The legality of *Uti Possidetis* in the definition of Kovoso's legal *status*

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Introduction

Autonomous Province of Kosovo-Metohija, a sub-federal unit within Republic of Serbia, declared its independence on 18 October 1991. The European Community refused to consider Kosovo-Metohija's application for the recognition on the basis that recognition was only available to republics of SFRY and not to autonomous provinces within republics.[1] The applications of Bosnian and Croatian Serbs for secessions were rejected, too. The legal justification for these political decisions of the European Community was provided by the Arbitration Commission that was established on 27 August of 1991 by the EC within the framework of its Conference on Yugoslavia. In its opinion, the Badinter Commission declared that whatever the circumstances, except where the state concerned agree otherwise, the right to self-determination must not involve changes to existing frontiers existing at the time of independence (*uti possidetis juris*)'. In line with this, the Commission stressed that 'except where otherwise agreed, former *republican* borders become international frontiers protected by the international law.'[2]

The Badinter Commission interpretation of the *uti possidetis principle* served as the basis for the UN Security Council Resolution 1244 (1999), which designates the Rambouillet Peace Accords as a platform for the final solution of the issue of Kosovo. Namely, the UNSC Resolution 1244 states that the province remains a part of FRY, although with considerable degree of autonomy.[3] Currently, the Contact Group is in place to provide the framework in which the final Kosovo status will be negotiated.

Bearing in mind that the *uti possidetis* principle was already invoked in the past in solving the Kosovo issue and that currently neither of negotiating parties offer a clear legal basis for resolving the Kosovo status, we deem that it is of crucial

[1] The only State that recognized Kosovo's claim was Albania. See GOODWIN, Morag. *From Province to Protectorate to State? Speculation on the Impact of Kosovo Genesis upon the Doctrines of International Law*. GERMAN LAW JOURNAL, Vol. 08, No. 01. (2007). p. 1.
[2] Conference on Yugoslavia Arbitration Commission, Opinion No. 2 (January 11, 1992).
[3] SC Resolution 1244, 54 UN SCOR (4011 th mtg) UN Doc S/Res/1244(1999), Annex 2; 38 ILM 1451.

importance to examine the legality of the *uti possidetis* application in the Kosovo context.[4]

Assuming that the central issue in the application of *uti possidetis juris* it its basis of legitimation[5] in law and not in politics or morality it is assessed whether the *uti possidetis* principle should be applied in Kosovo context. The legality of the *uti possidetis* as an international legal rule will be analysed from two angles (: from its form and from its content). From the standpoint of law-making process, it will be assessed whether *uti possidetis* might be deemed as a general principle of international law, a customary international rule or as a judicial decision. On the other hand, in order to assess its content, the relation between the *uti possidetis* principle and the right to self-determination will be examined in the realm of the traditional international law. Furthermore, in order to examine their relation, both concepts will be inserted within the normative framework of international legal hierarchy.

Finally the paper advocates the importance of the 'equity principle' as an essential tool for the decision-making process[6] in defining the Kosovo situation. The ICJ leading decisions are considered in order to incorporate in the 'equity principle' the duty/power of the Court in producing 'equitable results'.

Based on DWORKIN's[7] jurisprudential scheme the work of judges in achieving 'equitable results' as to whether it amounts to a duty or power is analysed with a view of providing a working scheme for negotiators and decision-makers involved in process.

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[4] In order to secede, Kosovo representatives claimed that it would be hard to distinguish Kosovo status from statuses of the federal republics under the Constitution of Socialist Federal Republic of Yugoslavia of 1974. Namely, under the Constitution of Socialist Federal Republic of Yugoslavia of 1974, Kosovo was given the right to establish its own constitution, legislative power and financial autonomy. Moreover, the bodies of executive, legislative and judicial powers had the same status as those in the republics including even direct representation on the federal level. See RADAN, Peter. *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission.* MELBOURNE UNIVERSITY LAW REVIEW, 2.

[5] Legitimation is used in the sense of 'law as integrity'. For this research both angles as legal making process and content within a certain legal hierarchy. See DWORKIN, R. *Law's Empire*. The Belknap Press of Harvard University Press. Cambridge, Massachusetts. 1986; DWORKIN, R. *Taking Rights Seriously*. Harvard University Press. Cambridge, Massachusetts. 1978.

[6] KRASNER, S. D. *Structural Causes and Regime Consequences. In* International *Regimes*. Edited by Stephen D. Krasner. Cornell University Press. 1983 "[D]ecision-making procedures are defined as prevailing practices for making and implementing collective choice."

[7] [1978] ; [1986].

Uti Possidetis as an international legal norm

General Principal of International Law

The ICJ has stated in *dictum* in the *Frontier Dispute* (*Burkina Faso/Mali*) Case that:

> [t]he principle (*uti possidetis juris*) is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the **obtaining of independence**, **wherever it occurs**.[8]
>
> (*emphasis added*)

Some authors regard that the way in which the Chamber[9] phrased its comment does suggest something more than a statement that *uti possidetis* applies in all situations of decolonization. It does seem that the Chamber was keen to make a general statement as to the situation with regard to 'the obtaining of independence, wherever it occurs' leading to the conclusion that in the Chamber's view the principle applied in all situations where there was a movement from one sovereignty authority to another.[10]

However, assuming that the principle applies to any independence is arguably an overstatement as can be demonstrated by a close interpretation of the judgment. As the Chamber carries on:

> [*U*]*ti possidetis*, as a principle which upgraded former administrative delimitations, **established during the colonial period,** to international frontiers, is therefore **a principle of a general kind which is logically connected with this form of decolonization wherever it occurs**.[11]
>
> (*emphasis added*)

Therefore the Court clearly defines *uti possidetis* as a general principal to be applied in that specific form of decolonization limiting the 'phenomenon of the **obtaining of independence**'.

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[8] ICJ 1986 REPORTS at 565, para.20. *Frontier Dispute* Case (*Burk. Faso* v. *Mali*) 1986 ICJ 554 (Dec. 22).
[9] para 20.
[10] SHAW, M.N. *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478, 507 (1997), p. 497.
[11] ICJ 1986 REPORTS at 565, para.23. *Frontier Dispute* Case (*Burk. Faso* v. *Mali*) 1986 ICJ. 554 (Dec. 22).

The court has re-affirmed this understanding in the *Land, Island and Maritime Frontier Dispute* Case[12]:

> While it was from the outset accepted that the new international boundaries should be determined by the application of the principal generally accepted in Spanish America of the *uti possidetis juris*, whereby the boundaries were to follow the colonial administrative boundaries..[13]

The Badinter Commission in answering the question on whether the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia could be regarded as frontiers in terms of public international law relied as a key judicial precedent on the 1986 *Frontier Dispute* case. Unfortunately, the Commission arguably misinterpreted the Chamber's definition of *uti possidetis* in that case. Basing itself exclusively upon paragraph 20 of the judgment and not taking into consideration that the Chamber limited its view on the normative status of *uti possidetis* to the emergence of nation-states from traditional self-identified European empires.

