

SELF-DETERMINATION AND BORDERS

The Obligation to Show Consideration for The Interests of Others



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Abstract

The 1990s brought with them a new generation of border frictions and disputes, many of which are still unresolved. In Central Asia many boundaries have been settled, some are in the process of being settled, and some are presently causing both inter- and intra-state tension and unrest. The wars in Yugoslavia late last century also concerned control over territory and the preservation or change of borders. Though there are many relevant and pressing questions in relation to borders, only one question will be examined here – that of conflicts regarding the location and function of territorial boundaries. A common position is that Public International Law only responds to the issue of the location of international boundaries, and understands functionality to fall solely within the sovereign or internal affairs of states. Issues related to internal boundaries are also considered to fall within the scope of internal affairs. Public International Law is understood as providing two approaches to the issue of changing the location of international boundaries. The first approach claims that changes to border location are only allowed between states if mutually agreed upon. If this is the case no international rules apply and the border is delimited as the parties agree. The second approach, applicable when there is no agreement between those concerned or the situation concerns only one state, is to refer to the principle of territorial integrity or the concept of *uti possidetis* to rule out any border changes.

These approaches are challenged on the basis and inter-relationship of the first two Purposes laid down in the first Article of the UN Charter. This thesis argues for an inter-relational interpretation of the Purposes of the UN Charter and proposes that respect for self-determination is a precondition for long-term and sustainable international peace and security. Research undertaken by political geographers on boundaries and peace reveals that boundary functionality is closely connected to peaceful relations in and between states. Rather than discarding the principle of self-determination it should be re-examined so that its application instead furthers international peace and security. In cases of boundary dispute or tensions, it can clearly contribute by requiring consideration to be shown towards those especially affected by border changes. Further, a multi-disciplinary response to conflicts concerning boundaries is required, forming the ‘meta-context’ in which the inter-related Purposes are interpreted and applied.

An interpretation reconciling the UN Charter Purposes and examining them in a ‘meta-context’ will disclose which aspects are necessary to consider as part of the principle of self-determination in cases of change to border locations and functions. The principle is understood to require *consideration as law* – the essence of self-determination being precisely to show consideration towards those affected, not simply as a matter of good policy, but as a specific legal requirement. The principle of self-determination is suggested to be relevant both to issues of boundary location and to boundary functionality.

Much of International Relations theory and Public International Law have generally excluded context-sensitive factors, legitimising an ignorance of history, geography and other highly relevant disciplines. Such exclusions have led, in part, to ill-founded and disastrous territorial policies. It is time to attempt to remedy this, in one area of boundaries, by taking context into account through interpretation of the principle of self-determination in the interests of long-term peace and stability.

Dona nobis pacem

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The thesis is dedicated to my family. I love you.

Table of abbreviations

AAAG	Annals of the Association of American Geographers
AJIL	American Journal of International Law
ASIL Proceedings	Proceedings of the American Society of International Law
BYIL	British Yearbook of International Law
CSCE	Conference on Security and Co-operation in Europe (presently the OSCE)
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law
ETS	European Treaty Series
FRY	Federal Republic of Yugoslavia (1991-2002)
HRC	United Nations Human Rights Committee
IBRU	International Boundaries Research Unit (Durham)
ICG	International Crisis Group
ICJ	International Court of Justice
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic, Social and Cultural Rights
ILR	International Law Reports
ILM	International Legal Materials
IWPR	International War and Peace Reporting
LoN	League of Nations
MJIL	Michigan Journal of International Law
OAU	Organization of African Unity
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RADIC	Revue Africaine de Droit Internationale et Comparé (African Journal of International and Comparative Law)
RdC	Recueil des Cours
RGS Proceedings	Proceedings of the Royal Geographical Society and Monthly Record of Geography
RIIA	Royal Institute of International Affairs
RIAA	Reports of International Arbitral Awards
RSFSR	Russian Soviet Federative Socialist Republic
SFRY	Socialist Federal Republic of Yugoslavia (1945-1991)
TXLR	Texas Law Review
UDHR	1948 Universal Declaration of Human Rights
UNCIO	United Nations Conference on International Organization
UNCLOS	1982 United Nations Convention on the Law of the Seas
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics (1924-1991)
VCLT	1969 Vienna Convention on the Law of Treaties
YBILC	Yearbook of the International Law Commission

1. INTRODUCTION

There can be no peace without law.¹

[M]isrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need.²

1.1 Introductory remarks

Self-determination certainly belongs to a different concept of International Relations (IR) from the one which has dominated much of the globe since the end of the second world war. Since then, IR has often viewed relations between states as determined by power relations, and has understood the actors to be stable entities, much alike and continuing. The ‘return’ of culture, identity and difference in IR reveals the static conception that has been dominant for so long. In a static world self-determination has no place. The statist student of Public International Law (PIL) examines self-determination and attempts to give stable definitions to the basic concepts ‘peoples’ and ‘self-determination’, which perhaps inevitably becomes a futile exercise. It is proposed in this study that such attempts miss the whole purpose of the principle. Entities change content and form over time and new labels are attached to different phenomena that may only come into existence, or be reified, with the very labels themselves.³ The concept of self-determination has been caught within the old conflict of foreseeability/procedural equality and justice, or legality and legitimacy. This work suggests that the principle of self-determination belongs to the latter categories of justice and legitimacy. It cannot be limited to unchanging rule content, as it is its very *purpose* which legitimates its existence. It changes as the world changes and responds to new challenges. The principle of self-determination will alter and develop, and cannot be limited to static rules and static entities. Its purpose is ‘decisionary inclusion’ – the *consideration of peoples concerned*.⁴ The

¹ U.S. President Dwight D. Eisenhower, Address to the Nation, 31 October, 1956, responding to the Suez crisis, in: *The Public Papers of the Presidents of the United States*, vol. 1956 (National Archives) pp. 1060-66 at 1066.

² Taylor, Charles, *Multiculturalism and the Politics of Recognition* (Princeton University Press, Princeton, 1992) p. 26

³ The static effort can be likened to giving firm rule content to the use of ‘equity’ in English law – it is a less than fruitful exercise.

⁴ In its Advisory Opinion in the Western Sahara case the ICJ explained the essence of the principle of self-determination to be “the need to pay regard to the freely expressed will of peoples”. Western Sahara, Adv. Op. (1975) ICJ Rep. 12 at 33 (paragraph 58-9)

entities ‘targeted’ or protected will change in response to the challenges of the times. While the essence of self-determination continues to be relevant, its modes of expression will change and adapt.

Historically, the principle of self-determination has challenged the present systems of power and decision-making. Exemplified by the formulations of the Socialist International towards the end of the 19th Century, the idea of self-determination was used to demand that nations within empires should not be exploited. Socialists were divided over the idea of the nation and its function or role in history, but over the course of time the Bolsheviks developed a theory of self-determination as the protector of the interests of nations. Later on, self-determination was explained as the right to decide whether the nation would be joined to the new Russian Soviet Federative Socialist Republic (RSFSR). At the end of the first world war, US President Woodrow Wilson advocated the principle in order to legitimise aligning the state borders of the defeated empires along national lines – thus rearranging the power structure of Europe by wresting control over territories from former decision-makers. Thirty years later, the principle was effectively used to question the conquering empires’ sovereignty over faraway lands and colonies, thus again denouncing exploitation over ‘Others’.⁵ In the 1990s it was often perceived as a threat to the existing order.⁶ It has always constituted a threat. The theory and principle of self-determination accompanies the idea and requirements of the nation, but it does not owe its existence to the rise of the nation in politics. It has its roots in the emerging thinking on rights, freedom and equality – ideas which were seeping into mainstream politics by the late 1700s – and its spirit seeks the rearranging of unjust and exploitative power relations.⁷ Thus it is connected with justice and inclusion; it cannot be harnessed by the existing system, which only offers equality of states as a sustainable and sufficient guarantor of peace in a multi-polar system of states of increasing differences of opinion on most matters, as well as lessening control over their own interests. It is in the effort

⁵ Attacks against colonialism were, however, made much earlier, as e.g. at the German founded League of Non-Native Peoples’ Lausanne Conference (1916) and in Lenin’s article “The Socialist Revolution and the Right of Nations to Self-Determination” published the same year, where he required that, “Socialists must [...] demand the unconditional and immediate liberation of the colonies without compensation”. Lenin, V. I., “The Socialist Revolution and the Right of Nations to Self-Determination” (1916), in: Lenin, V. I., *Collected Works, vol. XXII* (Progress Publishers, Moscow, 1964) pp. 143-56 at 151

⁶ Sureda wrote that from the very beginning self-determination has had “the character of a threat to the legitimacy of the established order, trying to substitute for it one with more equality.” He continued by describing that self-determination has nevertheless been closely related to peaceful change, as the requirement of the consent of the population to territorial change “offered a method of settling disputes whereby the arbiter was the people themselves.” Sureda, A. Rigo, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Sijthoff, Leiden, 1973) pp. 17-18

to reformulate the principle to uphold the *status quo* that its content is lost, and causes the confusion to scholars that it has unwillingly and unfortunately generated for decades. The principle of self-determination of peoples constitutes a warning directed to states to exploit and oppress on pain of violence, destruction and possible extinction. For sustainable peace the principle must be respected. Even though states are inherently repressive entities, it is not the core aim of self-determination to discard the state construct, but to limit its excesses so that peace prevails, both within and between states.

My interest in this topic was fuelled by the tragedy of the Yugoslav conflicts in the 1990s. I have come to believe that the whole area of border disputes begs for more legal attention. It is to be hoped that this thesis might prove to be more than a theoretical contribution in a morass, perhaps being only a very small paddle in a great puddle.

1.2 The territorial angle

Why is the question of the location of borders so pressing? How is the issue connected to self-determination? Many present and recent differences over the location of borders have far-reaching consequences for those affected. The first question to respond to here is why border tensions or conflict are a relevant topic in relation to the UN and its Charter. While it is reasonable at first to suggest that the issue falls within the domain of inter-state relations or internal affairs and is not of universal concern, there are several reasons why the area, on the contrary, is of clear international concern and falls within the Charter's ambit. First and foremost, tensions between states regarding borders may develop into a threat to international peace and security. Under Article 1(1) of the UN Charter the Organisation is "to take effective collective measures for the prevention and removal of threats to the peace" which thus includes preventive action before threats to peace have developed into full-scale conflict.

However, though frictions do not always risk falling within the scope of Article 1(1) there are additional reasons why border tensions can be considered to fall within the international scope of concern. Article 14 of the UN Charter allows the General Assembly to "recommend measures for the peaceful resolution of any situation [...] which it deems likely to impair the

⁷ Berman has suggested self-determination as a critique of sovereignty without consent, situating the concept "between law and sovereignty". Berman, Nathaniel, "Sovereignty in Abeyance: Self-Determination and International Law" 7 *Wisconsin International Law Journal* 1 (1988) 51-105 at 56-8

general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”. It has been suggested that the inclusion of this last passage “recognizes explicitly and clearly that any violation of the Purposes and Principles of the Charter, the Organisation’s *raison d’être*, is prejudicial to the ‘general welfare’ and might impair ‘friendly relations among nations’”.⁸ If the principle of self-determination, as one of the Purposes of UN Charter Article 1, requires consideration of peoples in border disputes or conflicts arising from changes, then non-consideration falls under Article 14, allowing the General Assembly to make recommendations to remedy the situation, unless the Security Council is dealing with it (Article 12). Thus the UN Charter allows the Security Council to consider a situation which falls under Article 1(1) and the General Assembly to make recommendations in situations violating Articles 1 and 2.

The traditional PIL approach to boundary disputes between states has been to alter the location of borders only by the consent of both parties. If they cannot come to an agreement then, no change is possible since nothing can be required by law. There is no legal obligation requiring the parties to come to an agreement, and accommodation depends on the goodwill of heads of state. What is unconsidered is that all leaders are not necessarily geared up for peace, national or international. There may be a party or parties who see the continuation of tensions or acceleration of conflict as beneficial to their interests. When observing international conflict or simmering tensions between states, one must not always suppose that the problem is a lack of *capacity* to solve the dispute or ease tensions. This may, of course, be the case – but it is not necessarily so. Territorial conflicts are often very complex. Yugoslavia in the 1900s provides an example of how useful it was for political leaders of an international adversary, with unsolved conflicts, to be able to stay in power and leave domestic political systems unreformed. Part of the background to the Hutu-Tutsi conflict and the Rwandan genocide, suggested a former Rwandan minister of agriculture, was that the conflict was used as a diversion from the central problems of land and access to food.⁹ The continuing crisis in the Middle East shows similarities. Conflict is often used as a means of control over power. This essential truth is conspicuous at the basic level of families and small groups. It also applies to situations within states, in regions and globally. When this is the case – that the

⁸ Explanation given by UNGA Special Committee studying the South African apartheid policies, in: Goodrich, L. M., Hambro, E. & Simons, A. P., *Charter of the United Nations: Commentary and Documents*, 3rd ed. (Columbia University Press, N.Y., 1969) at 144

⁹ Gasana, James, “Remember Rwanda?”, excerpt from *World Watch Magazine*, September/October 2002, at: <http://www.worldwatch.org/fe/EP155B.pdf> (accessed 16/10/2002)

leaders or one of the leaders of the conflicting countries wish for tensions to continue for internal political reasons – traditional International Law options in border disputes are insufficient. The choice of bilateral agreement presupposes willingness to compromise and agree in the interests of peace, while the default *ad hoc* application of *uti possidetis* either puts a lid on the tensions, leaving the issue unresolved, which does not necessarily harmonise with long-term international peace and security, or merely leaves the option of using force to coerce boundary changes. Is there not another alternative where the willingness of leaders to keep the peace is not the only motivation, and where there can be a long-term solution for those most affected by a particular border and changes to it?

Lord Curzon wrote almost a century ago: “Frontiers are indeed a razor’s edge on which hang suspended the modern issues of war or peace, of life or death to nations.”¹⁰ Disputes between states are not the only border issues of international concern. Relations between the inhabitants of a frontier area or borderland and their government might, for example, be enflamed by restrictive boundary functions that hinder groups from carrying out their affairs and conducting relations with the ‘other side’. Some political geographers have warned that the most pressing threats to international peace and security today are not inter-state wars but internal conflicts and violence, and that boundary research must develop in accordance with this change.¹¹ PIL research is also challenged by this development. When internal conflicts begin to threaten international peace and security, they are no longer merely domestic issues, in the similar sense that respect for human rights entered the arena of international concern in 1948 with the adoption of the Universal Declaration of Human Rights.

However, the functions of boundaries have traditionally been considered to fall within the internal affairs of states. As sovereign states they, and they alone, determine how the boundaries are to function and whether they are to have an ‘open’ or ‘closed’ character. It is argued here that the functions of borders are undoubtedly related to international peace and security, as frustrations of divided groups who are additionally hindered from continuing relations, trade and crossing, may spill over into the international arena. Since the inter-war period, political geographers have argued the close connection existing between peace and border functions. What goes on in borderlands is therefore related to international peace and

¹⁰ Lord Curzon, *Romanes Lecture on the Subject of Frontiers* (1907), at page: <http://www-ibru.dur.ac.uk/docs/curzon1.html> (accessed 29/01/2003). Lord Curzon later became British Foreign Secretary (1919-24) and headed the British delegation at the 1922-23 Lausanne Peace Conference negotiating the infamous Turkish-Greek treaty on forced population exchanges. Gilmour, David, “The Unregarded Prophet: Lord Curzon and the Palestine Question”, 25 *Journal of Palestine Studies* 3 (1996) 60-68

security. The principle of self-determination should be understood to support respect for the interests of affected groups or borderlanders, and also to form a response to hindrances they face. If this is the case, the very question of boundary functionality may fall outside the sphere of the domestic affairs of states, and in relation to tensions connected to international peace and security, there might be a duty to arrive at a solution that *inter alia* shows consideration for borderlanders.

The two situations that will be more closely examined in this dissertation are Yugoslavia in her different forms and the two former Soviet Central Asian Republics – Uzbekistan and Kyrgyzstan. These cases are intriguing illustrations of the complexities of the issue at hand. In both situations the Socialist states were constructed under the rhetoric of the principle of self-determination and united numerous nations of varying creeds. The federal borders were not haphazardly constructed but set up with political visions of uniting the shaky constructions. Their purpose was not to function as international borders. The end of Communist power led to a public re-evaluation of the internal relationships within the state, and thus the continuation of the states and *inter alia* their boundaries became a pressing issue. The breakdown of the USSR (Union of Soviet Socialist Republics) and the SFRY (Socialist Federal Republic of Yugoslavia) involved claims to and/or actual changes to the location and functionality of the former federal, now international, boundaries.

The international community responded with a formula created within the state-centric framework for the era and case of decolonisation: borders were not to be changed, for if discussion was made possible it would lead to force being used to alter the borders unilaterally.¹² The theory on the relation between discussion and violence was accepted as self-evident and needed no empirical support. The viability of borders in the long term, as well as their functionality, were deemed to be non-issues.

The wars in Yugoslavia during the 1990s should shock observers into a re-evaluation of the international community's response to the boundary issue in the light of its goal of maintaining international peace and security. Many *lacunae* and problems became apparent.

- The legal requirement of interpreting the UN Purposes as interrelated has been understood as practically impossible, thus allowing the principle of self-determination

¹¹ Wood, W. & Milefsky, R., "GIS as a Tool for Territorial Analysis and Negotiations" in: Schofield, C. *et al* (eds.), *The Razor's Edge: International Boundaries and Political Geography* (Kluwer Law International, London, 2002) pp. 107-123 at 110

to lapse into insignificance instead of its replacing force by providing space for context-sensitivity in the maintenance of peace and security.

- PIL has not distinguished between borders, treating all as of the same nature. This misses the important connection between boundaries and peace that Political geography has noted since the 1919 Paris Peace. Distinguishing the case is replaced with ideology built on a statist worldview where states are similar and enjoy complete territorial control. The effect is that the problems in a conflict including border claims are only superficially responded to, leaving the goal of long-term international peace at risk.
- Political values of stronger and involved states have also been adopted to legitimise the application of certain policies as though they were binding on the international community when ‘resolving’ conflicts. These have been applied without their examination in the light of the UN Purposes or taking into account the risks that other values, requirements and legal principles may be scuppered, and long-term peace undermined.

1.3 The problem and delimitation of the study

The object of this study concerns the applicability of the principle of self-determination in border disputes for the purpose of long-term stability. This thesis examines the inter-relationship of the UN Charter Purposes, primarily the principles of maintaining international peace and security and respect for the self-determination of peoples. The position adopted is that neglect of the principle of self-determination is both legally and practically unsound.

Because territorial disputes and tensions arising at boundary changes involve complex factors, it would be presumptuous to claim that the suggested interpretation and application of self-determination will resolve all such conflicts and problems. My belief is, nonetheless, that certain frictions can be pre-empted, and that the response of the international community to certain cases can indeed be more beneficial to international peace and security.

¹² The ICJ recognised in the Frontier Dispute case that the retention of colonial borders did not respect the right of peoples to self-determination, but explained that this was a legitimate sacrifice for peace to be upheld. Frontier Dispute case (Burkina Faso/Rep. of Mali) ICJ Rep. (1986) 554 at 566-7

What does respect for the principle of the self-determination of peoples mean in practice for those affected by border changes? What interests are covered by their right to self-determination which are the duty of the international community to respect? How should the principle of self-determination be interpreted in order to further international peace and security? These are some of the most relevant questions that the thesis attempts to answer.

Concepts that are often claimed to prevent the application of self-determination to boundaries, such as *uti possidetis*, territorial integrity and the principle of the stability of boundaries, will be examined. This is all the more important, as the concepts are often used interchangeably or add confusion in other ways.¹³

Special reference is made to the former Soviet Union and Yugoslavia – situations where changes of boundary status occurred with varying consequences. The fundamental concern is whether self-determination can contribute to peace in border disputes, and the possible content of such a contribution. In other words, can the principle of self-determination be applied so as to maintain ‘sustainable’ or long-term international peace and security? How could this be done? Might it even be detrimental to peace *not* to apply it? Derek Bowett asserted as early as 1966 that “the presupposition of strife between nations is not of itself a consequence of the principle of self-determination but the reflection of a desire to resist it”.¹⁴ Though his focus was on post-colonial African boundary retention, the main thrust of his argument remains relevant. Disregarding the wishes and interests of a people causes conflict, not whether boundaries are maintained or changed.

