

Chapter VII

Conclusion

Among the concepts closely associated to self-determination in general, that of *uti possidetis* takes prominence. In essence, the message of this rule deals with respect for former administrative borders, both within and outside the colonial context. This content, however, has not been recorded in the distant past. At the outset, in Roman Law, the rule of *uti possidetis* referred to private relationships and was distinct from the title-holders of the private property. Only in the Medieval Ages was the rule of *uti possidetis* transformed into a rule applicable in interstate relations, thus equalizing private possessions and ownership. By using *uti possidetis* as a basis, various rulers of the time conferred upon individuals property rights over vast areas. This content changed in the 1800s when the decolonization of Latin America took place. By this time, the principle of *uti possidetis* meant that former colonial administrative borders were to be international frontiers of the newly independent Latin American states. Until present times, content, more or less, remained unchanged. Its first manifestations came out after Second World War, when the process of decolonization commenced in the 1960s. Consequently, the application of *uti possidetis* was designed to set out the territorial limits for the realization of self-determination. Previously this had not been the case. The period between 1912–1945 consisted of a total lack of respect for the previous administrative borders. Victors in the battlefields determined the divisions of the Ottoman and Austro-Hungarian empires.

Next to the above concept, also closely related to self-determination, is the concept of international stability. Its classical definition remains connected with the state-as-actor acting in an essentially anarchical environment. This classical definition, however, says very little about its own relationships with the concept of self-determination. These two concepts are related only when the former is conceptualized from a different perspective, focusing on the sources of international (in) stability. This segment covers the issue of the internal dynamics of the so-called weak (collapsed/or failed) states that came to the surface. The

externalization of the internal dynamics of these states has in recent years proved to be a huge source of international instability because these dynamics were usually associated with ethnic or nationalist conflicts developing within them. The very survival and further development of these states rests with the rules, norms, and institutions and principles of the current international regime. In International Relations literature the statehood of these states is labeled as a 'juridical statehood' as opposed to a 'real' or 'normal' one that relies on the balance of power logic. The end of the Cold War, in essence, proved the fallacy of the old balance-of-power concept as a basis for explanation of international (in) stability. The end of the Cold War was followed by instability stemming from inside the weak (failed/or collapsed) states and not from the international system.

There are two sets of questions in every case related to self-determination. One is the would-be unit of self-determination and the other is the potential body entrusted with the right to decide about potential self-determination units. Both of these questions are closely connected. The answer to them settles the crucial dilemma as to whether today's self-determination is territorially or ethnically based. The would-be units of self-determination have changed over time. At the beginning as such were considered to be former colonies only. A later addition to this list has been the category of the federated states, that is, the federal units of certain federations. In none of the above cases has ethnicity been a decisive factor in the determination of the scope of self-determination. It has been, and still remains, that territory serves as a basis for the determination of the would-be units of self-determination, despite the fact that self-determination claims have usually been triggered by ethnic factors. This is the prevailing stance in today's international community that has been crystallized over decades following the Second World War.

Various regional organizations have been the bodies entrusted with the mandate to decide about the units of self-determination on behalf of the international community. In the case of Africa, it was the OAU that took up this responsibility, while in Europe after the Cold War this task belonged to the European Community (now European Union). In

additions to this, in the past, units of self-determination have been considered territories under military occupation and territories where the majority colored population were victims of institutionalized apartheid at the hands of Europeans. In these cases, however, self-determination did not entail the creation of new state entities. Self-determination was rather attached to the very position of the inhabitants of certain territories that, at the same time, enjoyed some limited international status.