The Commission concludes that: '*Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a **general principle**, as stated by the International Court of Justice in the Frontier Dispute'.[14]

In defining *uti possidetis* as 'a principle of a general kind which is logically connected with this form of **decolonization** wherever it occurs', rather than self-determination, the Chamber clearly avoided any suggestion that an upgrading of administrative boundaries would apply during the breakup of nonimperial states – even if the new states regarded themselves simply as subjugated peoples in an empire (e.g. the former Soviet republics). [15]

The Commission's opinion makes no reference to this *conditio sine qua non*, attributing to the principle a general character that does not correspond to the line of cases ruled by the ICJ, mainly the *Frontier Dispute* Case itself.

The Commission apparently assumed that only *uti possidetis* would enforce the right of territorial integrity protected by Article 2(4) of the United Nations Charter and therefore avoid anarchy by preventing attacks by one former Yugoslav republic

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[12] El Salvador/ *Honduras*: Nicaragua intervening, ICJ 1992 REPORTS 1992, 351 (Sept. 11).
[13] para 28.
[14] *Frontier Dispute*, ICJ 1986 REPORTS 554 at 565, Opinion 3 Third Paragraph.
[15] See Jochen A. Frowein, *Self-determination as a Limit to Obligations under International Law, in* Modern Law of Self-determination. *In:* RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996). p. 614, note 191.

on another.[16] This supposition seemed consistent with the European Community's September 1991 declaration rejecting territorial changes within Yugoslavia brought about by violence.[17]

Arguably the principle of *uti possidetis* was applied interchangeably with the right of territorial integrity, concepts that as it will be demonstrated later in this research belong to different hierarchy within the international legal system.[18]

According to BROWNLIE [1998] the general principals of international law 'are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice.'[19] In applying this definition to *uti possidetis juris*, based on the leading cases and documents mentioned above, arguably it is not possible to assume that the principal prevails as a general principal of international law even in case of decolonization as in some cases other options were available. Leading to the conclusion that it is not possible to disconnect the principle from state practice.

Another assumption would be to consider *uti possidetis juris* as a norm based on the application of article 38 (I) (d) of the Statute of the ICJ; decisions of international tribunals. As BROWNLIE [1998] observes:

> Decisions of international tribunals – Judicial decisions are not strictly speaking a formal source, but in some instances at least they are regarded as authoritative evidence of the state of the law… A coherent body of jurisprudence will naturally have important consequences for the law.[20]

In this sense it is possible to admit the existence of a coherent body of jurisprudence applying *uti possidetis juris*, as the leading cases analyzed could demonstrate in the **context of decolonisation**. However, it is not possible to assume based on the body of jurisprudence that the principal is a general norm of international law to be applied whenever independence takes place, due to the

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[16] Opinion No. 3, Conference on Yugoslavia, Arbitration Commission Opinion No. 3 (Jan. 11, 1992), 31 ILM at 1500: author's interview with Robert Badinter (June 29, 1994). Judge Badinter has stated that the decision to recognize Bosnia-Herzegovina as a state led to the war in the former Yugoslavia. In: *In:* RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996). p. 614, note 192.

[17] SC Res. 713 preambular para 8, UN SCOR, 46th Sess., Res. & Dec., at 42, 42-43, UN Doc. S/INF/47 (1991).

[18] For the concept of hierarchy see SHELTON, Dinah. *International Law and "Relative Normativity"*. Chapter 5, 145-172. *In:* EVANS, Malcolm D. (organiser) *International Law*, 1st edition, Oxford University Press, New York, 2003.Meron, T. *On Hierarchy of International Human Rights*. AJIL, Vol. 80, No. 1 (Jan., 1986), 1-23.

[19] BROWNLIE, Ian. *Principles of Public International Law*. Fifth Edition, Oxford University Press, New York, 1998. p. 19.

[20] BROWNLIE, Ian. *Principles of Public International Law*. Fifth Edition, Oxford University Press, New York, 1998. p. 19.

requirement of decolonisation as *condition sine qua non* for the application of *uti possidetis* principle in the absence of a previous *compromis*.[21]

Customary norm

The ICJ has never adjudicated whether *uti possidetis* is a norm of customary law. In the cases involving these types of border disputes as the *Frontier Dispute* Case and the *Land, Island and Maritime Frontier Dispute* Case both parties have stipulated by *compromis* or otherwise that their boundary would be determined according to the borders in effect at the time of independence.[22]

In defining *uti possidetis juris* as a norm of customary law, proving the existence of two elements are required: first, the general practice of states must reflect the rule (the generality requirement); and second, states must follow the rule in the belief that such a rule is legally required (*the opinio júris sive necessitatis* requirement).[23]

What gives the authoritative character to international custom, according to D'AMATO [1987] is that it 'consists of the resultants of *divergent states vectors* (acts, restrains) and thus brings out what the legal system considers a resolution of the underlying state interests. Although the acts of states on the real-world stage often clash, the resultant accommodations have an enduring and authoritative quality because they manifest the latent stability of the system'.[24] Therefore the existence of a *compromis* would certainly disqualify the requirement of divergent states vectors.

Identifying which of these acts out of many have legal consequence is the role of *opinio juris* in this process, which can be summarised in the following terms:

> First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, *opinio juris* has nothing to do

[21] This context will be further explained in the next pages.

[22] *Frontier Dispute*, ICJ 1986 REPORT at 557 (quoting 1983 *comprimis*): id. At 565 ('there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned'); *Land, Island and Maritime Dispute*, 1992 ICJ Reports at 351 (Both parties are agreed that the primary principle to be applied for the determination of the land frontier is the uti possidetis juris; even though this, unusually for a case of this kind, is not expressly mentioned in Article 5 of the Special Agreement, nor in General Treaty of Peace, to which, as explained below, the Chamber is referred by the Special Agreement), para 40.

[23] WEISBURD, Arthur M. *Customary International Law: The Problem of Treaties.* VANDERBILT JOURNAL OF TRANSNATIONAL LAW. vol. 21 (1988) NUMBER 1, 1- 46, p. 6.

[24] D'AMATO, Anthony. *Trashing Customary International Law*. AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 81, No. 1 (Jan., 1987), 101-105, p 102, commenting on the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicar*. v. *U.S*), Merits, 1986 ICJ REP. 14 (Judgment of June 27), emphasis added.

> with "acceptance" of rules in such documents. Rather, *opinio juris* is a psychological element associated with the formation of a customary rule as a characterization of state practice.[25]

During the decolonization of Latin America, Africa and Asia the tendency for regarding *uti possidetis* as requiring states to presume the inheritance of their colonial borders unless, as occurred in some instances, the colonial power(s) or another decision maker (such as the United Nations) had determined otherwise[26] gives support for setting the principle as a customary norm of international law.

As a consequence of the adoption of *uti possidetis* in Latin America, many of its constitutions adopt the principal and the 1964 Cairo resolution reflected the trends within Africa at that time.

It should be also noted that the Declaration on the Granting of Independence to Colonial Countries and Peoples indicates a preference, though hardly explicit, for the inheritance of borders.[27] However in doing so, the Declaration advocates the 'integrity of [the] national territory [of dependent people]' and the prohibition of 'partial or total disruption of the national unity and territorial integrity of a country' within the framework of the purposes and principles of the Charter of the United Nations.