The history of self-determination and its development into law has been treated sufficiently in many excellent works, and this thesis does not attempt to give an exhaustive account of self-determination as it is regulated under treaty and customary law. The presentation of self-determination in various sections of this work will instead aim to extract or emphasise certain aspects or characteristics of the principle for the purpose of interpretation, in order to be able to respond to the main issue treated – of groups caught in the middle of different boundary changes (of status, location or function). One section of the thesis will examine self-determination as part of Article 1 of the UN Charter for the purpose of *context*, as one circumstance to take into account at interpretation under Article 31(1) of the Vienna

¹³ Rosalyn Higgins wrote quite sternly, when noting that the concepts were used interchangeably, “But *uti possidetis* is *uti possidetis* and territorial integrity is territorial integrity.” Higgins, Rosalyn, “Postmodern Tribalism and the Right to Secession: Comments”, in: Brölmann *et al* (eds.), *Peoples and Minorities in International Law* (Kluwer Academic Publ., Dordrecht, 1993) p. 34

¹⁴ Bowett, D. W., “Self-Determination and Political Rights in the Developing Countries”, *Proceedings ASIL* (1966) 129-135 at 130

Convention on the Law of Treaties, 1969. Another section will examine the function of self-determination as a *principle*, as distinct from a rule.

The content of the *right* to self-determination, as distinct from the *principle* of respect for the self-determination of peoples, would be the subject of a separate study and it is not the object of this work to determine this. The focus on the principle of self-determination arises from its inclusion in the Purposes of the UN Charter, and thus its existence as a fundamental part of a possible 'constitution' of the international community.

In this thesis little attention will be given to the issue of secession, though it is one of the most common topics to be raised in relation to the principle of self-determination. So much has already been written in that area. Instead, the focus will be on the duty of *states* and the international community to respect self-determination in cases of border disputes or changes of borders, and so the interests or rights of groups to break away from a state of which they form part to set up a new state are therefore not treated in any exhaustive way.¹⁵

1.4 Method of study and theory

This thesis involves both critique and suggestion. The position adopted is that the understanding of the principle of self-determination and its application in border disputes has not accorded with the principle of maintaining international peace and security, either theoretically or practically. It is asserted that the principle has not been interpreted together with other principles of PIL – laid down in the Purposes of the United Nations Charter – as it should. This thesis accordingly argues how this may, or ought, to be done. The method of inter-relational interpretation of the fundamental obligations that the international community has under the UN Charter has seemingly been forgotten or discarded as being too difficult or even impossible. The principle of self-determination has in practice been viewed as a threat to peace, and ready for desuetude. The author suspects that the application, or rather the non-application, of the principle in border disputes has in fact aggravated at least one conflict, that of the Yugoslav wars of 1991-1995. One of the objects of the study is, therefore, to examine a perceived misapplication of the principle of self-determination in the context of the SFRY and propose an alternative interpretation that would better accord with maintaining international

peace and security. An attempt is made to argue how self-determination might, and should, be applied to further international peace and security in border disputes. This means *inter alia* examining the present dominant interpretation of *uti possidetis* and of territorial integrity. Further, it involves study of the appropriate methods by which the Charter Purposes are to be reconciled.

It has already been suggested that the principle of self-determination is to be applied together with other fundamental principles of international law, especially that of the maintenance or value of international peace and security. This is theoretically uncontroversial, though practically very controversial in the case of self-determination. As the values of the community change over time, so must the application of self-determination. The essence of the principle is the denial that peoples may be dominated, exploited and treated like chattels without any consequences for peace. It is, nevertheless, possible to glean specific rules from the principle when it is examined in the light of international peace and security and specific situations threatening peace. It is futile merely to inductively add together all historical applications of self-determination and from that to delineate rules for today. The essence and function of the principle must instead be studied and grasped, and then examined and applied in the light of present day circumstances so that its purpose can be fulfilled. Thus the applications, or even rules, that then emerge in response to specific threats to peace may differ significantly from past applications. The application of the principle of self-determination for the maintenance of international peace will be highly contextual.

The method used is identification of problems related to the application of certain suggested rules of PIL, and examining the structure of the Charter, as well as the principle of self-determination, in order to argue for an application of the principle in 'real' contexts that lead to long-term international peace and security. An assumption is that, as re-interpreted, self-determination may be found to pose requirements on the international community in its response to border conflicts and in preventing conflict. Political geography and history have proved to be vital components in applying the principle of self-determination with the goal of furthering international peace and security. These disciplines, it is suggested, should form part of the 'meta-context' in which an inter-relational interpretation of the Purposes should take place for boundary purposes. Some references will also be made to IR theory. The use of these disciplines is suggested generally to enrich a PIL which seems impoverished and outdated in responding to boundaries and related territorial problems and difficulties.

¹⁵ It seems clear that PIL is silent on the legality of secession, neither supporting nor prohibiting the occurrence, for the simple reason that it is an issue falling within national jurisdiction.

As to the materials studied, much of them are secondary. The aim of the thesis is to outline the development of certain parts of law and interpretation of law, and also to provide arguments from history, geography and law to show why the dominant interpretations are flawed or insufficient for today. This might, or might not, adequately explain the use of the materials selected. Trips undertaken for the study have provided a sense of place and thinking, and a confirmation of ideas, rather than constituting strict fieldwork. Because of the wide issues spanned, much is presented in the form of introductions; clearly within each chapter there remains unlimited ground to be dug, and vessels to unearth and carefully brush off.

1.5 Premises or tenets of the international system

It seems that at least a few international lawyers believe that rule of law is a sufficient guarantor of peace.¹⁶ This belief in the role of law has at least two implications. The first is that the expansion of rule of PIL is understood to be the best way to preserve international peace. It can be argued that, in the interests of peace, it must then be a first priority to sustain the entities which ‘create’ and uphold the system itself – states.¹⁷ Since the entities are understood to provide the basis for the system, their weakening or disappearance may be felt to constitute a direct threat to peace. If two interests clash, it must be a priority to protect the continuity of the entities themselves. Thus *change* is instinctively interpreted as a threat to international stability.¹⁸ The *status quo* is something that ought to be maintained; *status quo* is something valuable and it must then be the task of PIL to uphold it.

¹⁶ Kratochwil stated his belief that domestic peace has more to do with “the successful institutionalization of a political process” than only rule of law. Kratochwil, Friedrich, “How Do Norms Matter?”, in: Byers, M. (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, Oxford, 2000) pp. 35-68, at 40. On rule of law in PIL at all, see e.g. Koskeniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (Lakimiesliiton Kustannus, Helsinki, 1989). See also discussions on legality vs legitimacy, in e.g. Schmitt, Carl, *Legalität und Legitimität*, 1932 (3rd ed.) (Duncker & Humboldt, Berlin, 1980) and Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, London, 1996); “Postscript to Faktizität und Geltung”, *20 Philosophy & Social Criticism* (1994) 135-50

¹⁷ Shaw wrote: “Indeed, one of the reasons for the failure of international law to adapt to the problem of contemporary international relations is seen as its concentration upon territory as the fundamental concept of international law.” Shaw, Malcolm, *Title to Territory in Africa: International Legal Issues* (Clarendon Press, Oxford, 1986) p. 4

¹⁸ Stanley Waterman has suggested: “Although the world political map must constantly alter to meet the ever-changing needs of leaders and inhabitants, change is unsettling. Stability, i.e. lack of change, is easier to live with, at least for those not directly involved in demands for change. However, this may lead us to conclude dangerously that stability, or lack of change, is healthy. Stability can lead to stagnation and myopia. Problems are seen only in national terms and the international nature of many problems – such as the environment,

Formula 1: law protects ➡ *entities uphold/create* ➡ *law = peace*

The argument is buttressed by an understanding of the state as the preserver of harmony. Important positions in IR have presented the state as the space within which order was possible; outside the state there was only anarchy. Security then means preserving the state and its territory.¹⁹

When it comes to international borders – the boundaries that limit the territorial extent of state entities – a common premise is that changes to borders only lead to more changes, until the stability of the system and of states is undermined. The stability, often meaning continuation, of boundaries is understood as fundamental to the international order and peace. For example, the International Court of Justice (ICJ) has expressed that the rationale of the continuation of boundaries is the wish for “stability and finality”.²⁰ But stability is not necessarily maintained by preserving the *status quo* or by, as seems to have been the case so far, considering the functionality of boundaries as unrelated to peace.

One of the objects behind the policy of not changing borders is to communicate that force will be unsuccessful in attempts to change them; peace is then a natural consequence of non-change of borders. This must be further clarified. Unilateral border changes by use of force is ruled out both by the general ban on the use of force by a state against another state, as well as by its link to fuelling further conflict regarding other borders. Stability (of boundaries) then reduces conflict (as attempts to alter borders are prohibited), which reduces general instability (of other borders and of the *status quo*). However, in certain cases even *discussing* boundary changes has been ruled out on the basis of the ‘stability of borders means peace’ argument, which is theoretically only valid in its relation to precluding force.²¹ The ‘stable borders for peace’ argument has gone a step further when even discussing other options has been ruled out. The premise of border changes implying instability is nevertheless questionable. Firstly, it is generally not changes to boundaries, but the *methods* by which these are brought about,

transportation, trade, finance – are ignored or seen as someone else’s difficulty. Openness and flexibility are principal ingredients of change, and a willingness to be open and flexible, not just to approaches to practical problems and issues but to evolving international relations, might lead to greater acceptance of the need to alter the world political map.” Waterman, Stanley, “Boundaries and the Changing World Political Order” in: Schofield, Clive (ed.), *Global Boundaries* (Routledge, London, 1994) pp. 23-35 at 31-2

¹⁹ Agnew, John, “The Territorial Trap: The Geographical Assumptions of International Relations Theory”, 1 *Review of International Political Economy* (1994) 53-80 at 61-2. On changing security perspectives, see e.g. Katzenstein, Peter (ed.), *The Culture of National Security* (Columbia University Press, New York, 1996)

²⁰ *Case Concerning the Temple of Preah Vihear* (Cambodia/Thailand), ICJ Rep. (1962) at 14; see also p. 34; *Aegean Sea Continental Shelf case*, ICJ Rep. (1978) at 36; and *Case Concerning the Territorial Dispute* (Libya/Chad) ICJ Rep. (1994) at 37, paragraph 72

that may prove a threat to peace. The solution to that problem would not necessarily consist of a prohibition on border changes, but instead, of clear guidelines as to when and how discussion regarding border changes may be effected. Secondly, the premise supposes that retaining a boundary means that the *status quo* is actually preserved. The idea arises from a misconception that borders are similar and have like effect on those affected by it, whatever their status or functionality.²² This does not stand up to scrutiny, as boundaries indeed have very different effects on those near it. Maintaining some might be wise, while in other cases such a policy might not promote long-term peace.²³ The retention of the federal boundaries at the dissolution of the SFRY did not maintain the *status quo* or indeed stability, as internationalising the federal boundaries led them to gain a vastly different effect than they had had as the internal boundaries of a multi-national federal state. The mistaken presumption of uniformity is supported by the belief that parties are always more concerned with the legality of PIL than with their actual needs – the legality of an international law where legitimacy plays little or no part and which is often trumped by effective control. The *status quo* may in some cases facilitate peace, while in situations that are practically intolerable it may instead threaten peace. Thus, to promote peace, international law would instead do well to require and facilitate agreements based on certain standards. Long-term peace cannot be maintained and preserved without justice and consideration for important interests in each specific case. Uniformity by reference to *uti possidetis* is no universal panacea to conflict, but instead a dangerous substitute for contextualisation.

The second implication of the ‘law is peace’ formula derives from the inherent part of the rule of law calling for equality of the subjects it binds on the basis of procedural justice. PIL is generally understood to be based on the consent (contract theory)²⁴ of entities reified by PIL or the norms of the system. If they are to be bound by the norms of the system they must first consent to be bound. However, once they have become entities fulfilling the criteria of the system, they gain a quality called sovereignty, conditional upon respecting the same quality

²¹ *Infra* chapter 7.1.3

²² *Infra* chapter 6

²³ See e.g. Makau wa Mutua’s criticism of the imposition of the European construct on Africa, blaming it for its lack of peace and of internal legitimacy: “Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental basis for its failure.” Wa Mutua, M., “Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State”, 89 *ASIL Proceedings* (1995) 487-89 at 487. He suggests an “orderly re-creation of the state”, entering a human rights jurisprudence as “[i]t will not suffice to simply redraw Africa’s map.” *Ibid.*, at 488-9

²⁴ The use of the contract theory as a basis for obligations in the international context is, however, inappropriate, as the original theory explained the formation of societies and the consent of the governed to rule under common authority. Such rule was not absolute but required representation and basic rights, which in the international

on the part of the other entities. Within the system an entity may gain the quality, but is simultaneously burdened with the duty to respect it regarding others – equal sovereignty or sovereign equality.²⁵ The entities are in this way theoretically equal within the system. They have the same rights and duties on the basis that they have chosen to accept these. The obligations and rights are binding on the basis of consent.²⁶ It is practically reasoned that states would not accept to be bound by a system where others would dominate them, and normative arguments cannot be used to force them, as the norms of the ‘system’ are merely norms created by other states. Thus procedural justice replaces substantive justice as a premise or tenet of the system for two reasons. The first is that sovereign states are the originators of the norms and, theoretically, nothing can bind them to which they have not consented, and secondly, because only procedural justice guarantees non-arbitrariness and restricts international hegemony.²⁷

Formula 2: norms of the system ⇨ determine ‘entities’ ⇨ become states ⇨ having sovereign equality ⇨ requires their consent ⇨ to become subjects under binding law ⇨ rule of law (procedural justice) = peace

Thus international peace seems to require both protection of the existence of states themselves and their non-alteration, as well as respect for their equality (for practical and theoretical reasons) to maintain peace. Accordingly, the formula $F1 + F2 = \text{international peace}$.²⁸

context has been ignored, using the Hobbesian model of States’ inter-relations – amoral entities having absolute authority and subject to no standards.

²⁵ For a defence of sovereignty as a container of inequality (to a certain extent) between states despite its flaws, see Kingsbury, Benedict, “Sovereignty and Inequality”, 9 *EJIL* 4 (1998), 599

²⁶ Implications are that they become entities for the purpose of choosing to be bound by the rules that recognise them as entities by fulfilling criteria theoretically impossible for them to have accepted, because before they were entities they had no say or possibility to be bound by such rules. The contract theory invention is, however, deeply ingrained in PIL and divides PIL into two parts: the system itself, which logically cannot be supported by arguments other than that states think it exists (the ‘Tinkerbell’-effect, see Georgiev, Dencho, “Politics or Rule of Law: Deconstruction and Legitimacy in International Law”, 4 *EJIL* (1993) 1, 1-14 at 3); and the rules of PIL, which are believed to emanate from the will of states, though customary law and principles cause some hesitation.

²⁷ See e.g. Koskeniemi, Martti, “Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations”, in: Byers, M. (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, Oxford, 2000) pp. 17-34, on the threat of liberal inter-disciplinarity to PIL’s very existence and function.

²⁸ Shaw wrote that “since States are the territorial expression of individual political and legal orders, the institution of boundaries has to lie at the core of current international law. The stability of the international territorial order is crucial.” He qualified this by adding that “the principle of the territorial stability of States is subject to the need to preserve or restore international peace and security as this has developed under the United Nations system. Nevertheless for present purposes it suffices to underline that the principle of territorial stability is a key precept in the conduct of international life and will remain so until such time as the international system ceases to be founded upon the concept of sovereign States.” Shaw, Malcolm, “The Heritage of States: The Principle of *Uti Possidetis Juris* Today” 67 *BYIL* (1996) 75-154 at 83-4

This ideology²⁹ of PIL can be severely criticised for not corresponding with reality³⁰ and for maintaining exploitative and oppressive structures.³¹ An example of oppressive structures in our boundary context would be that the generally perceived options in border disputes, which consist of bilateral agreement and/or the retention, for example, of administrative borders, reward inflexibility. No account is taken of the fact that it might be in the very interests of states, or of a state's ruler or rulers, to leave border disputes unresolved, or even to escalate the conflict. The fact that discussion cannot be required of leaders, and that there are no standards that leaders must respect in the area of boundaries, in practice means boundary retention by default. If a leader thus refuses to discuss a boundary issue PIL today seems to be left with no options and makes no requirements to resolve the tensions. There is either discussion, which is premised on the good will of leaders, or nothing. This nothingness, which prevailed in Yugoslavia, is to be feared.

Questioning the underlying premises and assumptions which legitimise the application of rules and principles is a vital activity. If the primary aim of the norms that regulate international interaction is to reduce friction and promote peaceful relations, the results of their application must be of great importance. As international society and values change and more knowledge is gained, assumptions about what will promote long-term peace continually need to be examined and re-evaluated. If they are inappropriate they must be discarded. Because the link between *uti possidetis* and peace and stability is often assumed, this provides an important area of examination for this thesis, both in regard to background and underlying theoretical bases, as well as in its practical application. An evaluation of assumptions and principles concerning territory does not necessarily imply a reduction of norms protecting states on the simplistic assumption that dismantling the state will automatically benefit individuals and groups. It is nevertheless important to examine whether the present territorial regime works for or against the stability of states in the long term. Neither unqualified territorial sovereignty nor unmitigated interventionism has, up to now, guaranteed the stability of the international system. The future of the middle way, therefore, seems bright.

²⁹ See Marks, Susan, "Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter", 12 *EJIL* (2001) 109-23

³⁰ The contract theory cannot account for several aspects of customary international law, nor differences of importance of ordinary rules and *ius cogens*; states are not equal in any practical sense nor treated as such, as e.g. illustrated by the existence of the UN Security Council.

³¹ Examples are the lack of sufficient environmental and distributive standards and of binding standards for Transnational companies (TNC); maintaining the very borders set up within the colonial structure that violated the interests of the peoples concerned, giving these both legality, legitimacy and allowing for their even "harder" character through their internationalisation; the lack of standards requiring real and effective representation of states' inhabitants (in fact, even legitimising this by reference to equality and self-determination), as well as providing immunity or impunity for violations of HRs or IHL standards.

Values should also be emphasised in this context. These may be divided into two levels: political values, for example, of one state or a group of states, and long-term values of the international community. The latter could be those common values which transform a group of entities into a community, or are deemed to be those values which legitimise the international structure of today. It is here argued that the UN Charter Purposes should be interpreted and applied in the light of these values. The first type is not necessarily owned by the community of states and might also come into conflict with long-term values. A relevant example of such a value is the idea of the liberal multi-cultural state, an ideology imposed in the conflict in Bosnia and Hercegovina. The policy was not examined in the light of sustainable peace and security or self-determination, nor whether it was the best approach to power sharing in the light of the political history and power relationships and structure in the former Yugoslavia. It did, however, provide the rationale for refusing to discuss border changes. Additionally, a liberal perspective on boundaries often assumes that boundaries are unimportant because the liberal state can function within any boundaries.³² Add this perspective to the common IR assumption about the similar character of states and their correspondingly unchanging territory,³³ and the theoretical level of openness to discussions on territorial changes should become evident.

These assumptions need to be more closely investigated, because they might not be the premises that best further international peace and stability. More specifically, the values advocating the policy of *uti possidetis* in border conflicts should be examined in the light of long-term peace. It is suggested that the 1900s application of *uti possidetis* as a general principle is faulty and indeed dangerous. Its use in the Yugoslavian crisis undermined the argument that it provides stability. But let us begin by examining the principle of self-determination.

³² Buchanan, Allen, "The Making and Unmaking of Boundaries: What Liberalism Has to Say", in: Buchanan, A. & Moore, M. (eds.) *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press, Cambridge, 2003) pp. 231-61 at 231

³³ Agnew, *supra* note 19. See also Murphy, Alexander, "The Sovereign State System As Political-Territorial Ideal: Historical and Contemporary Considerations", in: Biersteker, T. & Weber, C. (eds.), *State Sovereignty as Social Construct* (Cambridge University Press, Cambridge, 1996) pp. 81-121

2. THE PRINCIPLE of SELF-DETERMINATION

The new principle of the consent of peoples is an arbitrary principle, frequently a deceptive one, and only an element of disturbance when one wishes to apply it to nations.³⁴

If the desire for self-determination of any people in the world is likely to affect the peace of the world or the good understanding between nations, it becomes the business of the League; it becomes the right of any member of the League to call attention to it; it becomes the function of the League to bring the whole process of the opinion of the world to bear upon that very matter.³⁵

2.1 Historical background

2.1.1 The principle of self-determination

2.1.1.1 Origins and development of the concept: background and theory

When explaining the meaning of *self-determination* it is usual to begin either by referring to the French and American revolutions or to the use of self-determination in the peace settlement after the first world war.³⁶ President Wilson used the concept at the time to set out

³⁴ M. J. L. Adolphe Thiers (1867), leader of the French liberal opposition, later first President of the Third Republic, quoted in Woolsey, T., "Self-Determination", 13 *AJIL* 2 (1919) 302-5 at 302

³⁵ Pres. Wilson, declaration of 1919, in: Sureda, *supra* note 6, p. 30, footnote 4

³⁶ There is much PIL literature written on the self-determination of peoples. Space excludes the possibility of a complete list; some of the important writings are: Berman, Nathaniel, "Sovereignty in Abeyance: Self-Determination and International Law", 7 *Wisconsin International Law Journal* (1988-9) 51-105; Cassese, Antonio, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995); Crawford, James (ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988); Cristescu, Aureliu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (United Nations, N.Y., 1981); Espiell, Hector Gross, *The Right to Self-Determination: Implementation of United Nations Resolutions* (United Nations, N.Y., 1980); Hannum, Hurst, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1990); Koskenniemi, Martti, "National Self-Determination Today: Problems of Legal Theory and Practice", 43 *ICLQ* (1994), pp. 241-269; Pomerance, Michla, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Nijhoff, The Hague, 1982); Sureda, *supra* note 6; Tomuschat, Christian (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht, 1993); Umozurike, U. O., *Self-Determination in International Law* (Archon Books, Hamden, CT., 1972). Even now, much is being written. Some recent monographies are: Castellino, Joshua, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possessions with Formulations of Post-Colonial 'National' Identity* (Kluwer Law International, Hague, 2000); Knop, Karen, *Diversity and Self-Determination in International Law* (Cambridge University Press, Cambridge, 2002); Raič, David, *Statehood and the Law of Self-Determination* (Kluwer Law International, the Hague, 2002)

his agenda for a new world order, illustrated in his “Fourteen points”,³⁷ providing the basis upon which Germany finally surrendered.³⁸ However, the concept has roots going much further back. As a term, self-determination has been attributed to the expressivist German nationalist J. G. Fichte in the early 1800s for whom freedom and self-expression were of paramount concern.³⁹ The concept carries with it the scent of an authenticity of persons who understand themselves through expression made possible from an absence of oppression. This link to freedom from oppression, whether epistemological or political, has continued throughout the development of self-determination.

