of aggression. As a matter of fact, the Gulf War went into shadow within a short period of time not as much because of the great powers' disunity as due to the pressures from the claims to ethnic self-determination of the long-time suppressed peoples. Most of the conflicts and wars following the Gulf War have been intra-state wars, or, as one author has put it, 'third type wars'[56]. These conflicts and wars, driven by the quest for ethnic self-determination, began in the Balkans, at a time when Europe itself was striving for unity and common defense and security policy agreed upon in Mastricht in December 1991. The world watched in horror as proud assertions of independence in what used to be Yugoslavia turned into a barbarous ethnic conflict among Serbs, Croats, and Bosniacs. The term 'ethnic cleansing' resurfaced again from the same region and nation, almost a century and a half later[57].

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[55] Charles Williams Maynes, 'The New Pesimism'. *Foreign Policy* No. 100 (Fall 1995) pp. 33-49.

[56] Martin van Kreveld, *The Transformation of War* (London: the Free Press, 1991), pp. 35-37; 48-49; 192-293.

[57] The term 'ethnic cleansing' is a brain child of *Vuk Karadjic*, the leader of the Serbian Enlightenment of the 19th century. Karadjic in 1860 used the term to describe the retaking of Belgrade from the Ottomans in 1805 when all non-Serbs had been expelled and their culture destroyed. Cf. Patric Cabanel, *Nation, Nationalites et Nationalisms en Europe: 1850-1920.* (Bruxelles: Editions Ophrys, 1996) pp.212-213. Not all would agree with this. Same would, furthermore, argue that the term itself has been coined by foreign policy-makers in the West to convince their constituencies of the need to stop a target

After four years of fruitless negotiations under international mediation, hundreds of broken ceasefires and a hostage crisis, involving the kidnapping of UN troops by Serbs, the 1995 Dayton Accords marked a turning point in the international approach. It showed that when dealing with tough minded Balkan politicians, a credible threat of force can cause them to be more reasonable. The tragedy repeated itself though. This time in Kosovo during 1998-1999, but with some difference. While in Bosnia-Herzegovina the West's publicly declared political aim was to implement the basic tenets of the principle of territorial integrity of that state, in the Kosovo case, the preservation of the FRY's territorial integrity was only a side-effect of an international action designed to prevent an unraveling human tragedy, threatening international peace and security.

In other parts of Europe, the Communist legacy did not prove so violent and tragic as in former Yugoslavia. Czechoslovakia was divided into two, its 'velvet revolution' showed that it was unable to sustain the unity of Czech and Slovak nations. It was a peaceful separation so that two nations joined the rest of the former Communist countries in the process

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nation e. g. the Serbs from committing atrocities against innocent civilians. In short, this term was introduced, according to some authors, to convey to the public opinion an aggressor-victim relationship. Cf. Dov Ronen, *The Challenge of Ethnic Conflict, Democracy and Self- Determination in Central Europe.* (London: Frank Cass: London 1997) pp. XXXIII. The evidence shows, however, that the term itself was neither forged term to serve foreign policy purposes nor an end result of the conflict and war in former Yugoslav territory. It proved to be the very aim of war instead. That the crime of ethnic cleansing was an orchestrated policy and endeavour of the Belgrade regime is documented by the former UN Special Rapporteur for Human Rights in Former Yugoslavia, Tadeusz Mazowiecki. See, the UN documents under the symbol UN Doc. A/47/666/ and S/24809 of November 17, 1992. For the comments about the phenomenon of ethnic cleansing, see, Alfred de Zayas, 'The Right to One's Homeland, Ethnic Cleansing and the International Criminal for Former Yugoslavia'. *Criminal Law Forum* Vol. 6 No. 2 (1995) pp. 260-301 at 294-296; Drazen Petrovic, 'Ethnic Cleansing - An Attempt at Methodology'. *European Journal of International Law* Vol 5 No. 3 (Spring, 1994) pp. 342-360. To stop this opaque occurrence in intra-state relations, it took too much of time.