Even though the principles upon which any arbitral body was to determine a border dispute were dependant upon the provisions of the relevant treaty or

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[25] D'AMATO, Anthony. *Trashing Customary International Law*. AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 81, No. 1 (Jan., 1987), 101-105, p 102, commenting on the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicar*. v. *U.S*), Merits, 1986 ICJ REP. 14 (Judgment of June 27). For the traditional and Modern Approaches to Customary International Law see ROBERTS, A. Elizabeth. Traditional and Moderm Approaches to Customary International Law: a Reconciliation. AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 95, No. 4 (Oct, 2001), 757-791, according to the author in *Nicar*. v. *U.S* the ICJ applied modern custom derived by a deductive process, this pattern is followed in defining *uti possidetis* as international custom.

[26] RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996). p. 598.

[27] GA Res. 1514 (XV), para. 4, UN GAOR, 15th Sess., Supp. No. 16, at 66, 67, UN Doc. A/4684 (1960) (4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.); id., para 6 (6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.)

agreement, [28] in cases of disputed boundaries, they have typically agreed to settle them through reference to *uti possidetis*[29].

When such a treaty or agreement stipulated the application of the principle of *uti possidetis*, it became the mandatory of any appointed arbitral body to establish the border line according to that principle[30]. However, in resolving border disputes lingering from decolonization, states have agreed to accept deviations from *uti possidetis*.[31] In this case if a treaty was silent on the basis upon which a border dispute was to be resolved, the arbitral body could, but was not obliged to, apply the principle of *uti possidetis juris*.[32]

Moreover, *uti possidetis* does not prevent the emergence of different borders during decolonization. In a significant number of situations, states emerged from

[28] L M Bloomfield, The British Honduras–Guatemala Dispute (1953) 94; L M Bloomfield, Egypt, Israel and the Gulf of Aqaba in International Law (1957) 107–8; Yehuda Blum, Historic Titles in International Law (1965) 342. RADAN, Peter. Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission. Melbourne University Law Review. [2000] MULR 3; (2000) 24 Melbourne University Law Review 50, April 2000 - Volume 24, No.1.

[29] Treaty of Arbitration, July 16, 1930, Guat-Hond. , Art. I, *in Honduras Borders* Case (Guat./Hond.), 2 R.I.A.A. 1309, 1322 (1933) ('the only juridical line which can be established….is that of the *Uti Possidetis* of 1821').

[30] *Honduras Borders (Guatemala v Honduras)* (1933) 2 RIAA 1307, 1322. Examples of treaties stipulating the application of *uti possidetis* include: *Treaty of Friendship, Commerce and Navigation*, 30 August 1855, Argentine Confederation–Chile, 113 ConTS 333, art 39; *Treaty between Columbia and Venezuela for the Arbitration of the Boundary*, 14 September 1881, 159 ConTS 87, art 1; *Bonilla–Gomez Treaty: Border Demarcation Convention*, 7 October 1894, Honduras–Nicaragua, 180 ConTS 347, art 2(4); *Treaty of Arbitration*, 30 December 1902, Bolivia–Peru, 192 ConTS 289, arts 1 and 5; *Treaty of Arbitration*, 16 July 1930, Guatemala–Honduras, 132 BFSP 823, art 5. In some of these cases the treaty did not specify which of the two versions of *uti possidetis* applied.

[31] ICJ 1960 REPORT 192-199-200 (Nov. 18) (allowing commission and arbitrator to 'grant compensations and even fix indemnities in order to establish, in so far as possible, a well-defined natural boundary line').

[32] See, eg, *Boundary Treaty*, 3 February 1876, Argentina–Paraguay, 150 ConTS 241; *British Guiana Boundary Arbitration Treaty*, 6 November 1901, Great Britain–Brazil, 190 ConTS 190. In both cases the arbitrator effectively applied the principle of *uti possidetis de facto*. On these two border disputes see Gordon Ireland, *Boundaries, Possessions, and Conflicts in South America* (first published 1938, 1971 ed) 27–34, 152–8.

colonial rule with other than their preindependence borders.[33] In addition, single colonies were split at independence through various processes.[34]

In the 1933 *Honduras Border* case, the *compromis* authorized the tribunal to take into consideration the 'interests' of the parties that might go beyond the *uti possidetis* line of 1821, and indeed to modify that line as needed through an exchange of territory 'which it may deem just'.[35] The panel determined a line different at points from the *uti possidetis* line after recognized territorial encroachments of each side on the other's territories.[36]

Besides, in the *Land, Island and Maritime Frontier Dispute* Case the Court affirmed:

> These latter frontiers are almost invariably the ones in respect of which *uti possidetis juris* speaks for once with the *uncertain voice*. It can indeed almost be assumed that boundaries which, like the ones in this case, have remained unsettled since independence, are ones for which the *uti possidetis juris* arguments are themselves *subject to dispute*. It is not a matter of surprise, therefore, that the Chamber has not found these land-frontier questions easy to determine...[37]
>
> *(emphasis added)*

In a previous decision the ICJ refused to regard *uti possidetis* as a peremptory norm of international law that would override a provision in *compromis* giving an arbitrator authority to take into account other historical and legal factors.[38]

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[33] The most notable examples: Britain and France split the German colony of Togo after World War I, and the British area became part of Ghana, not Togo or a separate state. These same powers split German Kamerun; the northern part of the British area voted for merger with Nigeria and the southern part of merger into the French area as Cameroun. See Northern Cameroons (Cameroon v. UK), 1963 ICJ Rep. 15, 21-25 (Dec. 2). British and Italian Somalia became independent as one state and not two; Kuria Muria, an island in British-administered Aden (later South Yemen), became part of Muscat and Oman (now Oman) in 1967 after its people voted for separate status. See RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996), p. 599 note 68. For a forcible incorporation of an enclave formally rejected by the international community, see SC Res. 389, UN SCOR, 31st Sess., Res. & Dec., at 18, UN Doc. S/INF/32 (1976), and GA Res. 32/34, UN GAOR, 32d Sess., Supp. No. 45, at 169, UN Doc. A/32/45 (1977) (East Timor).

[34] POMERANCE, Michla. Self-Determination in Law and Practice: The New Doctrine in the United Nations 19-20 (1982) (plebiscites on reversion of Belgian Rwanda-Urundi to two countries and divisions of British Gilbert and Ellice Islands and of U.S. Trust Territories). *In* Ratner p. 599 note 69

[35] Treaty of Arbitration, July 16, 1930, Guat-Hond, Art V, at 1322 *in Honduras Borders* Case (Guat./Hond.), 2 R.I.A.A. 1309, 1322 (1933).

[36] *Honduras Borders* Case (Guat./Hond.), 2 R.I.A.A. 1309, 1352, 1356-57 (1933) (refraining from "idealistic conception" of *uti possidetis* and recognizing line of de *facto* control along stretch of border). *In* RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States.* 90 AM. J. INT'L L. 590-624 (1996), p. 600.

[37] *Land, Island and Maritime Frontier Dispute* (El Salvador/ Honduras: Nicaragva intervening) 1992 ICJ Reports 1992, 351 (Sept. 11), para 41.