As to the seeds of its political application, one must return to the 18th Century. After the French revolution – which shook the rulers of Europe with its shift from the monarch to legitimacy by choice of the people and which should have prepared them for the changes to come – France took it upon herself to aid the rest of Europe in the pursuit of freedom and justice. Special consideration was given to territories surrounding France where referendums were held to allow the population to choose whether or not to belong to France.⁴⁰

This was the beginning of applying self-determination in the sense of taking the expressed wishes of the population into account against an 'oppressor', in this case when determining the status of a territory. It also illustrates the two ideas embedded in the principle of self-determination: one, reactive against domination by 'others', valuing freedom; and two, for

³⁷ Speech to Congress, January 8, 1918, in: Nicolson, Harold, *Peacemaking 1919* (Constable & Co. Ltd., London, 1933) pp. 39-40

³⁸ Self-determination was not respected in the end when it came to actually redrawing the German borders, to the disappointment and frustration of German leaders and the German population. Heater, Derek, *National Self-Determination: Woodrow Wilson and His Legacy* (St. Martin's Press, N.Y., 1994) pp. 45, 122-4

³⁹ Fichte, Johann Gottlieb (1762-1814) *Wissenschaftslehre* (1794) uses the term self-determination in discussing the individual as the source of human experience. Text in: Fichte, J. G. (Heath, P. & Lachs, J. [eds.]), *The Science of Knowledge* (Cambridge University Press, Cambridge, 1982). In “Outlines of the Doctrine of Knowledge” (1810) parts IX, XIII Fichte uses the term *Selbstbestimmung* in a theological context. Text in: Fichte, J. G. (Breazeale, D. [ed.]), *The Popular Works of Johann Gottlieb Fichte, vol. II* (transl. William Smith; 1889 edition), (Thoemmes Continuum, Bristol, 1999) pp. 501-17. On Fichte's national theories see his famous “Address to the German Nation” (1806). On Fichte in his context, see Zöllner, Günter, *Fichte's Transcendental Philosophy: The Original Duplicity of Intelligence and Will* (Cambridge University Press, Cambridge, 1998); Taylor, Charles, *Hegel* (Cambridge University Press, Cambridge, 1975) chapter 1

⁴⁰ Here is the first linkage between plebiscites and self-determination. In 1790, 102,000 out of 150,000 residents of Avignon and the surrounding Comtat Venaissin voted for the papal enclave to be incorporated into France. In 1792-3 the population of Savoy and Nice chose to change from Sardinian to French authority. During the 1800s many plebiscites were conducted in Italy and the Balkans. Heater, *supra* note 38, pp. 4-6. See also Cobban, Alfred, *The Nation State and National Self-Determination* (Collins, London, 1969) pp. 41-4; and Woolsey, *supra* note 34, who calls it the “plebiscite principle”. Anderson has noted the “crude public ‘opinion poll’” on whether the Rhine should be the French Republic's frontier, held in 1795. Anderson, Malcolm, *Frontiers: Territory and State Formation in the Modern World* (Polity Press, Cambridge, 1996) p. 23. See also Suksi, Markku, “On Mechanisms of Decision-Making in the Creation (and the re-creation) of States – With Special Reference to the Relationship Between the Right to Self-Determination, the Sovereignty of the People, and the *Pouvoir Constituant*”, *Tidskrift for Retsvidenskab* (1997) 426-59

democratic or participatory purposes,⁴¹ taking the wishes of a group into account for an ultimate purpose, such as that of preserving long-term peace. Self-determination has long been formulated as an argument against the national oppression of one group over another.⁴² This is seen in Vladimir Ilyich Lenin's call for the liberation of subjugated peoples from imperial domination into the revolutionary workers' fold, continuing to some extent in the decolonisation of the 1950s and 1960s. Self-determination has also been used as an argument for taking the wishes of a population into account concerning decisions that affect them, especially territorial ones. This is illustrated by the plebiscites conducted on territorial changes after the first world war and in plebiscites often – though not always – used in the process of decolonisation.

Several European rulers did not find the new developments under Napoleon much to their liking. Many resisted both in the granting constitutions and in considering the wishes of the populations under their rule.⁴³ The idea of national decision-making was a threat to the existing imperial order of Europe, and was firmly rejected. The right of nations to rule themselves was an idea that had nevertheless taken root. It quickly became established in the collective imagination of peoples in the multi-national⁴⁴ territories within the empires. The debate between Immanuel Kant and Johann Gottfried von Herder on the individual and community was having unforeseen consequences, as the identity of the individual within Europe, and the understanding of what was meant by freedom, was undergoing something of lasting consequence. The old worldview of identification by class and religion was 'out'; the adherents of the French revolution now considered all citizens to be of equal value.⁴⁵ At the same time, and as a reaction against Enlightenment objectification, the Romantic movement argued for the self-definition of all humans with freedom being a fundamental value – if not the highest.⁴⁶ Instead of developing a Kantian identity as citizens of a cosmopolitan world, several developments brought the group into focus: the message of the French leaders was liberation of all peoples from foreign rule, with the focus quickly turning on nations. Herder's

⁴¹ Brownlie has formulated the 'core' of self-determination as "the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives." Brownlie, Ian, "An Essay in the History of the Principle of Self-Determination" in: Alexandrowitz, C. H. (ed.), *Grotian Society Papers, 1968: Studies in the History of the Law of Nations* (Martinus Nijhoff, The Hague, 1970) pp. 90-9 at 90

⁴² Another popular 19th Century application of the idea of nations deciding for themselves was in calling for the unification of one nationality into one state, as e.g. Mazzini argued with respect to Italy.

⁴³ Tsar Alexander II of Russia, however, propagated the morality of constitutions in Paris in 1856 and Berlin in 1878.

⁴⁴ For a distinction between *multi-national* and *multi-ethnic*, see Pešić, Vesna, "The War for Ethnic States", in: Popov, Nebojša (ed.), *The Road to War in Serbia: Trauma and Catharsis* (CEU Press, Budapest, 2000) p. 11

⁴⁵ See Taylor, *supra* note 2 on identity and the shift with the French revolution

⁴⁶ Taylor, *supra* note 39, chapter 1

focus on self-awareness as the essence of life emphasised that the expression necessary for awareness could only come about in community with others. The group was ‘in’, both philosophically and politically.

i: Individual v community

Jean Jacques Rousseau’s *The Social Contract*, the Janus-faced textbook of the French revolution, included the seeds of both cosmopolitan and communitarian views of the way the world was organised.⁴⁷ The equality of man, and thus equal rights and freedoms, seemed to correspond with Kant’s theories, while the importance placed on the “will of the people”, which transcended the composite sum of individuals and their rights, had Herderian characteristics. The identification of groups had shifted from the situation that set off 30 years of religious wars in the 1600s to that of common characteristics such as language, shared history and culture. Democracy could be legitimised both on the basis of the value of the individual in society and the freedom of a people to determine its own destiny and enjoy its own distinctive and special characteristics free of domination by another people. The idea of legitimacy as a requirement for rulership was becoming entrenched; if, under the idea of contract, the consent of the people was necessary in relation to its rulership, it was even more of a requirement with regard to foreign rulers.⁴⁸

Herder’s influence on the valuation of national language and culture is clear. His emphasis was on the paramount importance of communitarian identity: individuals not only identify as members of groups distinguished by language, religion and culture, but express themselves through those media. This leads to a self-awareness that is the essence of human life and freedom.⁴⁹ Every nation possesses its own particular expressions and sense of destiny.⁵⁰ The argument, as it was further developed, constituted a basis for the unification of the German people, an idea unsupported by the strong powers of the day because of the change it would cause to the balance of power.⁵¹ Georg Wilhelm Friedrich Hegel elaborated the idea on man

⁴⁷ For a helpful introduction to International Relations concepts, see Brown, Chris, *International Relations Theory: New Normative Approaches* (Columbia University Press, N.Y., 1992) pp. 23-81

⁴⁸ The development of the contractual idea in politics, expounded by Hobbes in *Leviathan* (1651), is tied to the anthropology of autonomous and self-defining subjects, who can only be bound by their own consent, calculated by rational thinking.

⁴⁹ Taylor, *supra* note 39, pp. 17-22

⁵⁰ Taylor, *supra* note 2, p. 31

⁵¹ Cobban suggested that Herder’s focus was on the nation as a cultural entity; his political theory was very rudimentary: “[A] kingdom consisting of a single nationality is a family, a well-regulated household [...] An

and state, arguing that the state “is the real expression of that universal life which is the necessary embodiment (it would not be inappropriate to say ‘material base’) for the vision of the Absolute.”⁵² Man is part of society, whose order or ‘reason’ is not only practical or useful, but a part of the essence of the *Geist*, which is realised through mankind.

ii: Empire v nation

The ideas that spread from France and Germany quickly inspired groups to identify themselves as subjected nations with legitimate rights⁵³ causing a fundamental threat to the continuation of the empires of Europe. Others called for constitutions to govern their relationship with the ruler.⁵⁴ An awareness of group identity already existed among those who resisted ‘foreign’ rule, but the example of the French gave courage and created hopes of assistance for subjected peoples. The Ottoman Empire was already tottering with the economic crisis and internal tensions that made effective control over its territories seemingly impossible for long. The conservative Austro-Hungarian Empire had long since been in dire need of reform. It had already been forced to grant to the Hungarians equality with Austria in 1867, and had long experience of struggles for power between national groups such as the Hungarians and Croats.⁵⁵ Several national states came into existence at this time: Belgium, Germany, Greece, Italy, Montenegro, Serbia and Romania.⁵⁶

empire formed by forcing together a hundred nationalities, and a hundred and fifty provinces, is no body politic, but a monstrosity.” Herder, quoted in Cobban, *supra* note 40, p. 119

⁵² Taylor on Hegel, in: Taylor, *supra* note 39, chapter 14; quote on p. 366

⁵³ Regarding the French purchase of Corsica from the Republic of Genoa in 1768 Rousseau remarked, “It is making fools of people to tell them seriously that one can at one’s pleasure transfer peoples from master to master, like herds of cattle, without consulting their interests or their wishes.” Quoted in Heater, *supra* note 38, p. 2

⁵⁴ See Poland under Russia and Prince Alexander’s experience of establishing a constitution.

⁵⁵ There had been Austrian suggestions to change the Dual Monarchy into a Triple Monarchy, whereby the southern Slavs would gain some form of autonomous status, similar to that granted the Hungarians. This was, however, strongly opposed by the Hungarians, as it limited their newly gained power within the empire after the *Ausgleich* of 1867. Clissold, Stephen (ed.), *A Short History of Yugoslavia* (Cambridge University Press, Cambridge, 1966) pp. 36-42, 158

⁵⁶ In 1830 the independence of Greece, at that point not in full control of its territory from under Ottoman rule, was recognised in London by the strong powers. Belgium became independent from the Netherlands in 1830. The independence of Serbia, Montenegro and Romania was recognised 1878 at the Congress of Berlin. The unification of Italy in 1870 and Germany in 1871 was promoted by the argument of nationality. Here nationalism was not understood as being in opposition to a cosmopolitan future, but as a presupposition for it. Carr, E. H., *The Bolshevik Revolution 1917-1923*, Part I (Penguin, Harmondsworth, 1966), p. 416. The habit of the strong powers to grant territories and change borders as part of the balance of power, did nothing to lessen the claims of different groups, who all had experience of the same territories as being their own. The Great Powers had often wilfully played off the different nations against one another in attempts to strengthen their own positions of influence in the Balkans. Durham, Edith, *High Albania* (Beacons, Boston, 1987)

iii: Centralism v autonomy

We demand freedom of self-determination, i.e., independence, i.e., freedom of secession for the oppressed nations, not because we have dreamt of splitting up the country economically, or of the ideal of small states, but, on the contrary, because we want large states and the closer unity and even fusion of nations, only on a truly democratic, truly internationalist basis, which is inconceivable without the freedom to secede.⁵⁷

Meanwhile, socialists in Europe were busy debating the issue of self-determination and its implementation. Already in 1865 the London Conference of the First International had accepted the principle of self-determination in the *Proclamation on the Polish Question*, drafted by Karl Marx, as support for the Polish strivings for independence from Russia.⁵⁸ Its purpose seemed, however, primarily to criticise Russia rather than to advance a principle applicable to all nations,⁵⁹ and Friedrich Engels declared its non-universality the following year.⁶⁰ The economic and dialectical interpretation of history by Marx and Engels connected nationalism with the end of feudalism and the rise of capitalism, with an understanding of nations as being essentially economic units created by the centralising effect of new economic relations and changes in the mode of production. The ‘nation’ of which the state consisted was in fact the bourgeoisie, with the workers having no real part to play in the fatherland.⁶¹

⁵⁷ Lenin, V. I., “The Revolutionary Proletariat and the Right of Nations to Self-Determination” (1916), in: Lenin, V. I., *Collected Works*, vol. XXI (Progress Publishers, Moscow, 1964) pp. 407-14 at 413-14

⁵⁸ In it was clarified “[t]he need to eliminate Muscovite influence in Europe by applying the right of self-determination of nations, and the re-establishment of Poland upon a democratic and social basis.” Marx, K., Letter to Hermann Jung, November 20, 1865, in: Marx & Engels, *Collected Works*, vol. 42. *Marx and Engels: 1864-1868* (Progress Publishers, Moscow, 1987) p. 200. The programme of the Second International, 1896, stated: “This Congress declares that it stands for the full right of all nations to self-determination [*Selbstbestimmungsrecht*] and expresses its sympathy for the workers of every country now suffering under the yoke of military, national or other absolutism.” Text in: Lenin, V. I., “The Right of Nations to Self-Determination” (1914) in: Lenin, V. I., *Collected Works*, vol. XX (Progress Publishers, Moscow, 1972) pp. 393-454 at 430

⁵⁹ Carr, *supra* note 56, p. 421

⁶⁰ Engels distinguished between *nations* and *nationalities*: “[W]e perceive the difference between the ‘principle of nationalities’ and the old democratic and working-class tenet as to the right of the great European *nations* to separate and independent existence.” But he also argued: “The principle of nationalities [...] is nothing but a *Russian invention concocted to destroy Poland*.” Engels, Frederick, “To the Editor of *The Commonwealth*” (*The Commonwealth*, No. 160, March 31, 1866) in: Marx & Engels, *Collected Works*, vol. 20. *Marx and Engels: 1864-1868* (Progress Publishers, Moscow, 1985) pp. 155-58 at 157. His identification of peoples as nations or nationalities in concrete cases seems primarily political. Connor, Walker, *The National Question in Marxist-Leninist Theory and Strategy* (Princeton University Press, Princeton, 1984) p. 12-13. Jeremy Smith argues that the support of Marx and Engels for national liberation struggles early on depended on their role in the general “scheme of historical development”. Thus Poland’s struggle was supported, while those of the Schleswig Danes and Irish were not. Their position later changed in favour of all national movements. Smith, Jeremy, *The Bolsheviks and the National Question, 1917-23* (Macmillan Press Ltd., London, 1999) p. 9

⁶¹ “The workers have no country. We cannot take from them what they have not got. Since the proletariat must first of all acquire political supremacy, must rise to be the leading class of the nation, must constitute itself *the* nation, it is, so far, itself national, though not in the bourgeois sense of the word.” Marx, Karl, “The Communist Manifesto” or “Manifesto of the Communist Party” (1948), in: Marx & Engels, *Collected Works*, vol. 6. *Marx and Engels: 1845-48* (Progress Publishers, Moscow, 1976) pp. 477-519 at 502-3

Nationalism was perceived as being a bourgeoisie ploy to present their class interests as the interests of the whole society.⁶² With the projected demise of the capitalist system, because of its creation of untenable inequalities, nationalism was predicted to disappear, altering the identity of the proletariat from part of a nation to that of the worldwide international unity of workers.⁶³ The *Communist Manifesto* was published in 1848, the very year of nationalist revolutions. In it Marx wrote:

National differences and antagonisms between peoples are daily more and more vanishing, owing to the development of the bourgeoisie, to freedom of commerce, to the world market, to uniformity in the mode of production and in condition of life corresponding thereto. The supremacy of the proletariat will cause them to vanish still faster.⁶⁴

This understanding of the national issue was not uniformly accepted by the socialist movement at the end of the 19th Century, as history was advancing in ways quite unlike those which Marx had predicted.⁶⁵ In 1897 the Austrian Social Democratic Party began debating the national problem within the framework of preserving the political unity of the Empire.⁶⁶ Two proposals were made to attempt to resolve the national problem: the first, to divide the Empire into provinces along national lines with full freedom in cultural and linguistic affairs (*territorial national-cultural autonomy*); the second, to allow the various cultural groups cultural and linguistic autonomy throughout the Empire, thus dividing the Empire not into territories but into nations (*extraterritorial national-cultural autonomy*).⁶⁷ The main theoreticians of the latter proposal, Karl Renner and Otto Bauer, even suggested that the

⁶² *Ibid.*, pp. 477-519

⁶³ Carr, *supra* note 56, pp. 414-22, 426-28; Pipes, Richard, *The Formation of the Soviet Union* (Harvard University Press, London, 1997) p. 22. The main 20th Century proponent of this view was Rosa Luxemburg, thus 'Luxemburgism' was used synonymously with general hostility towards national movements. Smith, *supra* note 60, pp. 13-14. She also denied any right of self-determination, viewing it as a distraction from the solution provided for by socialist revolution. However, she felt strongly about the need to grant groups autonomy, and also supported federalism – contrary to the Bolsheviks' centralism. See Luxemburg, R., "The National Question and Autonomy" (1908-1909) in: Davis, H. (ed.), *The National Question: Selected Writings by Rosa Luxemburg* (Monthly Review Press, N.Y., 1976) pp. 101-287

⁶⁴ Marx, *supra* note 61, at 503

⁶⁵ Richard Pipes has noted that nationalism was developing in Western Europe side by side with socialism, the living standards of the workers of Western states were rising, so national propaganda was not rejected, and the reach of socialism into the East revealed an acute minority problem that socialism had no tools to deal practically with which would be accepted by the populations. Pipes, *supra* note 63, p. 23

⁶⁶ This recognised that separation was not an alternative when a group was dispersed throughout a territory. The 1897 Party Congress decided to divide the Party into six national-territorial parties. Smith, *supra* note 60, p. 10

⁶⁷ The proposals were made at the Brünn Congress of the Austrian Social Democrats, September 24-29, 1899. The Congress adopted a resolution favouring national autonomy within the Austrian state. Carr, *supra* note 56, pp. 423-4; Pipes, *supra* note 63, p. 24

influence of socialism would lead to greater nationalism among the “lower classes”.⁶⁸ The appropriate strategy would thus be – by granting extra-territorial autonomy – to accept what was useful in nationalism, which was culture and language, and neutralise only its harmful political aspects. Their fundamental assumptions were that nations were the natural and valuable formations of human society, and in fact the carriers of the new order.⁶⁹

The first party in Russia to adopt the strategy of national-cultural autonomy was the Bund, the Jewish socialist party, at their Fourth Congress in 1901, and from them it spread to other national groups within the Russian Empire.⁷⁰ The Russian Social Democratic Labour Party (RSDLP)⁷¹ aimed at the centralisation of power, which formed its understanding of minority strivings as anti-progressive. Likewise, the original Russian Marxist group, Liberation of Labour, did not mention in their 1880 programme the national question at all, but merely included a demand for the equality of all citizens – the cosmopolitan response to identity. Similarly, the manifesto of the First Congress of the RSDLP did not address the national question and did not include even an equality clause.⁷² However, under pressure from the Bund, the programme adopted at the Second Congress of the RSDLP (July 17-August 10, 1903) demanded both equal treatment of all citizens as well as “[n]ational self-determination for all nations [*natsii*] forming part of the state”.⁷³ The two main suggestions of ways to

⁶⁸ “The rule of the aristocracy or the upper middle class created an illusion of growing cultural internationalization of Europe and the rest of the world, because those ruling circles did possess something resembling an international civilization [...] But this was not true of the lower classes of the population [...] Those groups were deeply rooted in local traditions and preserved the national customs which the upper classes had already lost. [...] With the spread of Social Democracy, as those lower classes should obtain control over the instruments of political power, those differences, previously submerged, would come to the surface. [...] Bauer believed that subjection of individuals or peoples of different mentalities or psychological inclinations to a common experience tended to accentuate their initial differences. He based this belief on the assumption that an identical experience would separate rather than unite people with dissimilar perceptive systems.” Pipes, *supra* note 63, pp. 25-6

⁶⁹ *Ibid.*, pp. 26, 38. See Bauer, Otto, *Die Nationalitätsfrage und die Sozialdemokratie*, in: *Marx-Studien, II* (Vienna, 1907)

⁷⁰ Smith, *supra* note 60, p. 11; Pipes, *supra* note 63, p. 28; Carr, *supra* note 56, pp. 146, 424. Anti-semitism was on the rise and Jewish intellectuals argued that the Jewish and Russian workers had different interests, for which reason Jewish workers needed separate representation. The General Jewish Workers' Union of Lithuania, Poland and Russia (the Bund), founded in 1897, had been an autonomous section of the RSDLP from 1898 and was the most powerful labour organisation in Russia, but wanted to become the sole representative of Jewish workers in Russia. The question of a united party or one based upon national units was discussed at the 1903 Second Congress. The latter approach was strongly repudiated, whereby the Bund left the RSDLP. Woods, Alan, *Bolshevism – The Road to Revolution* (Wellred Publ., 1999) at: <http://www.marxist.com/bolshevism/>, Part 1 (accessed 15/02/2002); Carrère d'Encausse, Hélène, *The Great Challenge: Nationalities and the Bolshevik State 1917-1930* (Holmes & Meier, N.Y., 1992) p. 28

⁷¹ The party was formed March 1, 1898, and split into the Bolsheviks and Mensheviks after their 1903 Second Congress.