of social, political and economic transformation but is was not without painful symptoms of readjustments. In the case of Czechoslovakia, the application of self-determination along former administrative lines (borders) proved to be an exemplar for the rest: none of the nations expressed conflicting self-determination claims stretching beyond their former republican (administrative) borders[58]. Further inside the Communist world, the situation was quite different, resembling in many aspects that of Yugoslavia. In the Caucasus, violent conflict brought new bloodshed between Armenia and Azarbajan over Nagorno Karabakh. The old Soviet state of Georgia was torn apart by war among Georgians, Ossetians, and Abkhazians. At the root of these conflicts were quests for self-determination and territorial integrity that were either denied in a violent manner or demanded in the same way by one of the parties to the conflict. Within the territory of former Soviet Union, the war in Chechnya was another example of the prevalence of *uti possidetis* over self-determination and independent statehood[59].

The Balkan war was a test for President Bush's 'new world order'. At the outset, both the Europeans in NATO and the United States shied away from military intervention, initially on grounds that the war was an internal conflict, later arguing that intervention would be a quagmire. To stop the carnage, first in Bosnia and later in Kosovo, NATO undertook military operations that were unimaginable just a decade earlier. 'Out of area' operations of NATO encompassed not only military intervention but also large peacekeeping and peace-enforcement operations, aimed at restoring the peace and stability of the war-torn countries. This segment, made possible under conditions of globalization in international relations, besides the problems of poverty, hunger, crime, human rights,

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[58] With regard to the application of *uti possidetis* to the dissolution of Czechoslovak Federation, see, J. Malenovsky, 'Problems Juridiques Lies a la Partition de la Tchecoslovaque'. *Annuaire Fraçais de Droit International* Vol. XXXIX (1993) pp. 325-338 at 328.

[59] For an eloquent overview of the prevalence of *uti possidetis* over self- determination and independent statehood in the case of Chechnya, see, Gail W. Lapidus, 'Contested Sovereignty: The Tragedy of Chechnya'. *International Security* Vol. 23 No. 1 (Summer 1998) pp. 5-49.

environment protection and global economics, ushered in a new era in the concept of state sovereignty. NATO military engagement in the Balkan wars and after has definitively rendered the concept of sovereignty futile one for some areas of the world, or, to use UN General Secretary's own words, there are now 'two emerging concepts of sovereignty'[60]. Some have labeled this as a 'new NATO expansion'. NATO's eventual interests apart, the fact remains that the decade after the Cold War has offered more tragedy than triumph, less economic and political liberation than economic dislocation and political disintegration, more disenchantment and despair than renaissance and reassurance. This period shall long be remembered as an era of the outburst of the claims and counterclaims for self-determination. It will also be remembered for a new concern regarding relations between ethnic groups and states, and between the polyethnic and multiethnic character of actually existing states and the stability of the international order. The alleged right to self-determination, which had been assimilated by the anti-colonialist ideology, the Westphalian consensus (albeit broken very often during the course of history, starting with the French Revolution) and *uti possidetis juris*, has in recent decade been revitalized by a new surge of (sometimes) violent self-determination claims and counterclaims. One effect of this new crisis situation in the relations among the international order and its component states (and peoples) was a reconsideration of the underlying political theory and the practice of self-determination. To this issue we turn next.

[60] Kofi Annan, 'Two Conceps of Sovereignty'. *The Economist* September 18, 1999. (http://www.un.org).

4. Territorial and Ethnic Self-Determination

In the case of self-determination, the main issue is to decide who the 'selves' entitled to self-determination are. Next to it comes the question concerning the legitimate authority to decide about who the 'selves' are. In principle, the 'selves' could be considered entire peoples inhabiting certain portions of a territory. This begs the next question: What is the meaning of 'peoples'? Or, which parts of territory form the territorial base for the legitimate exercise of self-determination? On the top of this comes the issues of legitimate authority: Who shall decide on the legitimate categories of self-determination, be it territories or populations?

Scholars have made efforts to answer the above questions. For this purpose, there have been made various classifications. In most cases, they followed the practice of states on self-determination, although theoretical and abstract observations on the topic have been present. To this latter category we devote much of the discussion to follow. Among others, *Dov Ronen's* theoretical explanations and classifications of self-determination have been a valuable guide in our work.