[38] *King of Spain*, 1960 ICJ Rep. at 215: (..) In the judgment of the Court this complaint is without foundation inasmuch as the decision of the arbitrator is based on historical and legal considerations (*derecho historico)* in accordance with paragraphs **3** and 4 of Article II.

Based on the cases demonstrated above it is possible to affirm that *uti possidetis* does not bar postindependence changes in borders carried out by agreement. It is not a norm of *jus cogens*, and precludes states neither from altering their borders nor even from creating new states by mutual consent.[39] The Helsinki Final Act did not rule out peaceful border adjustments in Europe (however unlikely they may be) but banned only changes through force.[40]

The mere presence of *uti possidetis* in constitutions, bilateral treaties (including arbitration *compromis*) or Resolution 1514 does not demonstrate *opinio juris*.[41] For the *opinio juris* to be present it would be required, applying D'AMATO's [1987] scheme that *uti possidetis* had been the result of '*divergent states vectors* (acts, restrains)'[42] representing the 'psychological element' of what the legal system considers a resolution of the underlying state interests.

Uti Possidetis and the right to self-determination

The concept of self-determination is recognized by most scholars as a concept that underwent considerable changes.[43] The international law principle of self-determination has evolved within the framework of respect for the territorial integrity of existing states. Even today, the scope of the right to self-determination is vague due to the fact that, over the time, it has been developed by virtue of a combination of international agreements and conventions, coupled with state practice with insignificant formal elaboration of the definition of 'peoples'.[44]

The principle of self-determination was first mentioned as such in Articles 1(2) and 55 of the UN Charter as one of the grounds for the development of friendly relations between states, though not in the Chapters relating to non self-governing or

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[39] HIGGINS, Rosalyn. *Problems and Process: International Law and How We Use It*, Oxford University Press, New York, 1994, pp. 123-124.

[40] Conference on Security and Co-operation in Europe, Final Act, Aug. 1975, Principle III, 14 ILM 1292, 1294 (1975), 73 DEPT ST. BULL 323, 324-25 (1975) (parties regard frontiers as "inviolable" and will retain from "assaulting these frontiers".

[41] RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996), p. 598.

[42] D'AMATO, Anthony. *Trashing Customary International Law*. AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 81, No. 1 (Jan., 1987), 101-105, p 102, commenting on the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicar*. v. *U.S*), Merits, ICJ 1986 REPORTS 14 (Judgment of June 27), *emphasis added*.

[43] EPPS, Valerie. *Self-Determination After Kosovo and East Timor*, 6 ILSA J. Int'l & Comp. L. (2000), 445, at 445.

[44] REISMAN, M. ARSANJANI M. WIESSNER, S. WESTERMAN, G. *International Law in Contemporary Perspective*. Foundation Press. New York, 2004. p. 196.

trust territories.[45] Since its original appearance in the UN Charter, it has been repeatedly reaffirmed by, *inter alia*, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[46], common Article 1 of the 'twin' Covenants[47], as well as by the 1970 Declaration on Principles of International Law Concerning Friendly Relations.[48] Furthermore, a number of the adopted UN resolutions called for the application of the principle with regard to the specific territories.[49] The principle was also judicially approved in the *Namibia*,[50] *Western Sahara*[51] and *East Timor*[52] Cases throughout the judgments of the ICJ. The principle of self-determination became the intellectual engine of decolonization, both obligating the colonial powers to grant independence or other acceptable political status and endowing the territory in question with a political legitimation.[53]

The principles of self-determination[54] as well as of the territorial integrity[55] belong to the category of peremptory norms or *jus cogens.* On the other hand the

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[45] SZASZ, P. C. *The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: A Cautionary Fairy Tale About Clashes in Kosovo and Elsewhere*, 28 Ga. J. Int'l & Comp. L.(1999)1, 3.

[46] The famous General Assembly Resolution 1514 after explicitly proclaiming in paragraph 2 that'[a]ll peoples have the right to self-determination', states in paragraph 6 that 'any attempt aimed at the… **disruption of the national unity and territorial integrity** of a country is incompatible with the purposes and principles of the Charter of the United Nations', thus implicitly opting for the inheritance of borders.(Emphasis added). See Res. 1514 (XV), UN GAOR, 15th Sess., Supp. No. 16, at 66, 68, UN Doc. A/4684 (1960).

[47] The two 1966 Human Rights Covenants refer to self determination. They were adopted at the height of decolonization and these references helped to reinforce the process. Both state: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' This provision was included in the Covenants by specific direction of the General Assembly in A/RES/545 (VI) of Feb. 5, 1952. Both Covenants do not specifically refer to the protection of territorial integrity. See, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S 171, art. I.1; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. I.1.

[48] See GA Res. 2625 (XXV), Annex UN GAOR, 25th. Sess., Supp. No. 28. Section E, UN Doc. A/8028 (1970).

[49] See, inter alia, GA Res. 1755 (XVII), 1962; 2138 (XXI), 1966; 2151 (XXI), 1966… and SC Res. 183 (1963); 301 (1971); 377 (1975) and 384 (1975) In: REISMAN, M. ARSANJANI, M. WIESSNER, S. WESTERMAN, G. *International Law in Contemporary Perspective*. Foundation Press. New York, 2004. 262.

[50] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Nothwithstaning Security Council Resolution 276* (1970). ICJ 1971 REPORTS, 16, at 31, where the ICJ finds that 'the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them'.

[51] 'Self-determination requires a free and genuine expression of the will of the peoples concerned'. See. *Western Sahara*, ICJ REPORTS 1975. 12, 58.

[52] *Case Concerning East Timor* (Port. / Australia), ICJ 1995 Reports, 90, at 102.

[53] SZASZ, P. C. *The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: A Cautionary Fairy Tale About Clashes in Kosovo and Elsewhere*, 28 Ga. J. Int'l & Comp. L.(1999). 1, 3.

[54] CASSESE, Antonio. *International Law.* Oxford University Press. Second Edition, New York. 2005, p. 65.

principle of *uti possidetis* offers only a mere presumption that the borders entitled to protection under Article 2(4) of the UN Charter should be those that correspond to colonial borders.[56]

Recently-created concept of the *jus cogens* norms, introduces the hierarchy of rules into the realm of contemporary international law. The established hierarchical order encompasses special class of general norms made by custom that are endowed with a special legal force: they are peremptory in nature and they form the so called *jus cogens* norms. The *jus cogens* norms may not be derogated from by treaty or by ordinary customary process. In case of their derogation, the derogating rules may be declared null and void.[57]

It has been repeatedly asserted in international practice that the principle of self-determination of peoples cannot be derogated from by treaty. There is a number of countries that made statements to this effect in the UN GA on the occasion of the discussion on the Draft Articles on the Law of Treaties in 1963, at the Vienna Conference on the Law of Treaties in 1968-9, as well as in the UN GA in 1970, on the occasion of the discussion on the Declaration on Friendly Relations.[58] Spain, Algeria, and to some extent Morocco took the same attitude in their submissions in 1975, before the ICJ in *the Western Sahara* Case.[59] Italy also supported the view at issue in 1975, in the UN Human Rights Commission.[60] The Italian Court of Cessation in 1985, in the *Arafat* and *Salah* Case, also stated that self-determination is part of *jus cogens* as did the Arbitration Commission of the International Conference on Yugoslavia in its Opinions No. 1 and No. 2.[61]

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[55] Article 2 (4) of UN Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'. It is also reaffirmed in numerous treaties. See: UN Charter, See. Organization of African Unity, Charter Art. III (3), 479 UNTS 39, 74; Charter of Paris for a New Europe, Nov. 21, 1990, 30 ILM 190, 196 (1991).