⁷² Pipes, *supra* note 63, p. 32; Carrère d'Encausse, *supra* note 70, p. 27

⁷³ Point 9 of the Programme of the RSDLP, August 1, 1903, in: McNeal, R. (ed.), *Resolutions and Decisions of the Communist Party of the Soviet Union*, vol. 1: *The Russian Social Democratic Labour Party, 1898-October 1917*, R. Elwood (ed.). (University of Toronto Press, Toronto, 1974) pp. 42-5; Carrère d'Encausse, *supra* note 70, pp. 27-9

implement the principle – federalism and cultural autonomy – were nevertheless rejected by Bolsheviks and Mensheviks alike. Other parties supported the idea. At the first Congress of the Socialist Revolutionary Party in 1905 the Party adopted a programmatic statement that *inter alia* demanded “increased acceptance of federal principles in relations between various nationalities; [and] granting them unconditional right to self-determination”.⁷⁴ The Bund also began to gain allies among socialists from other nations, *inter alia* Caucasia and the Ukraine.⁷⁵

Lenin came to develop his own strategy on the function of nationalism in the development of socialism – as an aid to socialist advancement, both nationally and internationally.⁷⁶ Lenin had written several articles dealing with nations and self-determination following Joseph Stalin’s attempt in the 1913 article “Marxism and the National Question”.⁷⁷ While the

⁷⁴ V.V. Vodovozov (ed.), *Sbornik programm partii v Rossii*, 1st ed. (St. Petersburg, 1905) pp. 20-1; translation found at: <http://www.dur.ac.uk/~dml0www/srprog.html> (accessed 15/02/2002). However, a vote on the issue conducted at a national-socialist conference in 1907 found the Russian Socialist Revolutionary Party delegates abstaining from participation as they found extraterritorial national-cultural autonomy incompatible with their party’s national programme; Pipes, *supra* note 63, p. 31. The agrarian party was founded in 1902.

⁷⁵ Carrère d’Encausse, *supra* note 70, p. 35. d’Encausse also explained that support was growing among other national groups until 1912, which caused Lenin to task Stalin with responding by his text “Marxism and the National Question” (1913) in: Stalin, Joseph, *Marxism and the National and Colonial Question* (International Publishers, N.Y., 1936) pp. 3-61

⁷⁶ “[T]he Social-Democratic Party considers it to be its positive and principal task to further the self-determination of the proletariat in each nationality rather than that of peoples or nations. We must always and unreservedly work for the *very closest* unity of the proletariat of all nationalities, and it is only in isolated and exceptional cases that we can advance and actively support demands conducive to the establishment of a new class state or to the substitution of a looser federal unity, etc., for the complete political unity of a state.” Lenin, V. I., “The National Question in Our Programme” (1903), in: Lenin, V. I., *Collected Works, vol. VI* (Progress Publishers, Moscow, 1964) pp. 454-463

⁷⁷ “The national programme of working-class democracy is: absolutely no privileges for any one nation or any one language; the solution of the problem of the political self-determination of nations, that is, their separation as states by completely free, democratic methods; the promulgation of a law for the whole state by virtue of which any measure (rural, urban or communal, etc., etc.) introducing any privilege of any kind for one of the nations and militating against the equality of nations or the rights of a national minority, shall be declared illegal and ineffective, and any citizen of the state shall have the right to demand that such a measure be annulled as unconstitutional, and that those who attempt to put it into effect be punished.” Lenin, V. I., “Critical Remarks on the National Question” (1913), in: Lenin, V. I., *Collected Works, vol. XX* (Progress Publishers, Moscow, 1964) pp. 17-51 at p. 22. In a 1916 article he expounds on self-determination: “The right of nations to self-determination implies exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation. Specifically, this demand for political democracy implies complete freedom to agitate for secession and for a referendum on secession by the seceding nation. This demand, therefore, is not the equivalent of a demand for separation, fragmentation and the formation of small states. It implies only a consistent expression of struggle against all national oppression. The closer a democratic state system is to complete freedom to secede the less frequent and less ardent will the desire for separation be in practice, because big states afford indisputable advantages, both from the standpoint of economic progress and from that of the interests of the masses and, furthermore, these advantages increase with the growth of capitalism. [...] The aim of socialism is not only to end the division of mankind into tiny states and the isolation of nations in any form, it is not only to bring the nations closer together but to integrate them. [...] In the same way as mankind can arrive at the abolition of classes only through a transition period of the dictatorship of the oppressed class, it can arrive at the inevitable integration of nations only through a transition period of the complete emancipation of all oppressed nations, i.e., their freedom to secede.” Lenin, V. I., *supra* note 5, at 146-7

Mensheviks shifted towards a programme of national-cultural autonomy,⁷⁸ Lenin attempted to balance between the dominant Bolshevik and minority positions and solve the national question by interpreting the concept of national self-determination in the light of the socialist struggle for the freedom of subjugated peoples all over the world – the one right a nation had was to secede and create an independent state.⁷⁹ The purpose of the self-determination *lingua* in the situation facing the Bolsheviks following the February and October revolutions was to unite the former Russian territories, which had declared their independence, with the RSFSR.⁸⁰ It was a win-win situation, in that the threat of divisive national-cultural autonomy was replaced with a concept that would unite the territories even closer and which maintained centralisation.

[T]ake, for example, the way Lenin presents the question of the right of nations to self-determination, including secession. Lenin sometimes expressed the thesis of national self-determination in the form of a simple formula: “disunion for the purpose of union.” Just think—disunion for the purpose of union! It even smacks of the paradoxical. And yet this “self-contradictory” formula reflects the living truth of Marxian dialectics which enables the Bolsheviks to capture the most impregnable fortresses in the sphere of the national question.⁸¹

In this way the offer of secession would show the territories that there were only benefits involved in rejoining Russia.⁸² The second step in the theory on secession was that if a nation chose to remain it could not demand special treatment. Furthermore, the right to secede was not absolute. If it ran contrary to the interests of the proletariat, it could not be condoned. It seems that one of the main reasons why Lenin, despite massive Bolshevik criticism, doggedly courted the national movements was his focus on socialism's advancement in the Asian and

⁷⁸ The Mensheviks came to adopt national-cultural autonomy in their 1917 platform. Pipes, *supra* note 63, p. 34
⁷⁹ “[S]elf-determination of nations in the Marxists’ Programme *cannot*, from a historico-economic point of view, have any other meaning than political self-determination, state independence, and the formation of a national state.” Lenin, *supra* note 58, pp. 395-454 at 400. However, Lenin was not the first socialist to connect secession with self-determination. Plekhanov, the leader of Liberation of Labour, had previously stated at the Stockholm Congress in 1906: “The right to self-determination of nations also implies the right to secession, that is, the creation of a separate state if the majority of the people favor such a solution.” Self-determination was an alternative to federalism. Carrère d’Encausse, *supra* note 70, pp. 30-1

⁸⁰ Connor, *supra* note 60, pp. 45-51, 60-1. For an interesting exposé over discussions on the meaning of self-determination in Europe and Russia between 1912 up to the Russian revolution, see Carrère d’Encausse, *supra* note 70, chapters 3-4

⁸¹ Stalin on contradictions as a reflection of Marxian dialectics: “Deviations on the National Question” (1930) in: Stalin, Joseph, *Marxism and the National and Colonial Question* (International Publishers, N.Y., 1936) pp. 256-66

⁸² Lenin wrote: “To accuse those who support freedom of self-determination, i. e., freedom to secede, of encouraging separatism, is as foolish and hypocritical as accusing those who advocate freedom of divorce of encouraging the destruction of family ties. [...] The masses know perfectly well the value of geographical and economic ties and the advantages of a big market and a big state. They will, therefore, resort to secession only when national oppression and national friction make joint life absolutely intolerable and hinder any and all economic intercourse.” Lenin, *supra* note 58, at 422-3

African colonies and his view that imperialism was national oppression.⁸³ Russia had to set an example for the rest of the world.⁸⁴ However, it did this only in theory.

In hindsight, Lenin's strategic instinct proved to be correct.⁸⁵ Secession and independence as a reaction against imperialism was an appealing battle cry. However, his was not a strategy which could resolve the national issues facing Russia itself. Separation was not a realistic option for its many minorities or a solution to their problems, and Lenin would not consider autonomy or federalism as alternatives.

As to the question who is the carrier of the nation's will to separation, the Russian Communist Party stands on the historico-class point of view, taking into consideration the level of historical development on which a given nation stands: on the road from the Middle Ages to bourgeois democracy, or from bourgeois democracy to Soviet or proletarian democracy, and so forth.⁸⁶

This pseudo-Hegelian formula explained the Bolshevik view neatly: in areas not under Communist authority and power the national self-determination slogan could be used to attract sympathy, while nationalist opposition occurring in areas under Communist authority could be quelled.⁸⁷ The logic behind it was that as long as the bourgeoisie revolution was ongoing the national bourgeoisie was representative of the nation's will to separate, but when this revolution was completed only the proletariat could decide on whether separation was to take place. The practical effect was that a referendum on remaining or leaving could legitimately be excluded if the level of development allowed a Congress of Soviets to decide on a nation's fate.⁸⁸

Lenin's use of the principle of national self-determination could accordingly be interpreted in two different ways: either as a method of minimising the mistrust of workers and oppressed nations and consequently ending national divisions, or as a method of propaganda for international political purposes having little to do with any right residing in a people after a

⁸³ Connor also noted that in the wake of the first world war Lenin concluded that the lack of workers' class-consciousness in Europe was due to their sharing the benefits of the colonies' exploitation. In order to speed revolution in Europe the colonies should therefore be detached from the European exploiters. Connor, *supra* note 60, pp. 31-2

⁸⁴ On Comintern's efforts regarding the national question, see *ibid.*, pp. 55-61

⁸⁵ Many national movements' support for the Revolution was tied to the promise of self-determination. See Hirsch, Francine, *Empire of Nations: Colonial Technologies and the Making of the Soviet Union, 1917-39* (Ph.D. thesis, Princeton University, 1998) p. 34. "In the twentieth century, no left-wing movement succeeded in Asia or Africa - in Indo-China, Egypt, Algeria, Syria or Iraq - unless it went arm in arm with nationalist feeling." Berlin, Isaiah, "Return of the Volksgeist: The Ingathering Storm of Nationalism", 8 *New Perspectives Quarterly*, 4 (1991), pp. 4-10

⁸⁶ Fourth Article of the national programme of the Eighth Party Congress, March 1919, in: Pipes, *supra* note 63, p. 110

⁸⁷ For Hegel's influence of Marx and Marxism, see Taylor, *supra* note 39

⁸⁸ Carr, *supra* note 56, p. 276-7; Smith, *supra* note 60, pp. 21-2

socialist revolution had occurred. Perhaps both aspects are true. What is clear is that self-determination was not understood as mapping out the organisation of the state, for example by a federal structure. Stalin, who had begun to deal with the question in 1912 when requested by Lenin to write the article *Marxism and the National Question*, continued Lenin's international strategy.⁸⁹ Stalin tied the solution of the national question to a deepening of the revolution, holding that only this would end the national exploitation which fuelled nationalistic tendencies. This legitimised dealing with the nations in a suppressive and totalitarian manner in order to further the revolution.⁹⁰

A further socialist development of the concept of self-determination occurred in 1968. In a *Pravda* article the military invasion and occupation of Czechoslovakia was defended under the theory of 'socialist self-determination', which became known as 'the Brezhnev Doctrine', by which it was claimed that it was the duty of other Marxist-Leninist states to intervene in another Marxist-Leninist state to prevent its leaving the fold.⁹¹

iv: First world war

Austria-Hungary's stubborn determination to expand its rule, and its interests, in gaining access to the East led Hungary's foreign minister in 1878 to convince the Great Powers of the Empire's need to administer Bosnia, following reports of atrocities after the 1875 peasant uprising against Ottoman rule. In 1908 this administration was unilaterally transformed into outright annexation, greatly angering the majority Serb population of Bosnia, many of whom wished for all of Serbdom to be united into one state. The Serbian Social Democratic Party, internationalist in other respects, attacked Austrian "colonialism" and appealed to the

⁸⁹ Stalin, *supra* note 75, pp. 3-61

⁹⁰ Shoup, Paul, *Communism and the Yugoslav National Question* (Columbia University Press, N.Y., 1968) pp. 141-2

⁹¹ "[T]he implementation of such 'self-determination', in other words, Czechoslovakia's detachment from the socialist community, would have come into conflict with its own vital interests and would have been detrimental to the other socialist states. Such 'self-determination,'[...] in effect encroaches upon the vital interests of the peoples of these countries and conflicts, as the very root of it, with *the right of these people to socialist self-determination*. [...] Formal observance of the freedom of self-determination of a nation in the concrete situation that arose in Czechoslovakia would mean freedom of 'self-determination' not of the popular masses, the working people, but of their enemies." Kovalev, Sergei, "Sovereignty and International Duties of Socialist Countries", *Pravda*, September 26, 1968, in: Connor, *supra* note 60, pp. 191-3. Interestingly enough, in contrast, with regard to Hungary's situation in the mid-fifties UNGA resolutions were adopted (UNGA Res. 1004, November 4, 1956; Res. 1005 November 9, 1956; Res. 1131, December 12, 1956; Res. 1133, September 14, 1957; Res. 1312, December 12, 1958) which referred to the right of the Hungarian people to a government which could fulfil their national aspirations and to the UN supervising free elections so that the Hungarian people could choose a

principle of self-determination with respect to Bosnia, expounding the principle, as Lenin had, in the call against national oppression.⁹²

After the 1914 assassination of Archduke Franz Ferdinand, the heir to the Austrian throne, Austria attacked Serbia for alleged complicity in the murder. The domino effect caused by the balance of power arrangement led all of Europe into war.⁹³ What should also be noted in this context is the first Balkan war of 1912, where several states united in the aim of finally driving the Ottomans out of Europe.⁹⁴ After their success borders were changed and populations transferred, and the territory taken was divided among the victors.⁹⁵

With the last sighs of German resistance drawing to an end, President Wilson made clear his wish not only to end the war, but also to throw the old order out and its secret diplomacy.

What is at stake now is the peace of the world. What we are striving for is a new international order based upon broad and universal principles of right and justice, -- no mere peace of shreds or patches. [...] Whatever affects the peace affects mankind, and nothing settled by military force, if settled wrong, is settled at all. It will presently have to be reopened. [...] This war had its roots in the disregard of the rights of small nations and of nationalities which lacked the union and the force to make good their claim to determine their own allegiances and their own form of political life.⁹⁶

This professor from Princeton, an academic expert on law and political economy, had a clear vision for the new world. One of the primary aims of this world would recognise the necessity of respecting the will of the people.⁹⁷ The president saw a clear connection between democracy and long-term peace, viewing self-government and self-determination in the same

government. Though not directly referring to self-determination the principle is identifiable. Goodrich, Hambro & Simons, *supra* note 8, p. 33

⁹² Shoup, *supra* note 90, p. 17

⁹³ Austria's ally, Germany, attacked France for refusing to state that it would not support its ally, Russia, who was expected to come to Serbia's aid and from then on other states became quickly involved.

⁹⁴ The Ottomans only retained the area around Constantinople.

⁹⁵ The second Balkan war of 1913 was fought between the former allies of 1912, Bulgaria against Greece and Serbia, over the division of Macedonia. In the following treaty between Turkey and Bulgaria a Protocol on voluntary population exchange was included. Pentzopoulos records the text of Section C, § 1: "the two Governments agree to facilitate the optional reciprocal exchange of the Bulgarian and Moslem populations and of their properties in a zone of 15 kilometers at the maximum along their entire common frontier". He notes that the protocol affirmed a *fait accompli*, as the large part of the groups had already fled. The agreement was voluntary and confined to a limited group and territory. In 1919 Bulgaria and Greece agreed on a reciprocal and voluntary emigration of racial minorities, similar to the 1913 Bulgarian-Turkish agreement. Pentzopoulos, Dimitri, *The Balkan Exchange of Minorities and Its Impact upon Greece* (Mouton & Co., The Hague, 1962) pp. 54-5, 57, 60-1

⁹⁶ President Wilson's Address to Congress, February 11, 1918, at:

<http://www.lib.byu.edu/~rdh/wwi/1918/wilpeace.html> (accessed 22/01/2001)

⁹⁷ Considering the colonies Wilson required "[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned *must* have equal weight with the equitable claims of the government whose title is to be determined." Wilson quoted in Goodrich, Hambro & Simons, *supra* note 8, p. 29

light.⁹⁸ During the Paris Peace Conference, however, it became clear that the principles proclaimed, and which Germany had relied upon when finally surrendering, would not be fully implemented, and in certain cases not even considered.⁹⁹ Interesting to note in this context are the expectations that Wilson had on the future League of Nations on post-Paris border changes.¹⁰⁰ He explained that the organisation implied “later... alteration of boundaries if it could be shown that injustice had been done or that conditions had changed” after the Paris Peace treaties.¹⁰¹ He was not alone in having such expectations on the League of Nations. Gustav Stresemann, the Weimar Foreign Minister who succeeded in applying for German membership to the organisation, wrote in arguing the case for membership that this would, *inter alia*, facilitate for Germany in “the correction of the eastern border: the rewinning of Danzig, of the Polish corridor, and a correction of the border in Upper Silesia”.¹⁰² The League of Nations Covenant also included this possibility in Article 19: “The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.”¹⁰³

On his return to the United States, President Wilson made the following declaration:

⁹⁸ Pomerance, Michla, “The United States and Self-Determination: Perspectives on the Wilsonian Conception”, 70 *AJIL* 1 (1976) pp. 1-27 at 19-20. H. Notter claims that Wilson clearly explained his view on self-determination in 1907, and that he already in 1897 and 1901 stated that it was a principle confirmed in US history, connecting it to self-government, independence and development. Notter, Harley, *The Origins of the Foreign Policy of Woodrow Wilson* (John Hopkins Press, Baltimore, 1937) pp. 69, 117-18, 606, 647-52. See, however, Heater, *supra* note 38, chapters 2-3