Ronen sees five manifestations of the self-determination that have been dominant at successive periods from the French Revolution to the present. They are: mid-nineteenth-century European national self-determination, late-nineteenth-century Marxist class self-determination, post-WW I Wilsonian minorities' self-determination, and post-WW II non-European/racial self-determination[61].

In order to define self-determination, or 'nationalism' as he put it, *Ronen* takes the examples of German and Italian movements during the nineteenth century (the Belgian and Greek cases are mentioned as well). This type of quest for self-determination 'bridges over religious, ethnic and linguistic differences and thus functions as a centrifugal force in pursuing its goals… and it needs a state as a machinery to administer

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[61] Dov Ronen, *The Quest for Self-Determination* (New Haven and London: Yale University Press, 1979), pp. 25-26.

problems caused by these differences'[62]. Here the state serves as a reference point to distinguish between ethnic and national self-determination. In the former case, as opposed to the latter, the quest for self-determination emerges within a framework of the state that nationalism has often created. This type emerges in states 'where democratic representation, if not adhered to in practice, is at least paid service'[63]. The 'selves' are defined as against the rule of an alien nation, e.g., the French domination, exacerbated by the Napoleonic wars (the cases of Germany and Italy); the alien Dutch rule (in the case of Belgians, both Walloons and Flemish); and the Ottoman rule in the case of the Greeks. Here are included the 1848 national revolutions as well (to be discussed in the next chapter)[64].

The next manifestation of self-determination is that related to Marxist or class quest for self-determination. The core of the Marxist conception of self-determination is almost the same with other already mentioned cases: It also tries to get rid of the alien rule. But, the definition of this alien rule is different in Marxist thought. This rule is made up of the owners of the means of production (the capitalist class) who rule over the working class (proletariat). The aim is to create a common 'us' in pursuit of self-determination, meaning a communist society. So, in this case the fundamental dichotomy and conflict is not between the 'us' and 'them' of nations, but between polar groups inversely related to the means of production[65].

The following, and most interesting, typology made by *Ronen* is that concerning Wilsonian self-determination. This type is labeled as

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[62] Ibid. p. 29

[63] Ibid. p. 29

[64] *Ronen* uses the German word *Volk* to express best what national self- determination and the nation-state mean. The connotation of this word embraces the German sense of history (Historismus) of the *Volk*; it emphasises national uniqueness and the German people's unifying sense of community. The German 'nation' gives the state an indivisible homogeneous content. Cf. Ibid. pp. 27-28.

[65] Ibid. pp. 29-30.

'Wilsonian Self-Determination of Minorities'[66]. Since we discuss this issue in the following chapter, it suffices here to talk about the reasons behind *Ronen's* labeling of this type of self-determination as 'minorities' self-determination'. *Ronen* has again taken the concept of state as a reference point. Wilson's appeal to 'people' did not mean human beings in general; he referred to unrepresented minorities and, within them, the politically conscious, the elite, who had rocked Europe with nationalist fervor in the mid-nineteenth century revolutions and who had raised their voices in the beginning of the twentieth century[67].

The third manifestation, which does not take the state as a reference point, is that belonging to the African quest for self-rule. In the development of this quest for self-determination since the French Revolution, have emerged three manifestations: Pan-Africanism, formulated in the mid nineteenth century and persisting as such until WW II; Decolonization, which began after WW II and continued throughout 1960s, the decade of independence; finally, the activation of ethnic identity, in process since post-independence period of the 1950s, which may be considered as a third manifestation, but is dealt with separately by *Ronen*[68].

Pan-Africanism, according to the author, embraces all the movements, protests, conferences, and activities aimed at easing the sufferings of the blacks, obtaining more rights for them, and gaining their equality as human beings. Decolonization, differs from the above-mentioned manifestations. It is an attempt to materialize the 'desire for liberation from colonial rule, a rejection of political domination by a foreign society, especially of a different race, and not merely the will to secure more rights within the colonial framework, as during the Pan-African phase'[69]. The crux of the issue here is the activation of non-European/racial identities.

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[66] Ibid. pp. 30-32.

[67] Ibid. p. 32.

[68] Ibid. pp. 35-43.

[69] Ibid. p. 36.