The Peace of Westphalia marks the beginning of the state system as we know it today. In terms of self-determination, the period that followed the Peace of Westphalia is known as the time of dynastic legitimacy. This meant that the rulers were considered the only sovereigns on earth, ignoring the will of the population. They ruled according to the divine right without any regard as to the wishes of the populations concerned. This order of things was challenged by various thinkers, including Locke and Rousseau. This scholarly challenge of the divine right was later followed by concrete actions on the ground, such as the American and French Revolutions. These events restored the popular sovereignty and legitimacy denied until then by the Westphalian concept of state-centered and dynastic legitimacy. Napoleon's war campaign, however, pushed popular legitimacy to the extreme so that after his defeat in 1815, Europe again returned to the old principle of dynastic legitimacy. Only this time the concept of dynastic legitimacy had a different nature and content. It intended to serve as a cover up for the balance of power system set up in the Congress of Vienna in 1815. The period following this congress until 1918, was characterized by a struggle between the nationality principle and the dynastic legitimacy. Depending on the power politics exigencies, one of the above principles prevailed. The successful revolutions in Greece and Belgium and the unifications of Italy and Germany respectively, represent the use of power politics and the exigencies of brute force. The same applies to the ruthless suppression of the 1848 revolutions in Europe, which reflected sheer power politics. This means that neither the dynastic legitimacy nor the nationality principle can alone explain the concept of self-determination in this period. Both were the principal manifestations of the balance of power concept. They continue to possess capabilities in explaining the self-determination concept as it stood throughout this

period. It was, in fact, this logic of the balance of power that paved the way for the nationality principle that was to become a guiding rule in the interstate relations after WW I.

When this war ended there was no clear concept of self-determination. There existed a vacuum in this regard. In fact, from this time forward began the modern development of self-determination as it stands today. Two statesmen and one significant event deserve credit for this development: Lenin and Wilson and the notorious case of the Aaland Islands in Finland. While Lenin took up the issue of self-determination as a sign of weakness of his regime following the 1917 Revolution, Wilson did so in self-defense. Wilson realized all the destructive potentials of Lenin's plea for self-determination. To counteract this, Wilson urged his Western colleagues to have their countries to lead on the issues of nationality. It is true, however, that Wilson believed that the previous system of power management was the main cause of the Great War. This is the reasoning behind his Fourteen Points. The Points argued for a more manageable system of international relations based on a consensus, not pure power politics. He named this new system the League of Nations. The consent of the governed, as he termed it, was one of the main pillars of this new power management system, something similar to the logic of the 'democratic peace' theory. His counterpart, Lenin, based his concept of self-determination on the interests of the working class and Socialism (Communism), not on the consent of governed. In international relations, Lenin preached for full self-determination for oppressed nationalities of the Tsarist Russia, but only for a short period of time. As soon as he consolidated his power, Lenin started to take back former territories that he gave up in the 1918 Brest Litovsk peace arrangements. One of the core concepts of Lenin's self-determination was that of a 'Communist Federation'. In fact, the Soviet (or Communist) Federation was nothing but a tool in the hands of Lenin to gradually retake former Russian territories. Of a similar nature had been the concept of so-called 'territorial and political autonomies', designed to deny the status of nationhood to non-Russians.

The practice that developed in the Aaland Islands case is entirely different from Lenin's concept of self-determination. It approximates Wilsonian

views and, in essence, together form the very concept of modern self-determination as it stands at the present. In this case, the Islanders asked for a union with Sweden following Finland's successful secession from Russia in 1917. This move was resisted by Finnish authorities and, as a result, the issue had been brought before the League of Nations. The League formed two bodies to tackle the issue, one concerning its legal aspects and the other political ones. The first body, the Commission of jurists, handled the issue in a very valuable way, stressing the need for stability and order, while at the same time implementing self-determination. Especially important were Commission's view concerning the so-called *carence de souverainete* and the internal aspects of self-determination. These two segments of analysis made by the Commission form today's concept of self-determination. In fact, this understanding of self-determination, together with the Latin American precedent concerning the *uti possidetis* principle, has been the very foundation of the self-determination after the Second World War and the end of the Cold War. However, none of the precedents just discussed managed to level the issue of self-determination into a legal entitlement. This task became possible only during the process of decolonization.