⁹⁹ Finch, Geo, “The Peace Negotiations with Germany”, 13 *AJIL* 3 (1919) pp. 536-57 at 537, 540. Territories in which the majority were German but, nevertheless, were included in new states: Sudetenland, Danzig, Upper Silesia, certain Belgian towns on the frontier and the Saar, cutting off around six million Germans from Germany and leaving some 13 million Germans as minorities within other European states. Efforts to unite Austria and Germany into one state were refused by the ‘Big Four’. Heater, *supra* note 38, pp. 121, 149-52. The very first point of the “25 Theses”, proclaimed by Adolf Hitler on February 24, 1920, at a German Labour Party meeting (later known as the Party Programme of the National Socialist German Workers’ Party) stated, “We demand the uniting of all Germans within one Greater Germany, on the basis of the right to self-determination of nations.” The second point held that, “We demand equal rights for the German people (*Volk*) with respect to other nations, and the annulment of the peace treaty of Versailles and St. Germain.” Text on page: <http://www.us-israel.org/jsource/Holocaust/naziprogram.html> (accessed 20/11/2002). The application of the principle to other peoples was, however, clearly not supported, as the theory of racial superiority pervaded the Nazi action plan. At the 1919 Paris Peace Conference Nicolson was confronted with his own hypocrisy regarding self-determination by a fellow British colleague: “Would you apply self-determination to India, Egypt, Malta and Gibraltar? If you are not prepared to go as far as this, then you have not right to claim that you are logical. If you are prepared to go as far as this, then you had better return at once to London.” Nicolson, *supra* note 37, p. 246

¹⁰⁰ *Infra* chapter 3.2.2

¹⁰¹ Heater, *supra* note 38, pp. 53-4. Though naïve, Wilson was not alone in great expectations on the League of Nations; Lloyd George stated in the House of Commons that the League would “remedy [...] repair [...], and [...] redress” deficiencies of the Paris Peace. Cited in Pomerance, *supra* note 98, at 9

¹⁰² Heater, *supra* note 38, p. 128. See further Cobban, *supra* note 40, pp. 91-92

¹⁰³ Text at: <http://www.yale.edu/lawweb/avalon/leagcov.htm> (accessed 20/11/2002)

It was not within the privilege of the conference of peace to act upon the right of self-determination of any peoples except those which had been included in the territories of the defeated empires – that is to say, it was not then within their power. But the moment the Covenant of the League of Nations is adopted, it becomes their right. If the desire for self-determination of any people in the world is likely to affect the peace of the world or the good understanding between nations, [...] It becomes the function of the League to bring the whole pressure of the combined world to bear upon the matter.¹⁰⁴

The Paris Peace Conference of 1919-20 brought about a large number of boundary changes in Europe. A few new states came into existence, some states were enlarged, and others were reduced. Some of the primary challenges were to deal with minorities within selected states and to weaken ‘aggressive’ states. Thus territory changed hands, millions of people were transferred, and for ‘remaining’ minorities a system of minority protection was set up under the League of Nations to guarantee their interests.¹⁰⁵ One of the great tragedies following the Paris conference was that millions of people were transferred in its wake, as a third ‘long-term’ option alongside those of territorial transfers and minority protection.¹⁰⁶

At the same time, in the East the Bolsheviks were arguing and fighting for the reunification of former Russian territories in a new federation, leading to the 1924 construction of the USSR. In the intense inter-war period the Weimar project failed, and Adolf Hitler rose to power with the aim, among other things, of rectifying post-war territorial ‘wrongs’ inflicted

¹⁰⁴ Address September 17, 1919, in San Francisco, in: Heater, *supra* note 38, p. 99

¹⁰⁵ Kunz, Joseph, “The Future of International Law for the Protection of National Minorities” 39 *AJIL* 1 (1945) 89-95 at 90-1. On the LoN’s minority system, see Åkermark Spiliopoulou, Athanasia, *Justifications of Minority Protection in International Law* (Doctoral thesis, Uppsala, 1996) pp. 99-116. Koskenniemi comments that the tension between territorial integrity and self-determination, in e.g. the Helsinki Final Act, leads the application of the principles to consist of minority protection. Koskenniemi, *supra* note 36, at 256. It seems, however, that in the wake of the Great War, the concepts of territorial integrity, self-determination and minority protection existed alongside each other.

¹⁰⁶ Stephen Ladas wrote that the Peace Conference treaties included clauses in relation to all ceded territories which permitted the population to choose national allegiance. Under the clause they could remain or leave within a certain period, retaining their property, movable and immovable, wherever they went. “In theory this was thought to be liberal enough. In fact, however, national minorities inhabiting ceded territory were compelled to avail themselves of the option clauses and emigrate.” Ladas, Stephen, *The Exchange of Minorities: Bulgaria, Greece and Turkey* (Macmillan, N.Y., 1932) p. 2. The most notorious treaty on population exchanges was compulsory and was concluded between Greece and Turkey in 1923 at the Lausanne Peace Conference (the participants consisting of the Allied Powers and Turkey) as a ‘solution’ to the problem of Balkan minorities. *Ibid.*, pp. 3, 17-18. Peter Stirk suggests that Carl Schmitt’s interwar writing *inter alia* dealt with “how to generate sufficient political homogeneity to be able to dispense with the cruder forms of occupation and repression.” Stirk, Peter, “Carl Schmitt’s *Völkerrechtliche Grossraumordnung*”, 20 *History of Political Thought* 2 (1999) 357- 74 at 373. See Schmitt, Carl, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für Raumpfremde Mächte* (Deutcher Rechtsverlag, Berlin, 1939). After the Balkan population exchanges of 1913 (between Turkey and Bulgaria), 1919 (between Greece and Bulgaria) and 1923 large population transfers could at the time be claimed as an alternative to occupation. See, however, harsh criticism of the 1923 agreement at the time in: Pentzopoulos, *supra* note 95, pp. 52-3, 61-7. On post-second world war forced migration, see Ther, P. & Siljak, A. (eds.), *Redrawing Nations: Ethnic Cleansing in East-Central Europe, 1944-1948* (Rowman & Littlefield Publ., Inc., Lanham, Maryland, 2001). Kunz notes the German bilateral 1939-42 treaties on population transfers (of Germans into the Reich; only in the case of the USSR there was to be an exchange of populations) as well as agreements on the post-war compulsory transfer of Germans. Kunz, *supra* note 105, at 93-4

on the German people.¹⁰⁷ In the name of self-determination Czechoslovakia had to give up the lands inhabited by the Sudeten Germans in 1938, and the second great war was about to commence. The *lingua* of self-determination would soon enter a new phase.

v: Post-second world war, the UN Charter and Decolonisation

The ‘modern’ application of self-determination enjoyed the limelight in the decades of decolonisation following the second world war. The great wave of new post-colonial states that came in on the wind of self-determination was nevertheless not immediate. The majority of the original parties to the UN Charter, who agreed upon the inclusion of the principle of self-determination in Article 1 of the UN Charter, did not all have decolonisation in mind at the time.¹⁰⁸ The first Article of the Charter describes the Purposes of the organisation:

1. *To maintain international peace and security [...];*
2. *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*
3. *To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction [...]; and*
4. *To be a centre for harmonizing the actions of nations in the attainment of these common ends.*

Self-determination was also included in Article 55 of the same Charter.¹⁰⁹ The UN Charter additionally contained chapters XI-XIII, which regulated Non-Self-Governing (N-S-G) and Trust territories; independence was clearly not projected as attainable in the immediate future for all the territories affected. The connection made between self-determination and decolonisation is, nevertheless, so strongly emphasised that this point often seems forgotten. The legal connection between self-determination and decolonisation was only accepted by the majority of UN member states more than a decade after the adoption of the UN Charter, and

¹⁰⁷ Article 1 of the National Socialist Party programme described their aim as “the unification of all Germans to form a Great Germany on the basis of the right of self-determination enjoyed by nations”. Cobban, *supra* note 40, p. 93

¹⁰⁸ The Bolshevik position had long connected self-determination with non-exploitation and formed a basis for condemning colonialism. Thus the USSR’s position on the connection between self-determination and decolonisation is clear.

¹⁰⁹ Article 55: *With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living [...]; b) solutions of international economic, social, health, and related problems; [...] and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction [...].*

thus in that decade the interpretation of the second UN Charter Purposes developed rapidly. Much has already been written on the transition from mandates under the League of Nations to Trust and N-S-G territories.¹¹⁰ Suffice it here to focus upon the famous United Nations General Assembly Resolution 1514 adopted in 1960 which required “that immediate steps shall be taken” for the independence of all Trust or N-S-G territories. This was based on the proposition that

*All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*¹¹¹

The practice of self-determination, clearly expressed in 1960, was very different from Paris 1919-20, where no colonial application was accepted and European boundaries were redrawn to take *inter alia* ethnicity into account. In UNGA Resolution 1514 self-determination was instead formulated as a right of colonial “peoples” to immediate independence. The application was aimed to be very specific; the following day UNGA Resolution 1541 was adopted, which effectively excluded indigenous populations or peoples from the rights laid down in Resolution 1514 by what has been described as the ‘salt-water’ theory.¹¹² Resolution 1541 described the three available alternatives by which self-determination could be exercised by those living within relevant territories: independence, free association, or integration with an independent state.¹¹³ Self-determination accordingly shifted away from forming the basis for aligning territory with ethnicity by moving either the minority or the boundary, to a position of ending long-distance European administration of European-delimited territorial units containing different ethnic groups. What was similar to both contexts was that territorial changes were based on the wishes and consent of the populations affected. Consideration of their interests was the underlying concern motivating the application of the self-determination.

¹¹⁰ For a compact version, see Raič, *supra* note 36, pp. 193-202. See further: Cristescu, Aureliu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (United Nations, N.Y, 1981); Sureda, *supra* note 6

¹¹¹ “Declaration on the Granting of Independence to Colonial Countries and Peoples”, UNGA Res. 1514 (XV), December 14, 1960, paragraph 2,5

¹¹² “Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter”, UNGA Res. 1541 (XV), December 15, 1960. The Resolution stated that the territories designated by the Charter authors as N-S-G territories were those “*then known to be of the colonial type.*” The obligation contained in Res. 1541 was only relevant “*in respect of a territory which is [inter alia] geographically separate*” from the administering state. Res. 1541, Annex, principles I, IV. Sureda, *supra* note 6, p. 105

¹¹³ Res. 1541, Annex, principle VI

In the 1960 Declaration self-determination was claimed to be a right of all peoples, and the duty to grant the right belonged to the administering state. By UNGA Resolution 1541 the right was restricted to the whole population within designated territorial units and to designated choices affecting the entire unit. A few years later, though it had been excluded in the 1948 Universal Declaration of Human Rights, the right of self-determination was included in Common Article 1 of the 1966 UN Human Rights Covenants.¹¹⁴ As a right laid down in the Human Rights Covenants, it relates primarily to the relation between the population of a state (as a group) and its government, or, in certain cases, between specific groups and the state government, but it also contains extraterritorial dimensions and obligations. It is not restricted to the colonial context, but is often connected to democratic functions. The treaty's supervising committee has opened up the possibility that a state can contain several 'peoples' for the purposes of Article 1; indigenous groups have, for example, been treated as 'peoples' with the right of self-determination as contained in Article 1.¹¹⁵

While there have been suggestions that the colonial application has emptied the principle of self-determination of any other content or reach, the principle, as contained in Article 1 of the UN Charter has not, however, been exhausted by the crystallisation and codification of a right to self-determination, or by specific rules emanating from the principle. The first Article of the UN Charter provides the Purposes of the Organisation, according to and against which it must measure its actions (Article 24 etc.). It provides the rationale and legitimacy both for the Organisation's existence and for its actions. It provides the framework within which the Security Council may act. It also supplies the 'object and purpose' by which UN Charter provisions are to be interpreted.¹¹⁶ These functions continue, apart from any crystallisation of

¹¹⁴ Article 1: (1) *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.* (2) *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.* (3) *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provision of the Charter of the United Nations.* International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, Annex, UNGA Res. 2200A (XXI), December 16, 1966. For background, see Bossuyt, Marc, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Dordrecht, 1987) pp. 19-48; Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl am Rhein, 1993) pp. 6-13; McGoldrick, Dominic, *The Human Rights Committee* (Clarendon Press, Oxford, 1994) chapters 1, 5

¹¹⁵ See Human Rights Committee (HRC) General Comment No. 12 (1984), reproduced in UN Doc. HRI/GEN/1/Rev. 5, pp. 121-2; Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (Comm. No. 167/1984) and Apirana Mahuika et al. v. New Zealand (Comm. No. 547/1993); Scheinin, Martin, "The Right to Self-Determination under the Covenant on Civil and Political Rights" in: Aikio, P. & Scheinin, M. (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights [IHR], Åbo Akademi University, Åbo, 2003) pp. 179-99

¹¹⁶ As codified by Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT).

rights or specific state duties. The historical applications are but examples of contexts in which the principle has been recognised to require specific state responses. James Anaya distinguishes between ‘substantive’ v. ‘remedial’ self-determination and writes: “In all cases the universe of values that constitute the substance of the norm are the same, but the prescriptions to implement the norm or remedy deviant conditions are variable.”¹¹⁷

The inclusion of self-determination as a principle in the Charter has several implications. Firstly, the principle is of primary importance and forms a backdrop for all the activities undertaken by the UN. The principle is to adapt in order to respond to future challenges. Secondly, its understanding and application will develop primarily by interpretation and not by state practice. Thirdly, it is relevant both for the Organisation, as well as for individual states in their dealings with one another.

2.2 The principle examined: values and objects

2.2.1 Respect for the principle of self-determination and the maintenance of peace

2.2.1.1 Values identified when applying self-determination

In its political and legal form the principle, and the right of self-determination, have both been used by states or the international community to serve various purposes. It is suggested that self-determination is a value, a goal or a purpose, that has been applied differently in various contexts and its content should not be understood as being limited to earlier or existing applications. The essence of the principle is neither exhausted by, nor the equivalent of, its application. Different facets of self-determination may nevertheless be identified and understood by studying earlier applications and modes of implementing both the principle and the right. Past practices will exemplify the application of self-determination, but do not provide a satisfactory basis for arguing that the principle, by its application, has been exhausted.

¹¹⁷ Anaya, S. James, “Self-Determination as a Collective Human Right under Contemporary International Law”, in: Aikio, P. & Scheinin, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (IHR, Åbo

i: Ending national oppression

After the first world war self-determination was applied selectively in the changing of borders, excluding and including ethnic groups within both new and old states for the purpose of preventing further wars. This prevention can be understood in terms of the creation of nation-states (Czechoslovakia and Yugoslavia were apparent exceptions to this) in order to end internal tensions. Furthermore, nation-states were thought to harbour little territorial ambitions towards other states. In analysing this it should be noted that the issue of territorial change always involves at least two interested parties and is a zero-sum game: the gain of one is the loss of the other. The new states that were constructed were generally not only given territory inhabited by their 'own' nation, but territory including other groups. These were not always in the minority in the 'attached' territory. The territorial settlements were, of course, not only based upon the principle of self-determination, but economic factors and the resulting geopolitical situation were often determining points. The German nation was kept weak by *inter alia* denying both a desired union between Austria and Germany and by separating from Germany areas inhabited by Germans. Here self-determination was not only disrespected, but abandoned entirely. The inter-war delimitations were related to several goals, both to international peace and to self-determination. In cases where delimitations left certain minorities within states, minority regimes were set up. Though these regimes were not full exercises of self-determination, they were certainly related to self-determination as a form of 'substitute'. The colonial Mandate regime was also a self-determination compromise, where independence was not offered, though it was envisaged as a future possibility.¹¹⁸

Self-determination was not applied as though it were synonymous with respect for nationality or ethnicity. Edward Hallett Carr wrote in 1942 that the different meanings and implications of self-determination had to be identified and that self-determination and nationality were not equivalent. He argued that the spirit of self-determination was a freedom incompatible with the objective factor of nationality. Self-determination and nationality were only understood to be compatible because in Europe "national feeling had grown up with, and within the framework of, an existing state."¹¹⁹ He exemplified this by plebiscite results where persons of one language had chosen to live under the sovereignty of a state having another

Akademi, Åbo, 2000) pp. 3-18 at 12

¹¹⁸ Sureda, *supra* note 6, pp. 23-5; Shehadi, Kemal, *Great Powers, International Institutions, and the Creation of National States: A Comparative Study of the Management of Self-Determination Conflicts by the Concert of Europe, the League of Nations, and the United Nations* (Ph.D. thesis, University Microfilms International [UMI], Ann Arbor, 1995) p. 11

majority language.¹²⁰ His point emphasises the fact that the focus of self-determination does not fall automatically on nationality, but on the wishes of a certain group.

In a sense all government rests on the consent of the governed. No political unit will be strong or durable which cannot count on the more or less spontaneous loyalty of a considerable part of its component population. [...] There is therefore much to be said for self-determination. But there is hardly anything to be said for the principle of including people in a particular political unit merely because they speak a particular language.¹²¹

The group selected is also decisive; certain groups were considered, while the interests of other groups were clearly not. The Greek-Turkish forced population exchange of 1923 provides an example where forcible changes were made without consideration,¹²² as other interests were held to be paramount. The non-equivalence of self-determination and nationality is further exemplified by the Wilsonian interpretation of self-determination as allied with democracy. It has already been noted that references to self-determination in the American context would make little sense from a nationalist position.¹²³ In theory the ‘citizen’ perspective is denationalised and focuses on democratic participation by ‘one man-one vote’, linked to the decision-making powers and influence of the people of a multi-national state.

The inter-war discourse on and application of self-determination should therefore not be summed up as being restricted to delimitation on national lines, but as beginning to take the wishes of certain groups into account – first and foremost of national groups that had been contained within empires. Where there was insufficient state support for granting complete freedom and decision-making power to groups, compromises were made, which nevertheless illustrate the dawning realisation that complete disrespect for groups was no longer acceptable under international law, as frustrations and tensions were proving to be a long-term threat to peaceful international relations.

¹¹⁹ Carr, E. H., *Conditions of Peace*, (Macmillan & Co., Ltd., London, 1942) p. 42

¹²⁰ *Ibid.*, at pp. 45-46

¹²¹ *Ibid.*, at p. 46

¹²² P. Brown wrote in 1923 that, “The ferment of nationalism, as expressed in the alleged principle of the ‘right of self-determination’, has produced amazing results in Turkey as well as in other countries. [...] A lethargic people who believed in a theocratic state and who for centuries had maintained an indifferent, if not an indulgent, attitude towards their non-Moslem neighbors, have shaken off their apathy and are now asserting the literal claim of ‘Turkey for the Turks’. [...] A melancholy aspect of this manifestation of nationalism is the fervid conviction of the Turks that in view of the nationalistic aims of the Greeks and Armenians and the danger of European intervention on their behalf, it is no longer possible to permit such alien elements to remain within the Turkic nation. [...] Turkey and Greece have agreed, with the approval of the League of Nations, to exchange populations [...]. In such tragic ways has the principle of ‘self-determination’ affected the ancient civilizations of the Near and the Middle East.” Brown, Philip, “The Lausanne Conference”, 17 *AJIL* 2 (1923) 290-6 at 291

¹²³ Brownlie, *supra* note 41, at 90

ii: Ending racial oppression

The second great wave of self-determination implementation occurred after 1948 and the UN General Assembly adoption of the Universal Declaration of Human Rights (UDHR).¹²⁴ One of the important consequences of embracing this instrument was the internationalisation of respect for human rights – no longer did respect fall entirely within the internal affairs of a state. Another effect was due to the first Article of the UDHR which proclaims: “All human beings are born free and equal in dignity and rights”. It became increasingly difficult for European states to maintain the racially superior mindframe that had until then been a motive force behind its colonial policies.¹²⁵ South Africa’s setting up of the system of apartheid earlier that year undoubtedly caused immense exasperation for member states of the UN. Pressure increased within the organisation, much of it from socialist states, for an end to colonialism, and not only with regard to Trust Territories as had already been envisaged in the UN Charter.¹²⁶ With UNGA Resolution 1514 (1960) the distinction between territories was dismantled, and it was declared: “All peoples have the right to self-determination”.¹²⁷ Independence was the goal on the basis of racial equality. The aim was not the creation of nation states, since the colonial borders were generally retained, most often containing a plurality of different groups within each new state. Neither was the goal to minimise friction between states on the basis of differences, ethnic or other, as the changes were in rulership and government and not of territory. So there was a fundamental difference in the application of the principle after the first world war and during decolonisation. This was further underlined by the UN demands for the right of self-determination to be respected in the cases of South Africa and Southern Rhodesia, where black majorities were denied rights on the basis of race. The calls were not for independence, but for equality and internal self-determination for the majority.¹²⁸ Thus it was not the end that was fixed, such as the creation

¹²⁴ UNGA Res. 217A (III), December 10, 1948

¹²⁵ The participants at the Paris Peace Conference had rejected a Japanese proposal for inserting a racial equality clause in the text of the Covenant of the League of Nations.

¹²⁶ UN Charter chapters XII and XIII. Article 76 states: *The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: [...] (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned [...].* Cf. chapter XI concerning N-S-G Territories.