[56] RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996). p. 601.

[57] CASSESE, Antonio. *International Law*. Oxford University Press. Second Edition, New York. 2005, p. 199.

[58] CASSESE, Antonio. *International Law*. Oxford University Press. Second Edition, New York. 2005, p. 66.

[59] *Western Sahara*, ICJ REPORTS 1975. 12, 48-53.

[60] See. UN Doc. E/CN. 4/SR.1300, at 91.

[61] CASSESE, Antonio. *International Law*. Oxford University Press. Second Edition, New York. 2005, p. 66.

Moreover, the peremptory character of the right to self-determination derives from the fact that the principle of respect for fundamental human rights belongs to the category of *jus cogens*. [62]

Relied on sources of the traditional international law, the different legal character of the right to self-determination and principle of *uti possidetis* is also apparent. Opposite to the *uti possidetis* principle, the right to self-determination could be categorized as the right that has acquired a status beyond 'convention' and is considered a general principle of international law,[63]

While it is undisputable the *jus cogens* character of the right to internal self-determination, the comprehensive analysis of international documents and state practice has proved the existence of the seeds of the right to external self-determination under 'exceptional circumstances'.

There is a famous clause in the 1970 Declaration on Principles of International Law Concerning Friendly Relations which states that nothing in the section on self-determination shall be construed as authorizing or encouraging any action to 'dismember or impair, totally or in part, the territorial integrity or political unity' of 'states conducting themselves in compliance with the principle of equal rights and self-determination' and 'thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color'.[64] In other words, states that do not conduct themselves in the above described manner are not protected by the principle of territorial integrity.

Furthermore, the wording of the Vienna Declaration of Program of Action of the World Conference on Human Rights in 1993,[65] the Preamble of the 1970 Declaration on Principles of International Law Concerning Friendly Relations,[66] as

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[62] CASSESE, Antonio. *International Law*. Oxford University Press. Second Edition, New York. 2005, p. 65.

[63]REISMAN, M. ARSANJANI M. WIESSNER, S. WESTERMAN, G. *International Law in Contemporary Perspective*, Foundation Press, New York, 2004. p. 194.

[64] GA Res. 2625 (XXV), Annex, UN GAOR, 25th Sess., Supp. No. 28, Section E, at 121, 124, UN Doc. A/8028 (1970).

[65] Section I (2) of the Vienna Declaration reaffirms the clause from the 1970 Friendly Relations Declaration by omitting only the phrase relating to 'race, creed or color' giving at the same time due regard to respect of principles of the Charter of UN, emphasizing in Section (7) that 'the process of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law.' See. A/49/668, 32 ILM (1993) 1661.

[66] Section E of the 1970 Declaration on Principles of International Law Concerning Friendly Relations states that every state is obliged to promote the realization of principle of self-determination of peoples in order to:'[To] bring speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and

well as of the Concluding Document of the Vienna Meeting in 1989 of the Conference on Security and Cooperation in Europe on the follow-up to the Helsinki Final Act [67] gives rise to the interpretation that blocking from the meaningful exercise of its right to internal self-determination presents valid ground for invoking the right to secession by wider category of 'peoples.'

Even in the absence of unambiguous enumeration of 'exceptional circumstances', arguable in the case of Kosovo *uti possidetis* principle cannot be applied if it violates the principle of self-determination as *jus cogens* norm from which no derogation is permitted.

However, the enforcement problems are common every *jus cogens* norm, regardless of the vagueness of their legal scope. Nevertheless the network of normative standards was established, it was not followed by the commensurate progress in the setting up of international law enforcement machinery. The UN has been called upon to fill a vacuum temporarily.[68]

For the time being, judges and decision makers should be aware of the importance of the established normative hierarchy, giving due regard to these mandatory norms of the international legal system.

Considering the evolution of the legal landscape regarding self-determination, hopefully the borders will be adjusted by letting 'people to determine the destiny of the territory and not the territory the destiny of the people.'[69] Furthermore, the new states can be delineated peacefully in a way that is conductive to their being by a government 'representing the whole people belonging to the territory without distinction as to race, creed or color'[70].

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exploitation constitutes a violation of the principle, as well **as a denial of fundamental human rights**, and is contrary to the Charter of the United Nations.'(Emphasis added). See GA Res. 2625 (XXV), Annex, UN GAOR, 25th Sess., Supp. No. 28, at 121, 124, UN Doc. A/8028 (1970).

[67] The Supreme Court of Canada cited this document referring to 'peoples' having the right to determine 'their internal and external political status.' However, that statement was immediately followed by express recognition that states will always act in conformity with the United Nations Charter including those principles relating to territorial integrity of the states. See Reference re Secession of Quebec, 115 ILR (Can. 1998), para. 129. p. 536, 606.

[68] CASSESE, Antonio. *International Law.* Oxford University Press. Second Edition, New York. 2005, p. 67.

[69] See ICJ 1975 Reports 12, at 31, Judge Hardy Dillard's famous dictum in the *Western Sahara* Case has been much quoted. *In:* HIGGINS, Rosalyn. *Problems and Process: International Law and How We Use It*, Oxford University Press, New York, 1994, pp. 127-128.

[70] See. GA Res. 2625 (XXV), Annex, UN GAOR, 25th Sess., Supp. No. 28, at 121, 124, Section E, UN Doc. A/8028 (1970).

The applicability of the 'Equity Principle'

According to BRUTAU [1962], 'equity is one of the names under which is concealed the creative force which animates the life of the law'.[71] 'Equity' is used in the sense of considerations of fairness, reasonableness, and policy often necessary for the sensible application of the more settled rules of law.[72]

The ICJ has made frequent reference to principles of equity in the context of delimitation of maritime zones in *the North Sea Continental Shelf*, the *Gulf of Maine*, the *Fisheries Jurisdiction* (*UK* v *Iceland*), and Tunisia/Libya cases.[73] In these contexts, equity was encompassed by Article 38 (I)(c) of the Statute, and not by Article 38(2),[74] which provides: 'This provision [para. I, supra, p. 3] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.'

In the *North Sea Continental Shelf* Cases[75] the Court had to resort to the formulation of equitable principles concerning the lateral delimitation of adjacent areas of continental shelf, as a consequence of its opinion that no rule of customary or treaty law bound the states parties to the dispute over the seabed of the North Sea.[76]

Considerations of equity advanced by Belgium in the *Barcelona Traction* Case (Second Phase)[77] did not cause the Court to modify its views on the legal principles and considerations of policy.