The last and the most divisive and destabilizing form of self-determination is the one based on ethnicity. It is called ethnic self-determination, or ethno-nationalism. This is a type of self-determination through which the ethnic identity is activated aiming at the independence and sovereignty of certain states. There are two reasons for this activation: the slowing down of the process of integration within states (mostly newly independent states) and the speedy process of modernization[70]. The latter brought about integration and also spread the message of self-determination. Then, the process of integration slowed down. However, the message still sounded loud and clear. The quest for self-determination was there, and the glue to unite people was needed. National self-determination, as described above, now does not make sense, because its embodiment in the (nation-) state is precisely the problem; class self-determination is less available, for one reason because of social mobility; minorities' self-determination is impractical, because the issue is not democratic rights, strictly speaking; racial identity is out, because the rules cannot be defined in these terms. Ethnic - linguistic, cultural, regional, and historical past identity – lends itself as an effective adhesive, and the ethnic group emerges[71]. This description may be slightly oversimplified so as to stand for the point that the very same people, in different circumstances, could have activated other than ethnic identities. But still we have to cope with the side-effects of the age of modernity.

Among the definitions following the state practice, two are worth mentioning here. One is undertaken by James Crawford and belongs to the Cold War period, while the other refers to the period after Cold War's demise. We chose these two authors in a belief that they captures the essence of our original division between ethnic and territorial self-determination[72]. As we shall see in the next chapter, for most of the time

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[70] Ibid. p. 48.

[71] Ibid. p. 48.

[72] The division we make is more or less similar to Carr's distinction between the principle of self/determination and the principle of nationality. The principle of nationality tended to be 'one of disintegration', whereas 'self-determination did not necessary entail that' Men may 'determine themselves into larger as readily as into smaller units', Carr

since 1945, customary international law and the practice of states have recognized the right to self-determination. Analyses focusing on state (or inter-governmental organizations') practice as the evidence of the so-called *opinio juris*, suggest that, although expressed as 'people's right', self-determination has in fact been applied to (or recognized on behalf of) certain territorial units, even when these units were inhabited by nomadic peoples (the case of Western Sahara)[73].

The above stance on territorial units was stated by Crawford in 1979 in his revised doctoral dissertation, stating that 'self-determination had hitherto applied and recognized in practice only to the territorial 'units of self-determination' falling within one of four categories: 1) mandated territories, trust territories, and territories treated as non-self-governing under Chapter XI of the UN Charter; 2) states (except those parts of states which are them[74] selves units of self-determination); 3) distinct

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concluded. E. H. Carr, *Conditions of Peace* (London: Macmillan 1942) pp.59-60. The crux of this statement is that self-determination based on territory is less destabilizing as opposed to that based on ethnicity. One author, Hannum Hurst, pleads about the neo-decolonization approach to self- determination. He thinks, however, that 'it is less stabilizing than that based on ethnicity'. See, Hannum Hurst, 'Rethinking Self-Determination'. In Robert McCorquodale (ed.), *Self-Determination in International Law* (Dartmouth: Ashgate, 2000) pp. 195-263 at 232.

[73] For an excellent analysis of the territory as a basis for the group identity in the case of Western Sahara, see, Joshua Castellino, 'Territoriality and Identity in International Law. The Struggle for Self-Determination in the Western Sahara', pp. 423-551; For the role of territory in common identity formation, see also, John Agnew, 'Mapping Political Power Beyond State Boundaries: Territory, Identity, and Movement in World Politics'. *Millenium: Journal of International Studies* Vol. 28 No. 3 (1999) pp. 499-521; Daniele Conversi, 'Nationalsim, Boundaries and Violence'. *Millenium: Journal of International Studies.* Vol. 28 No. 3 (1999) pp. 675-698.

[74] James Crawford, *The Creation of States in International Law*. (Oxford: Clarendon Press, 1979) pp. 84-102. The same view has recently been expressed in his article 'State Practice and International Law in Relation to Unilateral Secession' (http://www.canada.justice.gc.ca/). There is some controversy in Crawford's later essays on the subject. Thus, in his essay *Democracy and International Law* (Cambridge: Cambridge University Press, 1994), pp. 1-43 at 8-10, the author qualifies as

political-geographical entities subject to *carence de souverainete*; and 4) other territories in respect of which self-determination is applied by the parties.