¹²⁷ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV), December 14, 1960. The first point of the Declaration stated: *The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.*

¹²⁸ In UNSC Res. 216 and 217 of November 12 and 20, 1965 the declaration of independence of the “*illegal racist minority régime*” was condemned, its continuance termed “*a threat to international peace and security*”,

of a new state, but the wrongs that self-determination revealed and which it formed a response to – oppression on the basis of race. Colonial self-determination can be understood as a universally extended exercise of racial equality, where there is a comparable connection between international peace and respect for groups by granting self-determination, similar to the inter-war European application.

iii: Post-colonial developments

After colonial independence and the inclusion of a right of self-determination within the 1966 human rights conventions, the focus shifted towards internal forms of suppression and dominance, and especially towards indigenous peoples. Because of the immediate connection between the exercise of self-determination and independence, states have been loath to recognise an ‘unconditional’ right to self-determination of indigenous peoples as groups, and the discourse has focused on the connection between indigenous peoples, land and self-determination within ‘maintained’ states. Expressions allowed have generally been restricted to autonomy and recognition of rights attached to culture and an indigenous way of life on the basis of discussions with specific indigenous groups.¹²⁹ Some indigenous advocates have not wanted to recognise this as self-determination, because the state’s duty could then be claimed to have been fulfilled without the granting of further options.¹³⁰

However this is perceived, it is on the basis of the ‘pressure’ of self-determination and the respect that it entails that states have offered or agreed to forms of autonomy and special rights. The indigenous context, and its related application of self-determination, could be understood as being more closely related to the right of self-determination than to the principle. The reason is partly that the right of self-determination covers the relation between state/government and inhabitants, and that the support for the self-determination of indigenous groups is post-1966 and based upon Common Article 1 of the 1966 human rights conventions. Furthermore, the situation of indigenous groups has not been understood as

and calls were made “to allow the people of Southern Rhodesia to determine their own future consistent with the objectives of General Assembly resolution 1514 (XV)”. In UNSC Res. 232 of July 23, 1966 the SC stated that “the situation resulting from the continued application of the policies of apartheid and the constant build-up of the South African military and police forces [...] constitutes a potential threat to international peace and security”.

¹²⁹ Anaya, *supra* note 117, at 14. See also the 1993 Draft UN Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/29

related to international peace and security, and therefore does not fall within the UN Charter scope of the inter-dependent principle of self-determination of peoples.

iv: Some conclusions on values

The human element is the common strand in these different understandings of the basis upon which self-determination has been applied, whether as a principle or as a right. Consideration of the interests and desires of certain groups in history, by appealing to self-determination, has been based upon respect for those who are not in a position to claim, or enforce, such respect. The requirement of respect for the self-determination of peoples could be rephrased as that of protecting the interests of the most vulnerable, oppressed or exploited. Substantive justice is entered into an international legal system which can no longer be used to legitimise systematic oppression or exploitation. The issue is not of the equality of states; this has been laid down as a separate principle in UN Charter Article 2.¹³¹ The requirement of respect for self-determination is a regulation that benefits weak third parties and is based on the position that respect for human beings as a fundamental value is related to long-term international peace and stability. The essential value remains, even when changes and developments require new modes of applying the principle of self-determination.

This underlying value should also be taken into consideration when interpreting and applying the principle requiring respect for the self-determination of peoples. In some of the major contexts of application – post-first world war, decolonisation, and of indigenous peoples – the application of self-determination has related to territory. In the first two situations territorial changes were effected, or required, by groups of states based upon the wishes and consent of the populations affected. In the last context it is the use and rights attached to territory that are protected by self-determination. Consideration of their interests was the underlying concern motivating the application of the self-determination. Since changes to the status of a boundary involve not territorial shifts, but still relatively similar drastic territorial changes (of separation by the independence of one's own territorial entity, or of the separation of another entity) consent and consideration of those affected should also form the basis for such changes.

¹³⁰ Kingsbury, Benedict, "Reconstructing Self-Determination: A Relational Approach", in: Aikio, P. & Scheinin, M., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (IHR, Åbo Akademi, Åbo, 2000) pp. 19-37 at 25-27

¹³¹ UN Charter, Article 2(1)

During the 20th Century self-determination was repeatedly applied in contexts where long-term international peace and stability were at stake. The principle of self-determination was applied in ways thought to promote long-term peace and stability – never to challenge peace and stability. The legal status of the principle is necessary, because all states do not accept that this level of consideration is necessary for long-term stability within and beyond their state territory. The legal status of the principle, as contained in the UN Charter, implies extraterritorial obligations for the international membership of the organisation.

2.2.1.2 Self-determination applied in relation to boundary disputes

Boundary disputes between two or more states may constitute a threat to international peace and security because they risk escalating into full-blown inter-state conflict. But additionally, intra-state tensions are increasingly being perceived as threats to international peace and security because they risk escalation into civil unrest, war and even international armed conflict. The understanding of what peace is, and the causes which threaten or support it, change with time and with developments.¹³² Most conflicts today are not inter- but intra-state. The post-1900s provide many cases of such conflicts, especially those resulting from changes to the status of boundaries.

The response of international law to inter-state tensions or conflict has focused on prohibiting the use of force, and allowing boundary location changes where the states agree, thus barring unilateral changes by a prohibition on the use of force. There are no international rules on how boundaries should be delimited. To the intra-state boundary situation the international law deemed to apply seems to be twofold: partly in prohibiting territorial changes by the principles of territorial integrity, the stability of boundaries and *uti possidetis*; and partly in requiring respect for human rights arising from conventional obligations, and the *ius cogens* prohibition of genocide. The presumption is that international law has little to say about territory and boundaries in the intra-state context because any signals that secession is a possibility for groups must by every means be avoided in the interest of the stability of states. The functionality of boundaries is generally considered to fall within the sovereign affairs of states, and unrelated to any international legal obligations.

¹³² Wolfrum, "Article 1", in: Simma, Bruno, *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 1994) p. 50

But perhaps there are legal obligations already binding upon states which relate to intra-state boundary tensions and which go beyond the positions described above. A legal response to border conflicts, or for resolving border tensions, might lie in applying precisely the concept that many in the international community fear – self-determination – though not in the way traditionally imagined. The instantaneous connection between self-determination and independence might explain the difficulty in understanding the wider applicability of self-determination as well as its positive contribution to stability. The way in which its Charter application could be formulated in the interests of peace and stability is *consideration as law*, the essence of self-determination being precisely that consideration is shown towards those affected in order to benefit long-term peace and stability. The Realist E. H. Carr heavily criticised the post-first world war implementation of self-determination as the equivalent of a principle of nationality. He wrote:

If we then ask why “the liberation of oppressed peoples”, which had rightly been regarded as a progressive principle in the nineteenth century, came to appear a reactionary and retrogressive principle which helped to put the clock back after 1919, the simplest answer is that Woodrow Wilson and his associates failed to recognise that the principle was a variable one requiring constant modification in the light of political and economic conditions, and that the extension given to it at Versailles was utterly at variance with twentieth-century trends of political and economic organisation.¹³³

Whether or not one agrees with the importance of the conclusions and specific factors that Carr emphasised, his approach is important: the principle of self-determination is closely related both to freedom and the possibility of choice, and is not limited to pre-determined or static factors such as nationality. As self-determination can be applied in different contexts and times, other factors of importance must also be considered and used in its application so as not to undermine the essence and future of the principle.¹³⁴

This thesis argues that international peace and security forms such a consideration that limits the application of self-determination. But this is not only a limitation to avoid excesses and preserve a functioning international community – it also provides possibilities for the extension of the principle to contexts where self-determination supports and is fundamental to these other interests, factors, goals or values. This means that groups other than those connected by nationality or colonial administration may fall within the scope of self-

¹³³ Carr, *supra* note 119, p. 49

¹³⁴ “The divorce between nation and state, or between ‘cultural nation’ and ‘state nation’, would mean, expressed in simpler language, that people should be allowed and encouraged to exercise self-determination for some purposes but not for others, or alternatively that they should ‘determine’ themselves into different groups for different purposes.” *Ibid.*, p. 62

determination. In the connection between peace and security and self-determination, an almost perfect example is illustrated in the duty to consider, at boundary changes of varying kinds, the interests and concerns of borderlanders or groups inhabiting one or both sides of an international boundary.

Because the principle of self-determination is applicable to territorial changes – requiring consideration for and the consent of those affected by such great alterations – it should also be considered relevant to status changes of boundaries. The reasons for this are vital: both situations involve great changes for the populations; in both cases, ignoring the interests of the populations concerned risks becoming a threat to international peace and security; and in both instances, when the wishes of affected populations have not had any effect, tensions and conflicts have often ensued.

The primary aim of the United Nations and the UN Charter is to maintain international peace and security, and self-determination is to be interpreted in the manner that best fulfils that purpose. In his exposé on self-determination and criticism of what he termed the “new doctrine” of the UN, Michla Pomerance suggested a more “realistic” approach based upon a number of propositions, *inter alia* that self-determination claims often collide with other rights and principles, and that the “self” to be determined is often a difficult business. He wrote:

Once these propositions are accepted, the solutions to self-determination claims which suggest themselves assume a corresponding complexity. The problem becomes one of *balancing* conflicting principles, of maximizing individual and group rights while respecting the rights of other individuals and collectives and preserving international peace and security. Such complexity can only be handled by means of a flexible approach which sees self-determination as a *continuum* of rights, as a plethora of possible solutions, rather than as a rigid absolute right to full “external” self-determination in the form of complete independence.¹³⁵

The primary interest of the international community in border disputes, or in situations of escalating tensions, lies in trying to ensure that the situation does not involve the use of force or turn into war. For a long-term solution the best interests of those concerned – especially those living in the border zone – should and must be a priority because those interests are more closely related to long-term stability and peace than has generally been perceived. Here the outline of the first two UN Purposes can be recognised. One important alternative to focusing on the *location* of a border is to examine its *functionality* or *effect* on those living or working in the area. The principle of self-determination may then be directly applicable to the

¹³⁵ Pomerance, *supra* note 36, pp. 73-4

functionality of boundaries, especially following status changes or other radical changes to a boundary.

But is it not sufficient to refer to the right of self-determination to gain the same effects as the principle? A general response, preceding the analysis in Chapter 5, is that the *right* of self-determination functions primarily in the relationship between state/government and inhabitants. As the right of a people, it is not binding upon the neighbour state, except in that state's own relationship to its inhabitants.¹³⁶ The UN, as an organisation, has no responsibility to promote the right, as the human rights conventions have separate systems of supervision. It is only in the relation between the *principles* on international peace and stability and self-determination that the international community has a role and duties in relation to self-determination. UNGA Resolution 1514 (1960) was agreed upon by UN member states with regard to still existing colonial states, where the duty to grant self-determination was proclaimed for all relevant territories, whether the colonised people had already petitioned for it or not. Several authors argue that the primary difference between the principle and the right relates not to content but to the definition of the subjects. While the holders of the right of self-determination are determined, the scope is wider, or at least less specified, for different constellations to which the principle is relevant.¹³⁷

It is also in the context of the UN Charter that tensions related to changes to boundaries – of status, location or functionality – might find a response through a purpose-oriented and inter-dependent interpretation of self-determination. The interpretation of the Charter Purposes is to be conducted teleologically and according to the principle of effectiveness in order to attain the goal of international peace and security. The application of the principle might therefore differ from the duties and essential respect contained within the right of self-determination. The two manifestations or vehicles of self-determination – the principle and the right – have inherent or core similarities, but differ both in their function as well as in their complete content and modes of expression.

The basis for these arguments will be examined in the following chapters, which will discuss interpretation of the UN Charter Purposes and propose ways in which boundaries should be approached for the benefit of peace and stability. But before this, a few principles which have been argued to preclude the application of self-determination to boundaries will

¹³⁶ Though Section 3 of Common Article 1 of the ICCPR and ICESCR contains an extraterritorial dimension, it does not have the same wide scope of obligations for all member states of the UN that the principle of UN Charter Article 1 involves.

be presented and studied. Because the general interpretation of these prohibitory territorial principles – territorial integrity, *uti possidetis*, and the stability of boundaries – bars any post-colonial application for many, these principles or doctrines will be more closely examined to see what they in fact legally prohibit, protect and imply.

¹³⁷ Knop, *supra* note 36, p. 34. Crawford doubts the strength of the principle, and distinguishes clearly between the political and legal principle. Crawford, James, *The Creation of States in International Law* (Clarendon Press, Oxford, 1979) pp. 87-8

3. Three TERRITORIAL PRINCIPLES

In idealizing the territorial state we cannot see a world in which its role and meaning change.¹³⁸

We cannot freeze history.¹³⁹

3.1 Sticklers or not?

The basic norm of PIL regarding boundaries is that force may not be used to change them, which generally refers to unilateral attempts at alteration. They may nevertheless be changed by agreement between the parties concerned. The positive and negative components of the norm do not, however, begin to answer all questions that relate to boundary disputes. There are several other concepts that come into play in relation to boundaries, such as the principles of territorial integrity and *nemo dat quod non habet*, the inviolability and intangibility of frontiers, *uti possidetis*, and the stability of boundaries. Both territorial integrity and *uti possidetis* are often understood so as to preclude the application of self-determination to territory and boundaries.¹⁴⁰ The two concepts are even sometimes used interchangeably, as though they carried the same meaning and legal implications.¹⁴¹ In the early 1900s *uti possidetis* was even argued to protect secessionist attempts against force used to reunite them,

¹³⁸ Agnew, *supra* note 19, at 77

¹³⁹ Wiessner on a return to *uti possidetis* as a rule. Wiessner, Siegfried, panel discussion in: “Communities in Transition: Autonomy, Self-government and Independence”, *Proceedings ASIL* (1993) 248-66 at 264

¹⁴⁰ By this I mean an application that would have direct effects on the territory and boundaries themselves, not an application, such as internal self-determination, which is argued to be applicable within territories. If affecting people, territory will generally be affected: “A popular story tells about a man who returned to his home to find an intruder hiding in his closet. Turning to the intruder in outrage, the householder bellowed, ‘What are you doing here?’ The intruder, a meek little man, replied, ‘Everybody has to be somewhere.’” Opening sentences in: Elazar, D., “Political Science, Geography, and the Spatial Dimension of Politics”, *Political Geography* 18 (1999) 875-86 at 885

¹⁴¹ Rosalyn Higgins has criticised the use of the concepts as though they were interchangeable, *inter alia* by Thomas Franck in the preceding chapter of the same volume. Higgins, *supra* note 13, p. 34. Alain Pellet declares yet another conflation of the concepts: “The territorial integrity of States, this great principle of peace, indispensable to international stability, which as noted by the [Badinter] Committee and the International Court of Justice [in the Frontier Dispute case], was invented in Latin America to deal with the problems of decolonization, and then further applied in Africa has today acquired the character of a universal, and peremptory norm.” Pellet, Alain, “The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples”, 3 *EJIL* 1 (1992). Bartoš formulates a succinct definition: “Whereas [territorial integrity] dictates respect for the established territory of existing States, [*uti possidetis*] establishes what the territory of new States is.” Bartoš, Tomáš, “Uti Possidetis. Quo Vadis?”, 18 *Australian Year Book of International Law* 37 (1997) 37-96 at 56

despite lack of effective control.¹⁴² The stability of boundaries is another concept often referred to in order to rule out boundary changes. The concepts are often conflated and confused, meaning all things to all men, and it will be important to extract the prohibition on use of force from other boundary norms.

It is here suggested that the concepts are different and the majority are quite specific: territorial integrity responds to the issue of the inter-state use of force against state territory, as it is contained in UN Charter Article 2(4); *uti possidetis* can be used to support claims of title to unoccupied territory, and as a limited tool for boundary delimitation; and the principle of the stability of boundaries functions legally as a method of interpreting boundary treaties and as a form of estoppel based on acquiescence.

3.2 Territorial integrity

Territorial integrity is a phrase fraught with ambiguity. An early example of the concept is found in a federative compact agreed in 1811 between five provinces of Santa Fé to set up the United Provinces of New Grenada. The parties reserved the liberty and sovereignty of each province and guaranteed “the integrity and inviolability of its territories [of each province].”¹⁴³ The concept was also referred to at the Congress of Vienna in 1815 in relation to Switzerland, whose neutrality the Congress Powers had agreed to guarantee. In a special Act the Powers covenanted to “guarantee the integrity of its territory within new frontiers, as fixed by the acts of the Congress of Vienna and by the Treaty of Paris of that day as they will be fixed in the future in accordance with the Protocol of November 5”. The Act continued by clarifying that “[...] no unfavorable conclusions for Switzerland, as to its neutrality and territorial inviolability can be drawn from the events which led to the passage of allied troops through a part of the territory of the Helvetic Confederation.” Similar promises were made to

¹⁴² *Infra* chapter 3.3.4.3

¹⁴³ In 1819 New Grenada and Venezuela were united under the name of Colombia; in 1822 Bolivar added two territories; in 1829 Venezuela detached itself and the two added provinces of 1822 formed Ecuador in 1830; former New Grenada readopted this name but in 1857 returned to the name of Colombia. Other territories had similar experiences of becoming united, separating and re-arranging territories. Moore writes: “It is needless to say that the establishment of the various independent governments which have been enumerated did not take place without frequent armed conflicts”. Moore, John Bassett, “Memorandum on *uti possidetis*: Costa Rica-Panama arbitration, 1911”, in: *The Collected Papers of John Bassett Moore in Seven Volumes* (Yale University Press, New Haven, 1944) vol. III, pp. 328-56 at 337-8. Alvarez describes a similar pact of 1826 on territorial integrity between Mexico, Central America, Colombia and Peru “against all foreign domination”. Alvarez, Alejandro, “Latin America and International Law”, 3 *AJIL* 2 (1909) 269-353 at 277-8

the Ottoman Empire at the Congress of Paris in 1856, whereby the states agreed to accept to “respect the independence of the Ottoman State, guaranteeing jointly the respect for that undertaking”.¹⁴⁴

Territorial integrity is today occasionally referred to as though it constitutes a *right* belonging to states that others have the duty to respect. This right is understood as not only directed towards other states, but even containing an intra-state dimension, meaning in effect the right of the state to continued unity, thus not to be broken apart – for example, by secession. Territorial integrity is often also understood to mean that the territory of the state is inviolable; all trespass or violence used against it is illegal under international law. An additional complexity is what integrity refers to – territory or boundaries.

3.2.1 Territorial integrity as territorial inviolability

An understanding of territorial integrity as a right under international law of inviolability of a state’s boundaries and territory is quickly refuted. Complete territorial inviolability is clearly not guaranteed by PIL, and can therefore not constitute the meaning of territorial integrity.¹⁴⁵ The UN Charter allows force to be used against a state in two cases. The first is included in Article 42, under binding Security Council decisions, and the second is codified in Article 51, in cases of self-defence.¹⁴⁶ Military actions taken in the past decade against the territories of sovereign states, and that have not been considered illegal, indicate that the international community in certain cases even seems to accept the possibility of inter-state force beyond those two uncontroversial bases.¹⁴⁷ Accordingly, the concept of territorial integrity cannot be understood as guaranteeing the territorial inviolability of states. What UN Charter Article 2(4) does is outlaw unauthorised threat or use of force against a state by other states:

¹⁴⁴ Akweenda, S., “‘Territorial Integrity’: A Brief Analysis of a Complex Concept”, 1 *RADIC* (1989) pp. 500-506 at 500

¹⁴⁵ Bowett, D. W., *Self-Defence in International Law* (Manchester University Press, Manchester, 1958) pp. 31-3. Shaw has also discussed the issue, though somewhat unclearly. Shaw, *supra* note 17, pp. 181-2

¹⁴⁶ UN Charter Articles 42 and 51. See the “Friendly Relations Declaration”, UNGA Res. 2625 (1970), which states: “[S]overeign equality includes the following elements: [...] (d) *The territorial integrity and political independence of the States are inviolable.* This must, however, be interpreted as prohibition against states violating the territory of other states and not as absolute inviolability, as the Declaration later provides for legitimate self-defence. This accords with interpreting the fundamental principles in light of one another, as required by the declaration itself, Article 2: *In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.*

¹⁴⁷ Recent examples where territory has been violated are Yugoslavia by NATO bombings in Serbia, Montenegro and Kosovo, (1999), Afghanistan (2001/02), Iraq continually since Operation Desert Storm through American and British military overflight, as well as by US-led full-scale military operations beginning in the spring of 2003.

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.

However, the use of the term ‘territorial integrity’ in the Article does not add any protective dimension beyond the clear prohibitive text. The inter-relationship between the Article and other Charter contents is not unambiguous,¹⁴⁸ but what nevertheless is clear is that Security Council authorisations of force and self-defence have never been understood to represent violations of Article 2(4).

3.2.2 Territorial integrity as a right: external and internal dimensions

Though territorial integrity has been continually mentioned in many multilateral treaties, such as the Covenant of the League of Nations, the United Nations Charter and the Charter of the Organization of African Unity (OAU),¹⁴⁹ it has not been formulated or agreed upon as a right.