However, in the *Fisheries Jurisdiction* Case the ICJ stated that 'it is not a matter of finding an equitable solution, but an equitable solution derived from the applicable law.[78]

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[71] BRUTAU, P. *Juridical Evolution and Equity*. *In*: Essays in Jurisprudence in Honour of Roscoe Pound, 1962, 82, 84, quoted by Judge Weeramantry in his separate opinion in *Jan Mayen*, 99 ILR 585.
[72] BROWNLIE, Ian. *Principles of Public International Law*. Fifth Edition, Oxford University Press, New York, 1998. p. 25.
[73] TRIGGS, G. *International Law: Contemporary Principles and Practices*. LexisNexis Butterworks, Australia, 2006, page 89.
[74] Judge Kellogg in the *Free Zones* Case (1930), PCIJ, Ser. A, no.24, pp. 39-40, thought otherwise, but was in error. See the North Sea Cases, ICJ Reports 1969, 48. *In*: BROWNLIE, I. *Principles of Public International Law*. Fifth Edition, Oxford University Press, New York, 1998. p. 26, note 167.
[75] ICJ REPORTS 1969, 3 at 46-52.
[76] BROWNLIE, I. *Principles of Public International Law*. Fifth Edition, Oxford University Press, New York, 1998, p. 26.
[77] ICJ REPORTS 1970, 3 at 48-50.
[78] *Fisheries Jurisdiction* cases, ICJ REPORTS 1974, 3; 55 ILR 238.

The ICJ affirmed later that considerations based on economic disparities between states 'are totally unrelated to the underlying intention of the applicable rules of international law'[79] in the *Libya v Malta* Case.

In the *Frontier Dispute* Case the Chamber affirmed the possibility of resorting to equity *infra legem* as the parties had recognized as applicable in the case,[80] stating as guiding concept that '[E]quity as a legal concept is a direct emanation of the idea of justice'[81]. However the Chamber concluded that: '[t]o resort to the concept of equity in order to modify an established frontier would be quite unjustified.' The main reason was, arguably, the authority of *uti possidetis* and its fully conformity with contemporary international law.[82]

The importance of respecting a natural reserve which, in the interests of the ecosystem and of biological diversity cannot be divided without lasting damage as well as a sacred site or archaeological preserve which must be maintained in its integrity if it is to be preserved was recognized in *Kasikili/Sedudu Island* (*Botswana/Namibia*)[83] According to the Court, equitable considerations should be given effect in such situations,[84] following the imperative need for this discretion on the part of the Court, on its words:

> [T]hat the Court has such a power, and indeed a duty in an extreme case, is thus beyond dispute. Whether a given situation is an appropriate one for the use of its equitable power is a matter for the Court's discretion.[85]

This decision confirms the application of equity in achieving an equitable result, not necessarily as a method for making the delimitation. This difference is of crucial interest for this research, as in the Kosovo situation the aim of achieving an equitable result arguably has not being invoked so far by the leading negotiators.

This difference was highlighted by the Court in *Land and Maritime Boundary between Cameroon and Nigeri* (*Cameroon* v. *Nigeria*: Equatorial Guinea Intervening):

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[79] ICJ REPORTS 1985, 81 ILR 239.
[80] *Frontier Dispute* Case, para 27.
[81] (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 60, para. 71) *in Frontier Dispute* Case.
[82] *Frontier Dispute* Case, Judgment (Burkina Faso/Republic of Mali) ICJ 1986 REPORTS, 554, 632-633. ICJ 1986Reports, 554, 633; 80 ILR 459.
[83] *Kasikili/Sedudu Island* Case (*Botswana/Namibia*), ICJ REPORTS 1999, 1045, DO Weeramantry, para 91.
[84] para 92.
[85] para 93.

> The Court is bound to stress in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.[86]

Therefore in applying the 'equity principle' to the Kosovo we are not concerned with the question whether something bearing the label 'equity' can be considered to be a formal source of law: that is to say, whether a legal right or obligation can be asserted, which does not derive from any treaty or any rule of customary law, simply on the basis of being 'equitable'.[87] We are concerned with *equity as a result*, as the mechanism applied by the Court in achieving an equitable solution.

This approach can be better explained following the maxims of equity invoked by Judge Abi-Saab (separate opinion) in the *Frontier Dispute* Case.

Initially Judge Abi-Saab observes that the principle of *uti possidetis* can not be conceived in the absolute as 'it has always to be interpreted in the light of its function within the international legal order'[88]

Admitting the necessity of defining the limit of lawful possession, therefore not strictly applying the concept of *uti possidetis juris*, Judge Abi-Saab goes on to evaluate the role of the Court in such definition:

> [t]he scope of a court's role in identifying that line will vary inversely to the extent of its having taken concrete shape. The fewer the points (or points of reference) involved in its definition, the greater the court's 'degrees of freedom' (in the statistical sense). And it is here that considerations of equity *infra legem* (mentioned in paragraph 28 of the Judgment) come into play, to guide the court in the exercise of this freedom when interpreting and applying the law and the legal titles involved.[89]

The Judge admits the legality of the decision due to the degree of freedom available to the Court, however he introduces concerns related to the results produced, in terms of equity concluding:

> [I] would have preferred another: one which, while respecting the points of reference (and it is not by chance that both are watering-places), would have been more deeply impregnated with considerations of equity *infra legem* in the interpretation and

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[86] *Land and Maritime Boundary* Case between Cameroon and Nigeria (*Cameroon* v. *Nigeria*: Equatorial Guinea Intervening), ICJ REPORTS 2002, 303.

[87] THIRLWAY, Hugh. "*The Sources of International Law*", Chapter 4, 117-143. *In*: EVANS, Malcolm D. (organiser) *International Law*. 1st edition, Oxford University Press, New York, 2003, p. 140, the author applies the equity as a formal source of law only, and concludes that ICJ has not recognized it on its decisions.

[88] *Frontier Dispute*, para 13.

[89] para 15.

> application of law, given that the region concerned is a nomadic one, subject to drought, so that access to water is vital.[90]

In order to assess the role of equity *infra legem* in the interpretation and application of the law, the description of the general model of political association followed by the International Community is a useful tool for the contextualisation of the international legal system that might be applied in the definition of Kosovo's legal status .

According to DWORKIN [1986], a community's political practices might aim to express one of three general models of political association. Each model describes the attitudes members of a political community would self-consciously take toward one another if they held the view of community the model expresses.[91]

The first model supposes a *de facto* association, where members of a community treat their association as an accident of history and geography. DWORKIN [1986] calls the second model the "rulebook' model. It supposes that members of a political community accept a general commitment to obey the rules they have accepted or negotiated as a matter of obligation and not merely strategy, but they assume that the content of these rules exhausts their obligations.

The third model of community, the model of principle as explained bellow, seems to best describe the International Community political association:

> [M]embers of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the **scheme of principles those decisions presuppose and endorse**. So each member accepts that other have rights and that he has duties following from that scheme, **even though these have never been formally identified or declared**.[92]
>
> *(emphasis added)*

It is argued that International Community aims at following the 'model of principles', based on Fundamental Principles protected by the 'civilized nations'[93]. In this sense, the origin of the Charter of the United Nations in terms of the Legal Principles it enshrines is relevant to this research, mainly as they belong to the so-called *jus cogens*[94] norms.