The first category above refers to the anti-colonial self-determination while the second refers to the self-determination of the existing states as foreseen by the UN Charter and other regional instruments. In this is included the so-called constitutional right to self-determination (the case of Quebec in Canada), or any other equivalent solution concerning the territorial units within (con) federal states. The third case, associated with the *carence de souverainete*, was first mentioned in the Aaland Islands Case after WW I (to be discussed later) and taken into consideration after the Second World War (the secession of Bangladesh). Although the UN and individual states recognized Bangladesh as a sovereign state based on systemic and widespread denial of human rights of the East Bengali population (*carence de souverainete*) and took the geographical distance between East and West (two former parts of Pakistan), the same precedent was not applied elsewhere. This precedent could have well been applied following the Cold War but was not, in part out of fear of anarchy and in part out of self-interest. Kosovo and Chechnya, despite the systematic and widespread violation of human rights of their populations and their distance from Belgrade and Moscow respectively, have been denied full independence based on the above precedent of Bangladesh. The issue of Kosovo shall be discussed later.

Finally, the fourth case refers to the self-determination as agreed upon by the parties and has to do with the plebiscites and referenda as recognizable forms for the expression of the free popular will. This form of self-determination mostly relates to the border areas and regions without entailing the creation of any new entities. To this we turn again in the following chapter, focusing mainly on the period between the two

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undemocratic the prevalence of the principle of territorial integrity over that regarding self-determination. A similar restrictive approach to self- determination in the Cold War era was expressed by Antonio Cassese. Cf. Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge: Cambridge University Press, 1996).

wars (1919-1939) when the plebiscite and referenda were widely applied. The cases after WW II shall be mentioned in passing only.

Later, some scholars extended the above list to include the cases and practices that emerged after Cold War's demise. The focus has been on the former Communist federations. It is believed that the new precedent was created with the dissolution of former Communist federations so that the above list should now include the following: 1) highest level of constituent units of a federal states that has been (or is in the process of being) dissolved by agreement among all (or, in the case of Yugoslavia, most) of the constituent units; and 2) formerly independent entities reasserting their independence with at least tacit consent of the established state where the incorporation into other state, although effective and enduring *de facto*, was illegal or of dubious legality (the three Baltic states)[75]. While the latter point (the three Baltic states) did not cause a serious divergence of opinions, the former one triggered a debate over the so-called 'federal right to self-determination'[76]. This

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[75] Benedict Kingsbury, 'Self-Determination and 'Indigenous Peoples'. *Proceedings of the American Society of International Law: the 86th Annual Meeting* (Washington, D.C. April 1-4, 1992), pp. 383-394 at 384 footnote no.1. Similar view is expressed by Marc Weller concerning the Yugoslav precedent. Cf. Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia'. *American Journal of International Law* Vol. 86 Issue 3 (July, 1992) pp. 569-607 at 606.

[76] On this debate, that is, whether there exists such a right, see, Otto Kiminich, 'A 'Federal' Right of Self-Determination'. In Christian Tomuschat (ed.), *Modern Law of Self-Determination*. (The Hague: Martinus Nijhof Publishers, 1993) pp. 83-100; Partic Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism'. In Christian Tomuschat (ed.). *Modern Law of Self-Determination*, pp. 101-138. Other authors have been engaged in this debate in an indirect manner, mostly through criticizing the way the Yugoslav precedent had been applied. Thus, Rolan Rich thinks that 'if a nation with its own federal unit is entitled to secede, it would be strange that secession be limited to such federal units and not extended to nations within unitary states'. See, Roland Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union'. *European Journal of International Law* Vol. 4 No. 1 (1993) pp. 36- 65 at 61. Similar view is expressed by Radan Peter in his article 'Yugoslavia's Internal Borders as International Borders: A Question of