Article 10 of the Covenant of the League of Nations stated:

The Members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

¹⁴⁸ One of the issues is the relationship between the Article 2(4) prohibition and the SC powers laid down in chapter VII. Article 2(4) does not state any exceptions to it, such as that included in Article 2(7): *[T]his principle [of domestic jurisdiction] shall not prejudice the application of enforcement measures under Chapter VII*. One interpretation could be that Article 2(4) only deals with inter-state actions, and the organs of the UN, such as the SC, are not bound by the prohibition, implying that when they take action affecting a state’s territorial integrity this is not prohibited by Article 2(4). Arguments against such an interpretation are that Article 2 begins by stating: *The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles*. Article 24(2) further states: *In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII*. Another response is based on the primacy of the Purposes over the Principles; actions taken under binding Security Council decisions do not violate Article 2(4) when there is a threat to peace and security, as the latter’s maintenance is the *raison d’être* of the Organisation, according to Article 1. The fulfilment of a Charter Purpose enjoys priority over a Charter Principle. This has the unfortunate effect of also nullifying the first part of Article 2, and is difficult to reconcile with the general belief that Article 2(4) enjoys the character of *ius cogens* (see *Nicaragua v. USA*, ICJ Rep. [1986] 14 §189). A third interpretation would suggest that the concept of violations of territorial integrity is connected to illegal force used, wherefore all legal decisions made are taken not to violate Article 2(4). For a short discussion on Article 2(4), see Reisman, M. “Coercion and Self-Determination: Construing Charter Article 2(4)”, and Schachter, O., “The Legality of Pro-democratic Invasion”, both in: 78 *AJIL* 3 (1984) 642-650. See also Elias, T. O., “Scope and Meaning of Article 2 (4) of the United Nations Charter”, in: Cheng, B. & Brown, E. (eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger* (Stevens & Sons Ltd., London, 1988)

In relation to the Covenant of the League of Nations what may first be noted is that the text constituted a bi-faceted agreement between the parties: not to attack each other; and what to do in case of an attack – the Council was to give advice. The Member States accepted the obligation to respect and preserve the territorial integrity of fellow Members of the League against other aggressors. In the latter case the Council would advise on what actions to take. Article 10 did not embody a proclamation of a right of states, but was a multilateral agreement on support in the event of attack by a non-member. Georg Schwarzenberger has noted that the Article also had the function of obliging the parties “not to recognize titles to territory obtained in contravention of such treaty obligations and thus put the seal of their own approval on breaches of these obligations.”¹⁵⁰ War and conquest had not yet been outlawed as a means by which states related, or as a basis upon which they could claim legal title to territory. The concept of territorial integrity would therefore have been unlikely, at the time, to have enjoyed the status of a right or even principle under customary international law which other states had a duty to respect.¹⁵¹ Hunter Miller, President Wilson’s legal adviser, who co-wrote the draft that after revisions became the Covenant of the League of Nations, noted the insistence of the French on the formulation of the Article since they understood this to be their guarantee of support against another German attack.¹⁵²

UN Charter Article 2(4) is similarly ‘weak’ on territorial integrity. It is not claimed to be a right of states, and states only have the duty to refrain from the threat or use of force against other states. It is up to the Security Council to decide if any actions are to be taken. States only have the duty to refrain from action; there is no requirement of positive action to protect the territorial integrity of other member states.¹⁵³ The positive duties, and collectivity core, are

¹⁴⁹ It is also included in the legally non-binding (then) CSCE Helsinki Final Act of 1975.

¹⁵⁰ He has argued that the same obligation is contained in UN Charter Article 2(4). Schwarzenberger, Georg, “Title to Territory: Response to a Challenge”, 51 *AJIL* 2 (1957) 308-24 at 319

¹⁵¹ Sureda stated that the implications of not holding plebiscites in all post-first world war disputed areas meant that occupation was accepted as providing a legal basis for title to territory at that time. Sureda, *supra* note 6, p. 22. Using a different approach, Oppenheim noted that “independence and territorial as well as personal supremacy are not rights but recognised and therefore protected qualities of States as International Persons”. Oppenheim, *International Law*, vol. I, 8th ed. (1955) p. 286, in: Shaw, *supra* note 17, p. 344, footnote 1. What Oppenheim in effect said is that these qualities are those of the system of states which uphold the entities themselves and precede the rules arising out of the agreement of those entities. They must then simply be accepted and cannot be argued to enjoy specific legal status.

¹⁵² Miller, David Hunter, *The Drafting of the Covenant* (G. P. Putnam’s Sons, N.Y., 1928; reprint Gaunt, Inc. 1998) pp. 289, 297 (Part I). On Miller, see Northedge, F. S., *The League of Nations: Its Life and Times, 1920-1946* (Leicester University Press, 1986) pp. 37, 41, 43

¹⁵³ At the 1945 San Francisco Conference, which drafted the final Charter text, several amendments that had attempted to include positive obligations within Article 2(4) failed. Panama suggested the amendment: “and to preserve against aggression the territorial integrity and political independence of all Members”. As a 2/3 majority was required for adoption of amendments, the motion lost, with 21 votes in favour, 18 against, and three abstentions. *Documents of the United Nations Conference on International Organization. San Francisco, 1945* (hereafter: *Documents, UNCIO*). Vol. VI (UN Information Organizations, London, 1945) p. 346

instead found in Article 1(1),¹⁵⁴ which is connected to threats to peace and aggression – not to territorial integrity. Neither Article 1, nor any other Charter Article, includes the obligation to protect any right of territorial integrity. It is therefore difficult to support the concept of territorial integrity as a legal right belonging to states. The essence of Article 2(4) is solely a prohibition on the use of force between states, limited by the right of self-defence and actions taken by states according to decisions made by the Security Council under Chapter VII of the same Charter.

Both the Covenant and the Charter Articles on territorial integrity are directed towards inter-state relations. Goodrich explained that the words ‘against the territorial integrity or political independence of any state’ in Article 2(4) were included “in response to the demand of the smaller states that there should be some assurance that force would not be used by the more powerful states at the expense of the weaker ones.”¹⁵⁵ As the prohibitions only treat the issue of force between states, they say nothing on the issue of maintaining the *status quo* and present power structures within the state itself. The Articles do not then, for example, outlaw secession, as they only concern inter-state action.¹⁵⁶ The territorial integrity of a state can, accordingly, only be violated by acts of other *states*. As it is difficult to find support for a claim that territorial integrity would be a right of states under customary international law, the question of state territory and intra-state actions then also must be concluded to fall outside the scope of international law, leaving territorial integrity lacking any intra-state dimension.¹⁵⁷

So far, then, it is suggested that territorial integrity does not codify the absolute inviolability of state borders and territory, it is not a right belonging to states, and it has no internal dimension under treaty law. Some interesting insights on the usage of the phrase are evident in the drafting discussions of Article 10 of the League of Nations Covenant. The primary aim of its inclusion in this agreement was not to maintain the territorial *status quo* of states. The Covenant text was drafted at the same time as territory was reorganised, borders shifted, old states territorially reduced and new states given birth. The term was included in the Covenant text at the same time as self-determination was being applied to change state boundaries. The purpose of including territorial integrity in the Covenant was surprisingly

¹⁵⁴ See New Zealand’s amendment to include positive duties in Article 2(4), and reasons for its rejection, in: *Documents, UNCIO*, vol. VI, *supra* note 153, p. 721

¹⁵⁵ Goodrich, Hambro & Simons, *supra* note 8, pp. 44-5

¹⁵⁶ Crawford, *supra* note 137, pp. 266-8

¹⁵⁷ For territorial integrity to have the character of a right, or an intra-state dimension, it could have such character as a norm of customary international law. For this, uniform practice would, nonetheless, have to be shown.

not, in contrast to paragraph 6 of the UNGA Resolution 1514 (1960),¹⁵⁸ to fossilise territorial changes after they had been made.¹⁵⁹ President Wilson had already stated on December 18, 1918, that the proposed League of Nations implied “territorial integrity plus later alteration of terms and alteration of boundaries if it could be shown that injustice had been done or that conditions had changed.”¹⁶⁰ This intention was evidenced by later American drafts, subjecting territorial integrity to border changes made on the basis of the principle of self-determination. The text of Wilson’s third draft of January 20, 1919, Article 3, stated:

*The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity, as against external aggression; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected if agreeable to those peoples and to those States from which the territory is separated or to which it is added; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of Political jurisdiction or boundary.*¹⁶¹

The object of the ‘guarantee’ Article under discussion, which was to protect territorial integrity subject to later territorial changes, was to create a united front against aggression and force used, even though the only final Covenant action envisaged was of the Council giving advice. The two components of the earlier draft Article – respecting territorial integrity qualified by later territorial changes – were later agreed to be separated, resulting in Covenant Article 10 and a distinct Article on revision.¹⁶² Article 19 of the final Covenant text stated:

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

¹⁵⁸ *Supra* footnote 111

¹⁵⁹ Miller wrote in response to Canadian criticism of Article 10 making permanent ‘all existing territorial delimitations’ that, “It is erroneous to suppose that Article 10 includes the idea that ‘all existing territorial delimitations are just and expedient’; for the principle of Article 10 here is merely that forcible annexation shall not result from ‘forcible aggression.’” Miller, *supra* note 152, pp. 354, 358 (Part I)

¹⁶⁰ Cited from notes of presentation taken by Dr. Isaiah Bowman, in: Miller, *supra* note 152, pp. 41-2 (Part I)

¹⁶¹ Article 20 of the ‘House Draft’ of July 16, 1918, closely resembles Wilson’s third draft on guarantees of territorial integrity and political independence by the parties subject to territorial modifications pursuant to the principle of self-determination. A ‘Cecil draft’ of January 16 regulated that if changes proposed by the League were not accepted the other members would be free from “the obligation to protect the territory in question from forcible aggression”. *Ibid.*, pp. 14-15, 52-3, 70-1, 289 (Part I) and pp. 10, 99 (Part II)

¹⁶² *Ibid.*, pp. 169, 202 (Part I)

Frederick Northedge lamented the separation of the two components into separate Articles, arguing: “Article 10, standing alone, acquired an even more inflexible appearance than even Wilson wanted to give it.” Partly because of this, states apparently ignored it, leaving Article 19 without any real significance as a qualifier to Article 10.¹⁶³

Derek Bowett notes President Wilson’s understanding of ‘territorial integrity’ in the Covenant of the League of Nations as implying “immunity not from armed invasion but from forcible annexation”.¹⁶⁴ This would be highly relevant after the territorial rearrangements of the Paris Peace Conference, both in Europe and regarding overseas colonies. This would also accord with the French post-revolution connection between popular sovereignty, denial of the right of conquest, and thus prohibition of annexation without popular consultation – evidenced by use of the plebiscite.¹⁶⁵ By Articles 10 and 19 states agreed not to attack one another or to recognise claims of title to territory based, for example, on forcible annexation, to ‘assist’ one another if attacked by non-member states, and to allow later territorial changes to be made, while prohibiting forcible annexation.¹⁶⁶ Changes to territory could thus be made, but not by use of force without the agreement of the population concerned.¹⁶⁷ Legal means, such as the plebiscite, would have to be used to alter boundaries and transfer territory.

It is possible to draw slightly different conclusions as to the implications of including the phrase ‘territorial integrity’ in the Covenant text. Certainly the Conference delegates

¹⁶³ Northedge, *supra* note 152, pp. 60-3

¹⁶⁴ Bowett, *supra* note 145, pp. 33-4. This accords with Miller’s observations as to its application. Miller, *supra* note 152, p. 354 (Part I). Bowett also noted the suggestion by Fischer Williams (1929) that “the effect of Art. X of the Covenant was to protect possession of territory, even against another state which might eventually prove to have a better title to the territory.” Bowett, *supra* note 145, p. 35. At the beginning of the Conference South Africa, New Zealand and Australia made strong claims to annex South West Africa (SA), German Samoa (NZ) and German Guinea (Au). This was ruled out and the mandatory scheme was instead adopted. Northedge, *supra* note 152, pp. 37-8

¹⁶⁵ Beigbeder, Yves, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Martinus Nijhoff Publ., Dordrecht, 1994) p. 78. Lenin based the prohibition on annexation directly upon self-determination. “[A]nnexation is violation of the self-determination of a nation, it is the establishment of state frontiers contrary to the will of the population.” Lenin, V. I., “The Discussion on Self-Determination Summed Up” (1916) in: Lenin, V. I., *Collected Works, vol. XX* (Progress Publishers, Moscow, 1972) pp. 320-360

¹⁶⁶ Northedge wrote: “In the course of this debate [on the guarantee of Article 10], the idea was mooted of going back to Colonel House’s idea of making the guarantee system dependent upon the occasional modification of the *status quo*, and this eventually won the day in the form of Article 19 of the eventual Covenant.” Northedge, *supra* note 152, p. 43. S. Akweenda has given examples of League of Nations Mandate Agreements containing specific provisions on colonial boundaries needing modification. Akweenda, S., *International Law and the Protection of Namibia’s Territorial Integrity: Boundaries and Territorial Claims* (Kluwer Law International, The Hague, 1997) pp. 37-9

¹⁶⁷ Wilson elaborated the internal dimension in a speech: “Then there was the question as to whether it [Article X] interfered with self-determination; that is to say, whether there was anything in the guarantee of Article X about territorial integrity and political independence which would interfere with the assertion of the right of great populations anywhere to change their governments [...] There is absolutely no such restraint [...] We do not guarantee any government against anything that may happen within its own borders or within its own sovereignty.” President Wilson, speech of September 24, 1919, quoted in: Cobban, *supra* note 40, p. 64

themselves understood the term and the duties arising from it differently. The first understanding was that territorial integrity did not rule out border changes, as such were allowed for by the Covenant. The second is that territorial integrity does not allow for border changes, as a qualifier had to be included. This latter observation does not preclude the fact that territorial revision was acceptable under international law and was seen to correspond with the principle of self-determination. It seems that the main purpose of including the Covenant Article was to hinder forcible annexations of territory.¹⁶⁸

The inclusion of the term ‘territorial integrity or political independence’ in Article 2(4) of the UN Charter originated in an Australian amendment to the Dumbarton Oaks proposal at the 1945 San Francisco Conference.¹⁶⁹ The Australian Deputy Prime Minister expressed this view:

In the Charter should also be inserted a specific undertaking by all members to refrain in their international relations from force or the threat of force against the territorial integrity or political independence of another state. The application of this principle should insure that no question relating to a change of frontiers or an abrogation of a state’s independence could be decided other than by peaceful negotiation. It should be made clear that if any state were to follow up a claim to extended frontiers by using force or the threat of force, the claimant would be breaking a specific and solemn obligation under the Charter.¹⁷⁰

This underlines the inter-state purpose of including the term within the Article. The prohibition is related to the use or threat of force between states and is directed towards prohibiting states to follow up claims of extended frontiers by use of force. This corresponds with the inclusion of ‘territorial integrity’ in the Covenant of the League of Nations as prohibiting annexations. This interpretation also seems to correspond with references to territorial integrity made in the context of decolonisation. The UNGA Resolution 1514 (1960)

¹⁶⁸ That territorial integrity was understood by several states to be directly connected to the threat of annexation is supported by a number of Latin American documents. An early Peruvian government instruction to its plenipotentiary at the Congress at Lima (1847-8), called by Peru and attended by six Latin American states because a Spanish expedition planned to recover Ecuador, included this paragraph: “There will be a stipulation made between the allied nations to preserve their territorial integrity: consequently, they will not permit any foreign power, under any pretext whatever, to occupy any part whatever, no matter how small it may be, of the territory of any of the allied states [...]”. See also the 1825 Treaty of Union between the predecessors of Costa Rica and Panama in which the parties “mutually guarantee the integrity of their respective territories against the attempts and incursions of the subjects of the King of Spain and his adherents [...]” as well as the 1825 treaty between then Central America (Costa Rica, Nicaragua, Honduras, Salvador and Guatemala) and Colombia, which stipulated that the parties “mutually guarantee the integrity of their respective territories [...] against all attempts and incursions of the subjects of the King of Spain and his adherents.” Moore, *supra* note 143, at 346, 353-5

¹⁶⁹ Amendment of May 5, 1945, in: *Documents, UNCIO*, vol. III, *supra* note 153, p. 543. The original Dumbarton Oaks text had read: “All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.”

¹⁷⁰ Francis Forde (Australia), April 27, 1945, in: *Documents, UNCIO*, vol. I, *supra* note 153, p. 174

made self-determination applicable to all colonial territories, but included an ambiguous *caveat* in paragraph 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 UN Charter.

Self-determination was to lead to independence on the basis of the document, and thus independence had not yet been fully achieved. What was the “country” then protected against such attempts? The meaning of it could not have been to protect the *status quo* in Africa, as the document laid down the basis for change in status from dependencies to independence. And “national unity” was one characteristic that certainly did not describe the colonial divisions and units in Africa. The context in which Resolution 1514 was written was an Africa which had moved from condemnation of colonial borders¹⁷¹ to a growing acceptance, but which remained divided on the issue.¹⁷² As certain African states had made claims to territory of existing colonial units or newly independent states on a historical basis, it seems likely that the essential purpose of the phrase was to protect the newly or future independent states from claims made by neighbouring states. The argument finds support in Article 4 of the Resolution which links force and territorial integrity:

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.

Thus territorial integrity did not limit the application of self-determination to the former colonial units by allowing their independence from the administering states through UNGA Resolution 1514,¹⁷³ but was declared in paragraph 6 to protect the newly independent entities from surrounding claims by neighbour states.¹⁷⁴ Only in 1964 did the Assembly of Heads of State and Government of the OAU, at their first Ordinary Session, proclaim their acceptance of the boundaries of the African states at independence, thus adopting the former colonial

¹⁷¹ See *inter alia* the All-Africa Peoples’ Conference at Accra (1958) where artificial boundaries dividing peoples were condemned and calls were made for their abolition or revision. Shaw, *supra* note 17, pp. 182-3

¹⁷² *Ibid.*, pp. 183

¹⁷³ To be logically consistent I would not formulate the argument like this, as I do not understand ‘territorial integrity’ to mean the maintenance of territorial *status quo*. Thus the territorial integrity of colonial or administering states would be unaffected by the independence of the colonial units. Military attacks by other states to annex territory would, on the other hand, legally violate their territorial integrity.

¹⁷⁴ In support of such an argument, see Shaw, *supra* note 17, p. 188

divisions.¹⁷⁵ Secession in Africa had not yet come into focus in 1960, but territorial claims by a number of African states were already being made on the basis of history and ethnicity. It may therefore be concluded that it is not changes to territory *per se* that the right to territorial integrity prohibits, but illegal acts of other states, such as intrusion, aggression, and force used against the territory of a state. The core of the concept does not prohibit the alteration by addition or removal of part of a state's territory, but that the state's territory is *violated* by transgression of a boundary or aggression other than in self-defence.¹⁷⁶ This may, of course, include occupying territory. Changes to territory are thus not proscribed by UN Charter Article 2(4). Only the illegal use of force is prohibited. Further conclusions are that the territorial integrity protected under Article 2(4) is not absolute in its protection: it is the illegal intrusion or violence of a state that is prohibited; and the prohibition is aimed at states.¹⁷⁷ Territorial integrity as it is treated in the UN Charter says nothing about disintegration, secession or changes to a state by other means or by non-state actors. In all cases above the concept has seemingly been connected to the use of force or aggression. Territorial integrity is not a concept that alone has legal effect, but is connected to the prohibition of the inter-state use of force.¹⁷⁸

The phrase territorial integrity was included in the Friendly Relations Declaration in 1970,¹⁷⁹ which has since caused much debate. The 'saving clause' reads:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

¹⁷⁵ *Ibid.*, p. 185. In the second operative paragraph of AGH/Res. 16(1) the Assembly "solemnly declares that all Member States pledge themselves to respect the frontiers existing on their achievement of national independence". Text in: Akweenda, *supra* note 166, p. 51

¹⁷⁶ As use of force between states was only finally prohibited by the UN Charter, it is difficult to argue that there is a right of territorial integrity under customary international law that extends further than Article 2(4) and thus also prohibits internal attacks of a state's territory by international law. When it comes to the territory of states international law only regulates the duties of states.

¹⁷⁷ As to political independence, this has also in practice been claimed to be violated by interference from other states.

¹⁷⁸ Akweenda summarised his short survey on territorial integrity by denying the existence of a general or specific definition of the concept, as well as the desirability of such: "Territorial integrity is a flexible concept which can be invoked in various circumstances, especially when the sovereignty, security or interest of a State is affected. It has more relevance to 'threat or use of force'." Akweenda, *supra* note 144, at 506

¹⁷⁹ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), October 24, 1970. For a background to the Resolution and discussion of its legal importance, see e.g. Rosenstock, Robert, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 *AJIL* 4 (1971) 713-35; Arangio-Ruiz, G., "Friendly Relations Resolution", in: Bernhardt, R. (ed.) *EPIL* <2> (North-Holland, Amsterdam, 1995) 485-490

One indisputable conclusion to be drawn from the text is that where self-determination is grossly violated a state enjoys no protection of its territorial integrity or political unity. Borders may then not be considered “sacrosanct”.¹⁸⁰ The minimum practical conclusion that may be drawn is that aiding groups within a territory that suffer violations of their self-determination is not considered illegal. This is in line with the view that the paragraph was aimed at undermining the system of apartheid in South Africa, which was understood as a gross violation of self-determination. As secession was not an option in that case – it was the oppressive system that had to be transformed – the paragraph should be interpreted as focusing on legitimising state support for movements, even military as such, and possibly also incursions into the territory of the oppressive state, in opposition to systems violating self-determination. In referring to territorial integrity in the remainder of the Declaration, the text mentions it in regard to the duties of states, which retains its inter-state character and relation to force used.