After the Second World War, the UN Charter followed the premises of the Atlantic Charter and other documents issued during the war. No legality or legitimacy had been accorded to the territorial changes effectuated by the Axis Powers. This does not mean that such changes did not occur (Stalin's territorial gains exceeding by far the borders of the Tsarist Russia). It simply means that no new political entities were set up as a result of the Second World War. The partition of Germany was considered an illegal occupation under international law, only temporary in character. By the same token, the annexation of three Baltic republics in 1939 was considered illegal in the West so that their accession to independence after the Cold War was deemed as a restoration of lost sovereignty rather than as the creation of new states. At least, this was the stance taken by the then European Community (now European Union), a position fully endorsed by the rest of the international community.

The process of decolonization first raised the issue concerning the legal character of self-determination. The UN Charter failed to address this issue. Following the events on the ground, the UN took the lead in the process of decolonization, granting to it the status of a full legal right. The Colonial Declaration and the Friendly Relations Declaration represent the UN documents that unambiguously leveled the status of self-determination into a legal entitlement even providing with procedure in the realization of this right.

The crux of colonial self-determination is that it was based on territory, leaving aside the issue of the internal organization of the newly independent states (former colonies). Despite the fact that their help was crucial in the channeling the process of decolonization, the UN did not include the issues such as the rule of law, democracy, and the respect for human and minority rights in its political agenda. This position was also endorsed by the international jurisprudence in the famous *Burkina Faso vs. Republic of Mali Case* (1986). In the pronouncements of this case, the International Court of Justice clearly gave advantage to order and stability, as opposed to other liberal values, such as democracy, the rule of law and respect for human and minority rights. These issues were tackled for the first time after the Cold War. Only this time the concept of self-determination took on a different content, taking into account both the liberal values and the value of order and international stability.

During the Cold War, self-determination was equated with the right to decolonization (with the exception of the forms of self-determination discussed in the previous paragraphs). The right to be free from colonial rule was in turn confined to the territories of former colonies. These colonies enjoyed full international protection equal to that foreseen by sovereign and independent states. This meant that the territory of former colonies was inviolable under international law and fully protected by the international regime of the time. This concept of territorial integrity for former colonies served as a reference point in determining the scope of colonial self-determination, and also served as a stabilizing factor in interstate relations. Furthermore, the period following the process of decolonization proved this to be the case. The rest of the international community resisted and prevented other sub-state entities or ethnic

groups striving to secede from former colonies after the latter's accession to independence. The cases that illustrate are respectively, the provinces of Katanga in Nigeria and Biafra in Congo/Zaire. The above were the rule and the order of the day. There is no rule without exception. In this period there emerged an exception to the rule: the case of Bangladesh (1970-1971). However, the successful secession of this country can be explained through the then prevailing logic of the international regime, meaning that the order and stability ran against the norms on the territorial integrity of former colonies. In this case, the preservation of the territorial integrity of a former colony (Pakistan) proved to be conducive to more instability and disorder than the opposite.

The common state of the South Slavs, the Yugoslav state, formed on December 1, 1918, was initially named the Serb-Croat-Slovene Kingdom. Its power structures were entirely Serb-dominated. In fact, it represented nothing but the realization of the dream of Greater Serbia. In the international environment between the two wars there was no way to change the internal balance of forces existing within this state because the new state had been given a role of a 'cordone sanitaire', first against the Soviet influence and later against the further penetration of the German factor to the East (*Drang Nach Osten*). The Serbian military and political elite used this opportunity to realize its hegemonic ambitions. In the 1930s, it even imposed a royal dictatorship led by the Serbian King from the Karadjordje dynasty. The only political force that tried at this time to come up with a real pan-Yugoslav idea was the Communist Party of Yugoslavia. Among the Yugoslav communists, however, there had been a stream acting in favor of the dismemberment of the Yugoslav state. At the end, though, the unitary wing of the Yugoslav communists took the upper hand. It fought for a single Yugoslav state but organized on the basis of different principles from those of the interwar period. With some variations in this period, the Yugoslav communists took up the Soviet idea about the 'Communist Federation'.