'federal right to self-determination' is different and should be distinguished from the above mentioned case concerning the constitutional right to secession (the case of Quebec in Canada). In the former case, as this example implies, self-determination is conceived as a right according to which certain federated states are entitled to dissolve the common (federal) state whenever they want to. This cannot be the practice of states in the future. If this were to be the case, then it would mean the precedent set up by the collapse of the former Communist federations shall have to apply to future similar cases, thus encouraging the dismemberment of the existing federations. This precedent, if accepted, would have yet another side effect concerning the rights of the suppressed peoples living within sovereign and independent states that are not federations. This would mean that these peoples have no right to independence and secession, no matter the level of violence exercised against them. This cannot be the case. As it has been argued for quite a long time, international law has a neutral stance towards state formation and secession[77]. This implies that there does not exist a right to

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Appropriateness', published in *East European Quarterly* Vol. 33 Issue 2 (Summer 1999) p. 137, 19 p (http://www.EBSCOhost.com/). For the critics of this view and the fear that the Yugoslav precedent might discourage states to devolve more power to the autonomous regions in their efforts to meet realistic and effective claims for self-determination, see, Hannum Hurst, 'Rethinking Self-Determination'. In Robert McCorquodale (ed.), *Self-Determination in International Law*, pp. 195-263 at 232- 233; Hannum Hurst has also expressed a general feat throughout his book *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1990); See, also, Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', pp. 569-606, footnote 215; Donald Horowitz, *Ethnic Groups in Conflict*, pp. 563-684.

[77] International law, in principle, has always had a 'neutral' stance towards the domestic regimes of states, their creation and disappearance. The same applies to their legitimacy. Cf. Geatano Arangio Ruiz, *Gli Enti Soggeti Dell' Ordinamento Internazionale.* (Milano: Editore Giufrre, 1951) pp. 344-345. See, also, Geatano Arangio Ruiz, *L'Etat dans le sens du Driot des Gens et de la Notion du Droit International* (Bologna: Cooperativa Libraria Universitaria, 1975) pp. 6-9, 22-63. Nevertheless, there are some cases from the past when international law has put some burden on the states as to their treatment of their own nationals. This was, however, made on a contractual basis. Thus, the articles 15 and

revolution leading to secession[78]. The line followed by the international community in the case of former Communist federations, especially in the case of Yugoslavia, was based on considerations pertaining to regional and wider peace and stability rather than relying upon some abstract administrative lines and divisions. These administrative lines have served and still serve the purpose of this peace and stability in interstate relations, not the opposite. Whatever the level of their correctness, the selection by the *Badinter Commission for former Yugoslavia* (and the international community as a whole) of former administrative borders (of the federated republics) as a reference point for the evaluation as to who was entitled to a sovereign statehood, along with the fulfillment of other traditional requirements for international statehood, was considered as a stabilizing factor in the process of the creation of new states after Cold War's demise[79]. Initially designed to

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17 of the Peace Treaty with Italy foresaw an obligation on the part of Italy to respect the fundamental rights and freedoms of the persons who fell within here jurisdiction according to the above treaty of peace. Similar provision had been stipulated in article 3 of the Treaty of Havana (between the US and Cuba), concluded in 1903. Cf. Gaetano Arangio Ruiz, *Gli Enti Soggetti*, pp. 344-345; See, also, Geatano Arangio Ruiz, *L' Etat dans le sens du Driot des Gens et de la Notion du Droit International*, pp. 28-63. In cases like these, one has always to deal with contractual obligations not having an universal character and whose legitimacy does not go beyond the reach of individual contracting parties. On the other side, there are situations in which state's legitimacy is measured internationally based on the respect for international human rights standards. This has been a very frequent occurrence following the end of the Cold War and shall be discussed later in details in Chapter VI.

78 See, David Armstrong, *Revolution and World Order. The Revolutionary State in International Society* (Oxford: Clarendon Press, 1993). Heather Wilson also writes that the 'use of force by elements opposed to an established government, for whatever cause, was neither condoned nor condemned by customary law. The resort to the use of force in the first place remained a matter of self-help beyond the purview of international law.' Heather Wilson, *International Law and the Use of Force by National Liberation Movements*, p. 28. See, also, pp. 55-88 of the same book, confirming the above-quoted stance on the rights to revolution.