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[90] para 17.
[91] DWORKIN, R. *Law's Empire*. The Belknap Press of Harvard University Press. Cambridge, Massachusetts. 1986. p.209.
[92] DWORKIN,[1986]. p.210.
[93] Stated in Art. 38 (1) (c) Statute of the International Court of Justice: '[t]he general principles of law recognized by civilized nations'.
[94] For the concept of *jus cogens* see Kolb, Robert. *Théorie du Ius Cogens International* : *Essai de relecture du concept*, Publications de L'Institut Universitaire de Hautes Études Internationales,

According to DWORKIN [1986], in the 'model of rules' the members of a political community accept a general obligation of complying with the rules established, whereas in the 'model of principles' the members accept that they are governed by common principles as part of a shared view, that constitute more than rules establish by a certain political agreement, here concepts like political moral are developed.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion[95], e.g. *uti possidetis juris* in the context of decolonization and the cases mentioned before due to the agreement of the parties involved, differently from the principle of territorial integrity and self-determination.

Still applying DWORKIN's scheme, there are basically two approaches towards principles. The first treats principles as binding upon judges, so that they are wrong not to apply the principles when they are pertinent. The second treats principles as summaries of what most judges 'make it a principle' to do when forced to go beyond the standards that bind them.[96]

If we follow the first, we are still free to argue that because such judges are applying binding legal standards they are enforcing legal rights and obligations. But if we take the second, we are out of court on that issue, and we must acknowledge, for instance that the respect of a natural reserve which, in the interests of the ecosystem and of biological diversity cannot be divide without lasting damage as well as a sacred site or archaeological preserve which must be maintained in its integrity in *Kasikili/Sedudu Island* (*Botswana/Namibia*)[97] was done by an act of judicial discretion applied *ex post facto*.

This second position would reflect the skeleton diagram of positivism, holding that when a case is not covered by a clear rule, a judge must exercise his discretion to

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Genève, 1ére édition, 2001; Riesenfelf S.A. *Jus dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court.* AMERICAN JOUNAL OF INTERNATIONAL LAW, Vol. 60, (1966), 511-516; Rosenstock R. *Peremptory Norms – Maybe Even Less Metaphysical and Worrisome*, DENVER JOURNAL OF INTERNATIONAL LAW, Vol. 5, (1975), 167-170. For the concept of hierarchy in international human rights see Meron, T. *On Hierarchy of International Human Rights*. AJIL, Vol. 80, No. 1 (Jan., 1986), 1-23.

[95] DWORKIN, [1978].p. 24.

[96] DWORKIN [1978]. p. 30.

[97] *Kasikili/Sedudu Island* Case (Botswana/Namibia), ICJ REPORTS 1999, 1045.

decide that case by what amounts to a fresh piece of legislation.[98] Arguably that was the basis for Judge Abi-Saad in affirming that the application of equity would be based on the discretion of the judges.

It is argued that this approach (the second) does not reflect the role that should be played by decision makers, negotiators and judges in applying International Law. In tacking delimitation disputes, based on the cases assessed above, the Court has demonstrated the importance of content of the legal norms applied, clearly rejecting Kelsen [1967]'s view, according to which:

> A legal norm is not valid because it has a certain **content**, that is, because its content is logically deducible from a **presupposed basic norm**, but because it is created in a certain way – ultimately in a way determined by a presupposed basic norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore **any kind of content might be law**….. [99]

It is suggested that the enforcement of the right to territorial integrity and self-determination be assessed from the perspective of what DWORKIN [1986] has denominated '*chain novel'*[100]

In the '*chain novel'* a fruitful comparison between literature and law was developed, resulting in an association of the role played by a judge with that of each one of the novelists writing different chapters of the same romance. Therefore as DWORKIN explains:

> [E]ach has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as **integrity**…In our example, however, the novelists are expected to take their responsibilities of continuity more seriously; they aim jointly to create, so far as they can, a **single unified novel** that is the best it can be.[101]
>
> *(emphasis added)*

By providing this framework of interpretation of Principles for judges to operate, their discretionary power would be tentatively taken away. However, the key to ensuring the judiciary's interpretation in this direction lies in the establishment of standards of protection that would lead to 'equitable solutions'. In relation to Kosovo this understanding should be applied to negotiators and decision-makers as a whole.

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[98] DWORKIN, R. *Taking Rights Seriously*. Harvard University Press. Cambridge, Massachusetts. 1978. p. 31.
[99] KELSEN, H. *Pure Theory of Law*. The Lawbook Exchange, Ltd. Clark, New Jersey. 2005. p. 198, assuming the concept of *Grundnorm*.
[100] DWORKIN, R. *Law's Empire*. Harvard University Press. 1986. p.229.
[101] DWORKIN [1986], p. 229.

It is a duty, not a mere power left for the decision-makers in setting Kosovo's *status* to take into consideration the conflicting principles and assuring that the *jus cogens* norms as defined before in this paper are respected in order to achieve an 'equitable result'.

Therefore, there is a commitment to all 'peoples' involved, mainly in terms of the future consequences of such decisions.

Starting from 1999, Serbian negotiators have proposed standards of protection that would lead to 'equitable solutions' based on the decolonization concept. While the initial Serbian proposals on decentralization were mostly ignored by UNMIK, after violent attacks that occurred on 17 March of 2004, it became clear to the international community that multiculturalism throughout integration and coexistence was not anymore a feasible solution for Kosovo.

Both documents, Programme[102] and Platform[103], adopted afterwards by Serbian representatives arguably possesses serious shortcomings owing to the fact that they failed to make the proper balance in reconciling the tension between conflicting principles to achieve an 'equitable result'.

On one hand, both documents insist on territorial integrity of Serbia throughout the statements that territorial autonomy afforded to Serbian population differs from the territorial division (separation, dissolution) of the Province[104]. On the other hand, both documents give due regard to 'realistic, reasonable, **equitable**' solutions[105] and 'in order to repair **injustices**'[106] and to protect the rights of Serbian population including the right to self-determination, stating that fully independent Serbian region should be created within the Province, holding almost absolute and exclusive legislative, executive and judicial jurisdiction. Based on the long list of the

[102] Programme of Serbian Government for Political Resolution of Current State of Affairs at Kosovo and Metohija, of April of 2004. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=19840.
[103] Serbia Platform on Political Negotiations on status of Kosovo and Metohija, of January 2006. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43059.
[104] Programme of Serbian Government for Political Resolution of Current State of Affairs at Kosovo and Metohija, paragraph 2.1, of 29 April of 2004. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=19840, Serbia Platform on Political Negotiations on status of Kosovo and Metohija, of January 2006. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43059.
[105] Programme of Serbian Government for Political Resolution of Current State of Affairs at Kosovo and Metohija, of 29 April of 2004. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=19840, para. 2.1.
[106] Serbia Platform on Political Negotiations on status of Kosovo and Metohija, of January 2006. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43059.

enumerated original competences that should be afforded to the Serbian Region,[107] it should be concluded that this proposed legal concept does not amount to decentralization, which essentially assumes transfer of power (but not creation of original jurisdiction as such.)