This idea was implemented immediately after Second World War. In the Yugoslav context, nevertheless, the issue of borders proved to be less troublesome as compared with the Soviet case. Once the new federal units had been set up in 1946, no serious border changes occurred until

Yugoslavia's final dissolution in 1992. When it dissolved, however, the issue of borders and their succession became the main cause leading to brutal wars and conflicts. Only at this time was raised the significant issue concerning the type of self-determination that would be pursued: Shall self-determination be based on territory or on ethnicity? The latter was espoused by Serbs while the former was supported by the former Yugoslav republics and endorsed by the rest of the international community. After the dissolution of Yugoslavia in 1992, there was a close connection with the mentioned types of self-determination regarding state continuity. In this regard, the Serbs insisted on being the sole successors to the common Yugoslav state, an action flatly denied by others. The above Serbian stance on state continuity has been an intrinsic part of the Serbian understanding of self-determination. This was outlined as far back as 1986, when the Memorandum of the Serbian Academy of Arts and Sciences had been drafted. The Serbs argued that it was unnecessary for Serbia to apply for new international statehood after Yugoslavia's dissolution since Serbia had been the very founder of that state, and, further, that the pre-1918 Kingdom of Serbia formed the core of the Yugoslav state.

Another important argument put forward by the Serbian elite was that other Yugoslav republics were secessionists, meaning that their departure from Yugoslavia left untouched the international subjectivity of the Yugoslav state. This position, of course, was rejected by all former Yugoslav republics and the rest of the international community. They both considered Yugoslavia's disintegration in 1992 and that from this process there already emerged five new states: Bosnia-Herzegovina, Croatia, Former Yugoslav Republic of Macedonia (FYROM), Slovenia and the Federal Republic of Yugoslavia (Serbia and Montenegro). The tiny republic of Montenegro supported Serbian claims on state continuity with the former Yugoslavia for quite some time, although from a different perspective. Montenegro did not demonstrate any expansionist tendencies and its quest for self-determination was based on the fact that the pre-1918 Kingdom of Montenegro had also been one of the two founders of the common state of Yugoslavia in 1918. In none of the public pronouncements did the Montenegrin authorities claim the right to self-determination extending beyond the borders of this republic.

Serbia was different in this regard. Its claims for state continuity with the former Yugoslavia and self-determination, although justified on historical and quasi-legal grounds, were in fact a plea for ethnic self-determination following the spirit and the letter of the 1986 Memorandum of the Serbian Academy of Arts and Sciences. This Serb claim had been further elaborated in Serbian scholarly work, with Serbian military backing throughout 1992-1999.

As we have noted throughout this dissertation, the main conflict within the former Yugoslavia has been concerning the nature of self-determination. In the north of Yugoslavia there existed a concept of self-determination based on territory. In the south of the country, Serbia opted for an ethnic self-determination. Bosnia-Herzegovina and Macedonia were caught in between. While Croatia during Tudjman's era greatly resembled Milosevic's Serbia, it could not fight outside its own borders for long due to military weakness. The tiny republic of Montenegro followed Serbia's path for some years following Yugoslavia's collapse until 1995. It gradually opted for the path chosen by other Yugoslav republics at the beginning. However, Montenegrin territorial self-determination did not mean full independence. For a long time, mainly during Milosevic's reign, Montenegrin self-determination meant equal status for this republic with that of Serbia. Only during the last years of Milosevic's rule and thereafter did the Montenegrin government assert its plea for full independence.

The mere fact that all Yugoslav republics, apart from Serbia, have opted for territorial self-determination does not mean that the content of self-determination remains the same for all cases. In Yugoslavia's north, self-determination was not only a territorial in nature but also based on liberal values regarding democracy, the rule of law and respect for human and minority rights. In the south and the center of Yugoslavia (Bosnia-Herzegovina and Macedonia), the type of self-determination was forced upon them. The choice by these two former Yugoslav republics was made in haste and had been a result of the internal balance of forces. This disadvantage in the balance of forces has had an enormous impact on the content of self-determination within Bosnia-Herzegovina and FYROM. The difference between these two Yugoslav

republics with the north consists in the fact that in former case the Yugoslav option was not entirely excluded in the ongoing arrangements concerning the future of Yugoslavia. Apart from this difference, the rest of self-determination remained much the same and focused on democracy, the rule of law and the respect for human and minority rights.