79 In scholarly work, we have found only one author linking directly, as we do, the peace and stability in Europe and wider with the consequent application of *uti possidetis* as

prevent the total unraveling of the state structures over the transition period from decolonization to independence, the principle of *uti possidetis* has gradually legitimized former colonial administrative lines for all times. As a matter of policy, *uti possidetis* has ever since militated in favor of territorial stability[80], notwithstanding the opinion of the inhabitants concerning the transfer of territory by states[81]. Having been considered a success story in Africa, the precedent was further extended in the 1990s to the unraveling of the Soviet Union, Yugoslavia, and Czechoslovakia. In all three cases, the parent states broke down under the pressure of ethnic nationalism of the different peoples living within them. Facing the threat of destabilization, the international community once more responded by calling on the principle of *uti possidetis* as a reference point for setting the territorial scope of the new quests for self-determination[82]. New entities claiming international statehood could do so only along the fault lines already in place during the time they were administrative units within the parent state. Paradoxically, though, the quest for self-determination was ethnically based and heavily relied upon ethnicity while its final realization went along the former administrative borders of a certain type (along the borders of former federated republic only). So, no ethnic self-determination has been recognized or encouraged by the international community after the Cold

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suggested by the Badinter Commission and the international community as a whole. Cf. Vladimir Djuro Degan, 'L'Arbitrage Juridique Ignore: La Jurisprudence De La Commission Badinter'. In Marie-Françoise Allain et al. (eds.), *L' Ex Yugoslavie En Europe. De La Fallite Des Democraties Au Processus De Paix* (Paris: Edition L'Harmattan, 1997) pp. 31-43. Other scholars have, as we shall see later, discussed either legal aspects of the Commission's ruling or put the whole blame for war and conflict on Badinter's work.

80 Ian Brownlie, 'General Course on Public International Law'. *Recueil des Cours* Tome 225 de la Collection (1995). *Academie de Droit International de la Hague* (1996), pp. 71-72.

81 Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990) pp. 170-171

82 It must be appreciated that there is a complementarity between *uti possidetis* and the principle of self-determination in certain aspects. It is *uti possidetis* which creates the ambit of the putative unit of self-determination. Ian Brownlie,' General Course on Public International Law', p. 72.

War[83]. The only document recognizing such a right, the 1993 Vienna Declaration, is in the process of gaining acceptance on this issue and thus cannot be said to represent a strong *opinio juris* in favour of ethnic self-determination[84].

Apart from the territorially based self-determination as described so far, in the post-1945 era, 'selves' have also been considered territories under military occupation and territories where majority colored populations were victims of institutionalized apartheid at the hands of Europeans. In both cases, self-determination did not entail the creation of new state entities. Self determination was, in these cases, attached to the very position of the inhabitants of certain territories, inhabitants and territories who at the same time enjoyed some limited international status. In order to improve their limited international standing, they were entitled to the so-called internal self-determination aiming at the

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[83] Ethnic claims for self-determination call into question the legitimacy of states and governments. This is where the reluctance of states to recognise these claims stems from. The regulation of ethnic conflict by international law, the consequences of such an eventual regulation included, like it was the case with anti-colonial self-determination, remains a doctrinaire issue for the time being. See, David Wippman (ed.), *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998) pp.1-7; Anne Marie Slaughter, 'Pushing Limits of the Liberal Peace: Ethnic Conflict and the 'Ideal Polity'. In David Wippman (ed.), *International Law and Ethnic Conflict*, pp. 128-144; Michael Freeman, 'The Right to Self-Determination in International Politics: Six Theories in Search of a Policy'. *Review of International Studies* 25 (1999), pp. 355-370 at 357-359.

[84] After having declared the right of 'all peoples to self-determination', the 1993 Vienna Declaration states the following: 'In accordance with the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind'. See, *The Vienna Declaration and Programme of Action. World Conference on Human Rights, June 1993* (New York: The UN Department of Public Information, 1993) para. 2 at page 29.

improvement of their self-governing position, their human rights or their right to full-fledged and genuine democracy[85]. We turn to this issue in the next chapter again. Now, without claiming to have exhausted the first part of this section, we shall examine the next question we asked at the outset: Who decides as to who the 'selves' are?