It seems that in order to protect 'basic rights of human persons' Serbian negotiators came up with the solutions that are not coherent enough. Namely under a label of protecting territorial integrity of Serbia they created completely separate (independent) entity of Kosovo that possess full legislative, executive and judicial power apart from the fields of foreign, customs, and monetary policy.[108] On the other side, contradicting the previous measures, in insisting on protection of human rights including the right to self-determination, Kosovo representatives were authorised to give only non-binding recommendations to the competent Serbian state authorities.[109]

Conclusion

As the research has initially demonstrated, the *uti possidetis* principle from its very inception had a provisional character, preserving the *status quo* only until competing claims could be resolved.

As the consequence of its provisional character, an admittedly heavy burden is posed on decision makers, whether they are national diplomats or international commissioners or judges.

Besides its provisional nature, there are certain legal obstacles that hinder the recourse to *uti possidetis* in Kosovo context.

It was demonstrated based on the analyzed leading cases and documents that *uti possidetis*, arguably, did not prevail as a general principle of international law failing to meet criterion of 'so long and so generally accepted' rules 'as to be no longer directly connected with state practice.'[110]

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[107] Section 3.1.2. Programme of Serbian Government for Political Resolution of Current State of Affairs at Kosovo and Metohija, of 29 April of 2004. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=19840.

[108] Serbia Platform on Political Negotiations on status of Kosovo and Metohija, of January 2006. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43059.

[109] Serbia Platform on Political Negotiations on status of Kosovo and Metohija, of January 2006. See. www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43059.

[110] BROWNLIE, I. *Principles of Public International Law*. Fifth Edition, Oxford University Press, New York, 1998. p. 19.

Namely, the Badinter Commission was the only legal authority that declared the *uti possidetis* as a general principle of international law (to be applied whenever independence takes place) by means of misinterpreting the phrasing of the ICJ in the *Frontier Dispute* Case, where the application of the *uti possidetis* '[**i]s logically connected with … form of decolonization wherever it occurs'**.[111]

On the other hand, the *uti possidetis* principle out of the colonization context cannot be regarded as an international customary norm due to the fact that it lacks evidence in demonstrating existence of two constituent elements: firstly, the general state practice must reflect the rule (the generality requirement); and secondly, states must follow the rule in the belief that such a rule is legally required (*the opinio júris sive necessitatis* requirement).[112]

The mere presence of *uti possidetis* in the constitutions and international documents does not demonstrate *opinio juris.*[113] It is hard to prove *opinio juris* as a psychological element having in mind that *uti possidetis* did not prevent the emergence of different borders even during the decolonization. Namely, in resolving border disputes lingering from decolonization, states have agreed to accept deviations from *uti possidetis.*[114] Considering significant number of states that emerged from colonial rule with other than their preindependence borders as well as the (pre)existence of a *compromise* in leading cases adjudicated before the ICJ, it is not possible to affirm that *uti possidetis* is a result of '*divergent states vectors* (acts, restrains) and thus brings out what the legal system considers a resolution of the underlying state interests'[115].

It is important to emphasize the juxtaposition between the right to self-determination and the *uti possidetis* principle bearing in mind their different legal characters. Namely, considering the established hierarchical order the right to self-

[111] 1986 ICJ REPORTS at 565. para.23. *Frontier Dispute* Case (*Burk. Faso* v. *Mali*) 1986 I.C.J. 554 (Dec. 22).
[112] WEISBURD, Arthur M. *Customary International Law: The Problem of Treaties*. VANDERBILT JOURNAL OF TRANSNATIONAL LAW. vol. 21 (1988) NUMBER 1, 1- 46, p. 6.
[113] RATNER, S. R. *Drawing A Better Line: Uti Possidetis and the Borders of New States*. 90 AM. J. INT'L L. 590-624 (1996), p. 598.
[114] 1960 ICJ Rep. 192-199-200 (Nov. 18) (allowing commission and arbitrator to 'grant compensations and even fix indemnities in order to establish, in so far as possible, a well-defined natural boundary line').
[115] D'AMATO, Anthony. *Trashing Customary International Law.* AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 81, No. 1 (Jan., 1987), 101-105, p 102, commenting on the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicar*. v. *U.S*), Merits, 1986 ICJ REP. 14 (Judgment of June 27), emphasis added.

determination as a *jus cogens* norm that should be applied as a Principle, whereas *uti possidetis* is a rule applied in terms of all or nothing. If the application of *uti possidetis* violates the right of self-determination it has an arguable illegality on its application from the point of view of its content, that cannot be overlooked during the process of creation of any new state. Therefore, human rights concerns cannot be ignored in order to meet the criteria imposed by the domestic legal regimes that regulate administrative borders.

Based on the arguable illegality of *uti possidetis* in Kosovo, it is advocated the importance of the 'equity principle' as an essential tool for the decision-making process[116] in defining the Kosovo's legal *status*. According to the leading ICJ decisions, 'equity' assumes the role of producing 'equitable results', understood in terms of fairness and justice.

Admitting that the international community reflects DWORKIN's[117] 'model of principles' the duty/power of judges in achieving those results is considered as the necessary product of the equation based on the principles shared by this community. As a conclusion, judges' discretionary power is taken away, indicating the mandatory aspect of taking these shared values, represented in the form on legal principals, in this research extensively approached as *jus cogens* norms.

Tentatively, this working scheme should be followed by negotiators and decision-makers involved in the process.

From this perspective, it is not conceivable that when group elites come forward, whether in former Czechoslovakia, former Yugoslavia, or some other state that is about to become a former state, beating the tom-toms of ethnicism, tribalism or subnationalism, the international community's response might be: 'Sorry, the boundaries here are not subject to change. The fundamental entity that exists cannot be broken up. You may, however, seek all sorts of accommodation inside the national community […]. The international community would provide some supervision in terms of a bill of human rights…'[118]

It means that in allowing for the flexibility in the formation of new communities, International law must follow ultimate substantive restrictions on what

[116] KRASNER, S. D. *Structural Causes and Regime Consequences*. *In* International *Regimes*. Edited by Stephen D. Krasner. Cornell University Press. 1983 "[D]ecision-making procedures are defined as prevailing practices for making and implementing collective choice."
[117] [1978] ; [1986].
[118] *Professor W. Michael Reisman*, 1993 Annual Meeting of the American Society of International Law, 87 AM. SOC'Y INT'L L. PROC. 258-259, 264-265 (1993).

any authority may do, based on fundamental tenets of respect for the dignity of the individual, and these tenets should be forced by the international community against any new entity that arises and violates them.[119]

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Abbreviations

AJIL – American Journal of International Law
EC–European Community
ESIL – European Society of International Law
ICJ – International Court of Justice
ICLQ – International Comparative Law Quartely
ILM– International Law Materials
ILR– International Law Reports
MULR– Melbourne University Law Review
O.A.U. Organization of African Unity
SFRY – Socialist Federal Republic of Yugoslavia

UN GA –United Nations General Assembly
UNMIK – United Nations Mission in Kosovo
UN SC – United Nations Security Council