Analyzing the behavior of the Serbs living outside Serbia, the author of this dissertation has found a causal relationship between this behavior and the Serb conception of (ethnically-based) self-determination. Although it had been clear from the outset of the Yugoslav tragedy that the international community would not tolerate any forceful changes in the previous administrative borders of the Yugoslav republics, the Serbs nevertheless pursued their ethnically-based self-determination claim. This has led to the ethnic cleansing of non-Serbs because it was entirely impossible to realize any ethnic self-determination within the Yugoslav context due to its highly heterogeneous ethnic composition. The decision-makers in Belgrade seemed to have believed that their quest for (ethnic) self-determination could be realized by force and with impunity if some territorial units resembling former Yugoslav republics were created. These units had been created violently, first in Croatia and then in Bosnia-Herzegovina. This was nothing but a wrong interpretation of the international statehood, having far-reaching implications.

The Belgrade policy of Greater Serbia was defeated in Dayton (1995), a year after the military destruction of the Serb entity in Croatia by Tudjman's forces. However, the Yugoslav crisis did not end here. The Kosovo issue remained unsettled and the international community resorted to the application of the same criteria for international statehood in the rest of Yugoslavia. The basic premise of these criteria was that only former Yugoslav republics should be encouraged to pursue external self-determination. Those entities not having the status of a republic at the time of Yugoslavia's dissolution were to enjoy the internal self-determination only. Among them was Kosovo as well. By the time the conflict in this region began in early March of 1998, the international community was caught by its own rulings so that NATO's military intervention to stop the killings in Kosovo resulted in the preservation of

territorial integrity and stability of the Federal Republic of Yugoslavia (Serbia and Montenegro), much in the same way as it resulted in Bosnia-Herzegovina before the Dayton Accords were reached.

The conclusion of this study is that the Yugoslav case of self-determination should not be singled out from other similar cases of its time. This covers not only the period following the end of the Cold War, but also the period prior to the South Slav unification of 1918 and thereafter. In all cases, the Yugoslav case reflects the features of self-determination as they appeared at the times under discussion. Evidence of this is best seen from the last period of the Yugoslav self-determination after the Cold War. In this period, Yugoslav self-determination was nothing but a part of the wider picture of self-determination covering all former Communist Federations (Soviet Union and Czechoslovakia). This further supports the argument that the Yugoslav case did not set any precedent in terms of self-determination that could be applicable in the future. Its relevance for the future rests in the fact that it has further crystallized one of the aspects of self-determination, that is, the principle of *uti possidetis*. The Yugoslav case has shown that the fixed territorial borders, as a rule of international law and relations that limits the territorial scope of self-determination, is a rule of utmost acceptance. The only novelty of the Yugoslav self-determination is perhaps that concerning the issue of coercive means used by the international community to effectuate a certain type of self-determination.

To prevent the illegal and illegitimate way of implementing self-determination within the territory of former Yugoslavia, the international community had had some means at its own disposal. These means were used according to the gravity of the situation on the ground and the type of breach committed by the Yugoslav actors.

The first sign as to the principles of self-determination to be applied in the Yugoslav context was given by the British officials as far back as the Summer of 1991. The British Foreign Secretary of that time, Douglas Hurd, told the Belgrade leaders that the West would not accept any forceful changes in the internal borders of Yugoslavia. At this time, it

was not quite clear as to what were to be considered 'internal borders' within the Yugoslav context. This became clear in November 1991 when the Badinter Commission left no doubt over this stating that only former Yugoslav republics shall be internationally entitled to a full protection of their administrative borders. This stance was later endorsed by the major part of the international community. In addition to this, the international community via the Badinter Commission, tackled the problem of the very content of Yugoslav self-determination. In this regard, the international community recognized two types of self-determination, one internal and the other external. This position was later reflected in the EU Guidelines on the Recognition of New States in the Soviet Union and Eastern Europe (December 16, 1991). External self-determination belonged to former Yugoslav republics alone, while the internal one was left for other entities, which did not have the status of a federated republic at the time of Yugoslavia's dissolution. The same rule applied, *mutatis mutandis*, to the Soviet Union and Czechoslovakia. This was, in fact, nothing but an extension of the application of the colonial self-determination to the existing sovereign states that would eventually collapse.