When President Wilson announced his appeal for self-determination, the US Secretary of State, Robert Lansing, expressed his fears about the extent of self-determination and those entitled to decide on that matter. On the surface, said Lansing, it seemed reasonable: let people decide. 'In fact it was ridiculous because people cannot decide until someone decides who the people are'[86]. Scholarly work has given a very simple answer to this by denoting the international community as the bearer of this responsibility. The community of nations decides who the 'selves' are[87]. Nevertheless, this answer begs another question regarding the legitimacy to decide on the above, as it has been apparent throughout the Yugoslav process of dissolution. Which/or whose international community decides about who the 'selves' entitled to self-determination are? Since there is no superior organ of the international community entitled to decide on the matter, a simple question follows: which organ of this community should decide upon the issues raised above? The practice of states, acting individually or collectively, has differed from time to time and from one case to the other. The following are some initial observations in this regard.

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[85] Cf. Patric Thornbery, 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism'. In Christian Tomuschat (ed.), *Modern Law of Self-Determination,* pp. 101-138; Allan Rosas, 'Internal Self-Determination'. In Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 225-252; Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?'. In Christian Tomuschat (ed.), *Modern Law of Self-Determination,* pp. 253-282.

[86] Quoted by Ivor Jennings, *The Approach to Self-Governance* (Cambridge: Cambridge University Press, 1956) pp.55-56.

[87] Allain Pellet, *Droit International Public* (Paris: L.G.D.J., 1994) pp.500-501.

Recent practice, following the Cold War's end and the collapse of former Communist federations, demonstrated that a regional organisation can decide on the above issues. It was then that the European Community (now European Union) decided on behalf of the whole international community as to the 'selves' entitled to self-determination and the scope of its application. The EC did so through an arbitration procedure, naming a French judge, *Robert Badinter*, as its chair. The *Badinter Commission* (initially called 'Committee') was an organ of the EC, whose legal opinions had an advisory and non-binding character on parties, both regarding the issues of self-determination and succession. However, the work of this body had a huge impact on the Yugoslav crisis and beyond, extending to all former Communist federations. The rules the Commission set up were more or less designed to follow the policies of the EC and, later, the rest of the international community.

In a similar fashion, the UN had to follow the pace of events and create norms, rules and procedures (institutions) concerning anti-colonial self-determination. Although the UN acted on behalf of the whole international community, thus having a wider constituency than the EC, its actions on the issue of self-determination's implementation, had been followed for the most part by the Third World Countries (in cooperation with the Soviet Block). Before the decolonization started in full swing, the actors knew more or less the territorial limits of their would-be political actions and the rights and duties vested on them by the international community (upon the attainment of their independence). This was not the case after the Cold War. Apart from the Western leaders, mainly from Europe, the rest of the local actors new nothing about who the 'selves' were to be and, consequently, their political actions went far beyond the territorial limits of the units they were ruling. Therefore, the conflicts over self-determination were pushed well above the administrative borders of the local rulers. What this case had in common with the former, is that in both situations the regional initiatives and bodies (the EU and the OAU respectively) proved to be ineffective in stopping the violence and tragedies created as a result of the conflicts and wars over self-determination. Their effectiveness increased after an initial failure and a deep involvement of the other outside actors: the UN during the decolonization process and the US/

NATO throughout the Yugoslav drama. In terms of legitimacy of the actions undertaken on behalf of the international community, the case of the OAU presents itself as more legitimate, compared with the EU's involvement in Yugoslavia. In the former case, the OAU dealt with its own members, an element clearly missing in the latter's case[88].

[88] In scholarly work, there have been proposals aimed at unifying the practice of international community as to the legitimate authority to decide about the subjects entitled to self-determination. Thus, *Kemal S. Shehadi* believes that the international community must clarify its conception of self-determination; this conception must balance the principle of the territorial integrity of states with the aspirations of aggrieved nations; and there should be international institutions with the authority to settle self-determination disputes in accordance with the rule of law rather than the rule of force. See, more, in Kemal S. Shehadi, 'Ethnic Self- Determination and the Break-Up of States'. *Adelphi Paper* No. 283 (London: The International Institute for Strategic Studies, 1993) pp. 1-90 at 81-85.