However, as opposed to the colonial self-determination, in the Yugoslav case as in the case of former Communist Federations, there had been put forward some corrective criteria in connection with the realization of self-determination. These criteria were meant to guide the would-be states as to their acceptable behavior within the society of states. Those entities claiming the international statehood had to confirm to these corrective criteria. Otherwise, the legitimacy of their international statehood was not considered as valid under international law. This denial of the international legitimacy of the newly independent states was effectuated by the international community (alone or through its various organs and organizations). This was done in various ways. The most common one was the use of the policy of non-recognition by the international community and its member states. Next to this came the imposition of the sanctions regime on the disobedient states claiming fully-fledged international status. In some cases, such as Bosnia-Herzegovina and Kosovo, even military means have been used to check and balance the Yugoslav self-determination. There is a difference,

however, between these two situations. The corrective criteria concerning democracy, the rule of law and the respect for human and minority rights meant different things for both cases. In general, corrective criteria were designed to prevent the development of dictatorship tendencies within the newly established states of the former Communist world. In this regard, these criteria were equal to the realization of self-determination because they presented themselves as a precondition for the integration of these new states into the community of sovereign and independent nations. On the other hand, the same criteria formed the very core of the internal self-determination because they offered a solid ground for the development of other forms of self-determination falling short of full independence. The problems emerged only when it came to the implementation in general lines of this vision. Then, the preservation of the territorial integrity of Bosnia-Herzegovina, as one of the manifestations of self-determination of the sovereign and independent states, had as a consequence the treatment of the Kosovo issue on par with other entities that did not have the status of a federated republic. It did not matter that Kosovo (within the FRY) and 'Republika Srpska' (within Bosnia-Herzegovina) had entirely different background when it comes to the manner through which they have been set up. While Kosovo used to exist as an autonomous entity for a long time, the 'Republika Srpska' was set up by violent means leading to the commission of grave crimes against humanity and international law, ethnic cleansing of the non-Serbs being the most conspicuous one. It might be that this was not the intention of the those who used the military power against the Serbs in Bosnia-Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro). However, this is certainly the end result of the military force used during March-June 1999.

Has the international community become a catalyst in helping to make a reality of a pre-existing principle, self-determination that could not be realised under the sovereign model of the former Yugoslavia? The intrusion of the international community in the political events altered the modality of governance and thereby made possible the realisation of the long accepted principle of self-determination. The international community via the mandate it gave to the international organizations,

such as UN, OSCE, NATO and the EC/EU, allowed for the implementation of mechanisms for the realisation of the potential of self-determination of the people of the former Communist federation. The international community in its call for democracy, the rule of law and the respect for human and minority rights allowed for process to begin for the actual realisation of self-determination within the accepted norms of international law relating to self-determination. Clearly, self-determination as a principle has not been altered. What existed prior to the 1990 events that caused international intrusion, existed after the events. The difference is that the crises and the international response to these crises made the principle a potential reality but not necessarily a universal norm. Comparing this experience with that of colonialism and the self-determination process associated with its end provides substantial differences. While in colonialism there was no insistence on preconditions, e.g., democracy, the rule of law, and the respect for human and minority rights, in this instance they became a *condictio sine qua non* for the realisation of any self-determination regime, be it internal or external. It can be concluded that no single binding principle of self-determination monopolises the contemporary international law. The recent experience after the Cold War provided only a model for actualisation of the principle. Self-determination, as a right and a principle, whose structure and meaning continues to evolve with case examples, presents challenges for international law and politics. The liberal values concerning democracy, the rule of law and the respect for human and minority rights will certainly be enhanced with a more developed understanding of the actual meaning of self-determination. Unquestionably, based on recent experience, human rights which is now seen as tied to democracy and the rule of law can be better realised in territories which have not benefited by self-rule. This means, in turn, that the human rights agenda may be greatly enriched with the appropriate realization of self-determination.