In conclusion, it is therefore suggested that the concept of territorial integrity, under treaty law, does not rule out border changes, other than in cases of annexation, where the population has not given its consent. Instead, it is connected with the issue of illegal force used against the territory of other states. To argue the existence of further legal dimensions under customary international law, evidence of *usus* and *opinio iuris* would have to be presented.

3.3 *Uti possidetis*

Uti possidetis is derived from Roman law “in which it designated an interdict of the Praetor, by which the disturbance of the existing state of possession of immovables, as between two individuals, was forbidden.”¹⁸¹ The interdict was accessible under the condition that the property had not been gained by certain specified faults. The content was summed up as “*uti*

¹⁸⁰ Ratner, Steven R., “Drawing a Better Line: *Uti Possidetis* and the Borders of New States”, 90 *AJIL* 4 (1996) 590-624 at 611

¹⁸¹ Moore, *supra* note 143, at 328. Cukwurah cited the ‘Interdictum *uti possidetis*’ expounded in Hadrian’s Edict: “I forbid force to be used to prevent him of you two who is at present in a faultless possession of the disputed building from possessing it as he at present does.” Cukwurah, A. O., *The Settlement of Boundary Disputes in International Law* (Manchester University Press, Manchester, 1967) p. 113, footnote 2. There was no faultless possession where the land had been acquired clandestinely, by violence or in a form which was revocable by the other party (*clam vi aut precario*). Ratner, *supra* note 180, at 593. See also Lalonde, Suzanne, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen’s Press, Montreal, 2002) pp. 10-16

possidetis, ita possideatis: ‘As you possess, so may you possess.’¹⁸² The Roman civil law rule *interdictum uti possidetis* did not ultimately determine a situation, but merely constituted a prohibition against altering the *status quo* by force,¹⁸³ implying protection of temporary possession pending litigation, when the respective claims to the disputed property would be finally determined by the Praetor. Under the prohibition no force could be used to retake property in the possession of another. Only the Praetor could determine who had permanent title to the property in question, and until he had done so, *uti possidetis* protected the possession of the possessor against any use of force. The protection offered under the interdict was therefore only temporary – not permanent – and did not extend to cases where the origin of possession was clearly faulty.¹⁸⁴

References to *uti possidetis* seem to have disappeared with Justinian’s codification, which was completed in 529 AD, and reappeared only with Hugo Grotius’ *De Iure Praedae Commentarius* in 1604, where it was explained to protect private property rights, such as the use of the sea for fishing by, for example, fencing in a smaller portion of the sea.¹⁸⁵ A century later the concept had become connected to post-war peace treaties and the state of possession between the parties after a conflict. In 1737 *status quo post bellum*, the formula for the possession existing at the end of a war, was based on the principle of *uti possidetis*.¹⁸⁶ Not until its post-Roman stage was it applied to state territory.¹⁸⁷ *Uti possidetis* thus shifted from temporarily protecting private possessions to making permanent the post-war territorial possession of states.

¹⁸² Moore, *supra* note 143, at 330

¹⁸³ Lalonde, *supra* note 181, p. 14. Lalonde notes that the interdict was based only on facts and not title.

¹⁸⁴ For the opposite conclusion, see Shaw, *supra* note 28, at 98, 133

¹⁸⁵ Lalonde, *supra* note 181, pp. 16-18

¹⁸⁶ Cornelius Van Bynkershoek wrote in 1737 regarding the French at Caselle and Turin, that “when a truce was made it was agreed that each party should during the truce continue to hold possession on the principle of *uti possidetis* of the part he had occupied in the war.” Bynkershoek quoted in: Lalonde, *supra* note 181, pp. 20-1. Moore cites Alphonse Rivier, who in 1896 wrote: “The basis of the negotiations [for peace] is given either by the *uti possidetis*, or *statu quo post bellum*, or by the *statu quo ante bellum*. The latter basis will not be presumed, the war having suppressed the former state of things and created a new state of things. We know the important rôle which belongs in the law of nations to the accomplished fact and to possession.” Moore, *supra* note 143, at 331. Lalonde quoted several PIL authors who hereafter interpret *uti possidetis* as the basis for *status quo post bellum*, unless peace treaties include stipulations to the contrary, though this position was not without critics, e.g. Bluntschli (1870).

¹⁸⁷ Fisher, F. C., “The Arbitration of the Guatemalan-Honduran Boundary Dispute”, 27 *AJIL* 3 (1933) pp. 403-27 at 415

3.3.1 Latin America

In a 1947 Latin American constitutional glossary *uti possidetis* was defined thus:¹⁸⁸

uti possidetis, *n.* [Lat.] “The principle that a conclusion or treaty of peace between belligerents vests in them respectively as absolute property the territory under their actual control and things attached to it, and the movables then in their legal possession, except as otherwise stipulated.”

Used by some Spanish American states as the basis for their national boundaries, as “the *status uti possidetis* of 1810,” i.e., the situation existing (in regard to boundaries of administrative subdivisions) at the end of the Spanish colonial period in (approximately) 1810.

The definition identifies two different applications of *uti possidetis*: the first, as related to claims of title to territory; the second, in determining boundaries. In order to explain its use in Latin America in relation to issues of title, it might be worth recapitulating this area of law briefly. The international law on acquisition of territory has historically accepted different evidence of title to territory,¹⁸⁹ such as discovery, conquest, occupation, accretion, cession, and prescription. The roots of title have been intimately connected with effective possession and the consent of other states in order to consolidate the claims.¹⁹⁰ Consent may take different forms, such as agreement, recognition or acquiescence.

At the independence of the Latin American states, one of the problems facing the new states was that large areas of the territory formerly under Spanish jurisdiction had been uninhabited, and neither effectively administered nor explored or even mapped (see Map 1 below), and the playing field for claims of title to territory seemed to be wide open. The potential for various claims and disputes was enormous. In this context, McEwen has

¹⁸⁸ Fitzgibbon, Russell H., “Glossary of Latin American Constitutional Terms”, 27 *The Hispanic American Historical Review* 3 (1947), 574-590 at 590

¹⁸⁹ Jennings’ defined the meaning of title as: “the vestitive facts which the law recognizes as creating a right”, and quotes Salmond, who wrote that “every right [...] involves a title or source from which it is derived.” Jennings, Robert, *The Acquisition of Territory in International Law* (Manchester University Press, Manchester, 1963) p. 4. Brownlie describes the essence of title as “the validity of claims to territorial sovereignty against other states.” Brownlie, Ian, *Principles of Public International Law*, 5th ed. (Clarendon Press, Oxford, 1998) p. 121

¹⁹⁰ Johnson, D., “Consolidation as a Root of Title in International Law” *Cambridge Law Journal* (1955) 215-25; Schwarzenberger, *supra* note 150; Jennings, *supra* note 189; Brownlie, *supra* note 189, pp. 129-67; Bernárdez, Santiago Torres, “Territory, Acquisition” in: Bernhardt, R. (ed.) *EPIL* <4> (North-Holland, Amsterdam, 2000) 831-9. See the ICJ’s comments on consolidation, acquiescence and *effectivités* in the case Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) ICJ Rep. (2002) paras. 62-70; also Sharma, Surya, *Territorial Acquisition, Disputes and International Law* (Martinus Nijhoff Publ., The Hague, 1997) pp. 173-82

explained that “the Latin American claim of *uti possidetis* was, in large part, an attempt to establish constructive sovereignty over unoccupied territory.”¹⁹¹

One explanation of the method by which new states gain title to territory is that title passes from ‘old’ to ‘new’ states. This was also the argument adopted by the newly independent Spanish American states.¹⁹² The agreement between these states to apply *uti possidetis* involved the assertion that their titles to territory were ‘coextensive’ with the title of the former Spanish Empire. No territory was accepted to be *terra nullius* open to occupation.¹⁹³ Spanish title was based on existing occupation, and it was to this title that the new states succeeded.¹⁹⁴ Ian Brownlie argues that in accepting the principle of *uti possidetis* there was implied agreement “on a rule of presumed possession” by the former units.¹⁹⁵ The various units were thereby agreed to have title to the entire territory delimited by the earlier administrative boundaries. No territory could thereby be claimed by non-American or neighbour states on the basis of occupation or prescription by arguments focusing on the prior lack of effective Spanish possession. Schwarzenberger has argued that the consent expressed in practice and agreements between the Latin American states to apply *uti possidetis* replaced use of traditional claims of title, such as acquisitions of *territorium* (or *terra*) *nullius*. It was “meant to exclude any form of original title in the relations between Latin American states”, as well as “intended to exclude recognition of territorial titles which non-American states might desire to acquire on the American Continent.”¹⁹⁶ It also effectively ruled out any territorial claims by indigenous groups.¹⁹⁷ It could be argued that either consent alone formed

¹⁹¹ McEwen, A. C., *International Boundaries of East Africa* (Clarendon Press, Oxford, 1971) p. 30. Wooldridge, F., “*Uti Possidetis* Doctrine”, in: Bernhardt, R. (ed.) *EPIL* <4> (North-Holland, Amsterdam, 2000) 1259-62 at 1260; also Bartoš, *supra* note 141, at 44

¹⁹² Bernárdez e.g. described the Latin American decolonisation as an issue of state succession. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening), Sep. Op. Judge Torres Bernárdez, ICJ Rep. (1992) 629-731 at 631

¹⁹³ McEwen wrote that “*uti possidetis* was used by [American states] not merely as a title to what they already possessed in fact but as a legal claim to the unoccupied remainder of what, in effect, was regarded by them as a sphere of influence.” He cited from the 1922 Swiss Federal Council Arbitral Award concerning the Colombia-Venezuela boundary: “This general principle offered the advantage of establishing an absolute rule that there was not in law in the old Spanish America any territory without a master; while there might exist many regions which had never been occupied by the Spaniards and many unexplored or inhabited by non-civilized aborigines, these regions were reputed to belong in law to whichever of the Republics succeeded to the Spanish Province to which these territories were attached by virtue of the old Royal Ordinances of the Spanish Mother country.” I *RIAA* 223 at 228, in: McEwen, *supra* note 191, pp. 28-9

¹⁹⁴ Occupation no longer forms the basis for a valid claim of title to territory; only *terra nullius* can be occupied and this concept has been discarded in PIL. Castellino, J. & Allen, S., *Title to Territory in International Law: A Temporal Analysis* (Ashgate, Aldershot, 2003)

¹⁹⁵ Brownlie, *supra* note 189, p. 132

¹⁹⁶ Schwarzenberger, *supra* note 150, at 320. See also Akweenda, *supra* note 166, p. 48; the Frontier Dispute case (Burkina Faso/Mali), ICJ Rep. (1986) 554 at 566 (paragraph 23) on ‘scotching’ the designs of non-American colonising powers

¹⁹⁷ Reisman, M., “Protecting Indigenous Rights in International Adjudication”, 89 *AJIL* 2 (1995) 350-62 at 352

the basis for title to Latin American territory, or that the new states consolidated their claims of succession to Spanish title by their own agreements. Either way, no other claims of title to Latin American territory would succeed, as it was agreed that consent would be withheld in relation to any other claims made apart from those of succession to prior Spanish title. No other claims of title could be consolidated.

Agreement on *uti possidetis* = consent → only succession to Spanish title granted legal title to Latin American territory

The effect of the formula was to recognise title to former Spanish territory without the need to show effective possession, which in the context would have been a requirement impossible to fulfil. The agreement to apply *uti possidetis* then had two important implications: the Latin American states agreed between themselves that they would neither make nor recognise claims made on any other basis than continuation of title to the territory delimited by the Spanish divisions; and by excluding the possibility of claims being made to any American *terra nullius* or on the basis of titles *jure belli*, potential non-American claims made over American territory were pre-empted.¹⁹⁸

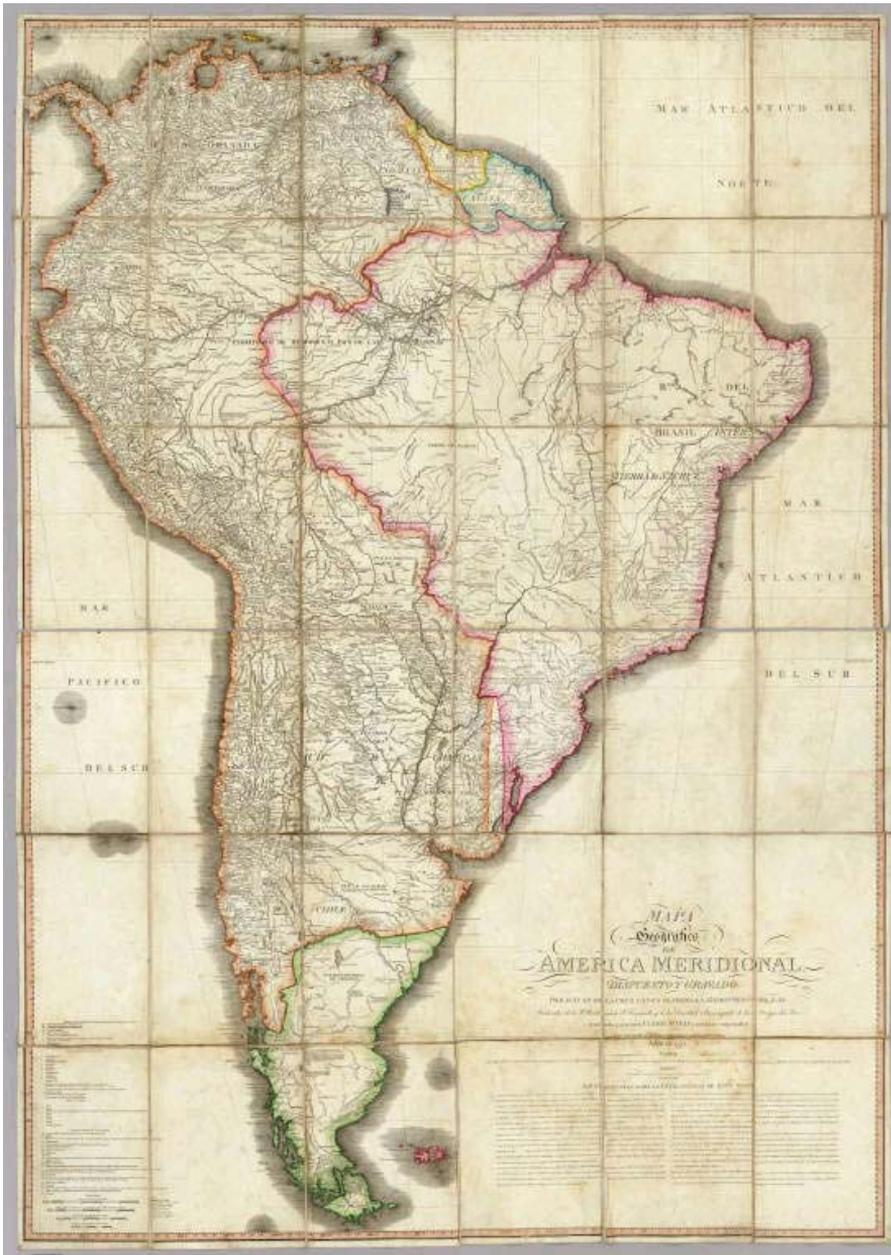
The second, essentially different and rather less successful, American application of *uti possidetis* was in the determination of boundary disputes. It is one thing to establish general agreement among several protagonists that no further parties will be allowed to enter the competition, and that the cake, or territory, is theirs to divide. The results of the slicing are another matter entirely.¹⁹⁹

Latin America had been divided between Portugal and Spain,²⁰⁰ and the two boundary issues that arose at the independence of the former colonial entities related partly to the former international boundary between Spain and Portugal, as well as to the Spanish internal administrative boundaries.

¹⁹⁸ Schwarzenberger wrote that conquest only provides an inchoate title unless consolidated by recognition or at least acquiescence, which, by referring to the doctrine of *uti possidetis*, the new states proclaimed they would not provide. Schwarzenberger, *supra* note 150, at 318-9

¹⁹⁹ On the distinction between determining title and boundary location, see Sharma, *supra* note 190, pp. 21-30

²⁰⁰ In the remainder of South America Britain, France, and the Netherlands had the colonies of British Guyana (until 1814 the Dutch United Colony of Demerara and Essequibo and the colony Berbice, united in British Guyana in 1831; independent in 1966), French Guyana, and Dutch Guyana or Suriname (the latter independent in 1975).



Map 1. *Mapa Geografico de America Meridional*, by Juan de la Olmedilla, 1799
With kind permission of David Rumsey Map Collection, www.davidrumsey.com

Brazil was the only Latin American entity that had been under Portuguese control, and it gained independent statehood as one unit. No internal Brazilian boundaries therefore became

international boundaries at independence.²⁰¹ The remainder of Latin American colonial entities that gained independence had been under the control of Spain, but that power had not defined its overseas administrative units sufficiently clearly,²⁰² and the uncertainty led practically all Latin American countries into border disputes at independence.²⁰³ The contested Spanish boundaries had formerly been the internal borders of one empire and therefore never subject to inter-state negotiation or the delimitation and demarcation process to which most international borders are subject. The geographic ignorance of Madrid, the mode of colonial settlement and expansion,²⁰⁴ as well as the less immediate political importance of precise internal boundaries accounted for the lack of clear boundaries.

The picture often portrayed is that the new states of Latin America primarily used the principle of *uti possidetis* to settle boundary claims, using the formula: “as you have the right to possess, according to the recorded acts of the sovereign and the known facts relating to jurisdiction of his agents.”²⁰⁵ In early inter-state agreements including reference to *uti possidetis* the treaties explain that the application of the principle was merely to provide a temporary solution until a final delimitation and demarcation of the relevant boundary could be contracted.²⁰⁶ In this, it shows some similarity to the Roman *uti possidetis*, in constituting a

²⁰¹ Pedro, the son of the Portuguese king, allied himself with the colonists’ revolt against the king’s efforts to restore colonial status after having been a kingdom, and became Brazil’s first emperor in 1822. Lalonde, *supra* note 181, p. 28

²⁰² See e.g. the *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Rep. (1992) 351 at 380 (paragraph 28). Moore writes: “When the process of emancipation was complete, not a single boundary line had been actually agreed upon and defined, much less marked. Even where attempts were made to indicate them, the indications were insufficient or defective, owing to the want of precise geographical data. The earlier laws, decrees and orders of the former Spanish government, home and colonial, were for the same reason necessarily insufficient.” Moore, *supra* note 143, at 338; also Maier, Georg, “The Boundary Dispute between Ecuador and Peru”, 63 *AJIL* 1 (1969) 28-46 at 30-34: “The King of Spain [...] sent voluminous instructions to his overseas officials. These *cédulas* often involved the transfer of territory from one jurisdiction to another, but they were in many instances so ambiguous, inconsistent or openly contradictory to other decrees that the royal officials were unable to reconcile their instructions and thus left them unexecuted. The confusion was especially prevalent in outlying regions [...]”

²⁰³ Woolsey, L. H., “Boundary Disputes in Latin America”, 25 *AJIL* 2 (1931) pp. 324-33 at 324. Alejandro Alvarez (*American Problems in International Law*, 1909) was even more categorical; he wrote that though many boundary conventions were concluded, the lines were vague: “For this reason, all the states of America have had boundary disputes with all of their neighbors.” Quoted in: Moore, *supra* note 143, at 333

²⁰⁴ Ireland noted: “Another cause of conflict [apart from the manner of settlement that left great areas uninhabited], especially potent in the earlier years, was the ignorance of Madrid of the real geographic and physical conditions in the overseas kingdoms, so that many of the decrees and ordinances [...] could not in fact be applied on the ground at all [...]” Ireland, Gordon, *Boundaries, Possessions, and Conflicts in South America* (Harvard University Press, Cambridge, Mass. 1938) p. 325

²⁰⁵ Boggs, S. Whittemore, *International Boundaries: A Study of Boundary Functions and Problems* (Columbia University Press, N.Y., 1940) p. 80

²⁰⁶ The 1819 act uniting New Grenada and Venezuela stated that the boundaries of the new republic should be those of the former captaincy-general and viceroyalty, but that the “settlement of its precise boundaries” should be “reserved for a more suitable time.” The Treaty of Union between Colombia and Peru, the Treaty of Limits between the Argentine Republic and Paraguay and the treaty between the United Provinces of Rio de la Plata and Chile contained similar arrangements. See additional examples in: Moore, *supra* note 143, at 338-44, 353.

temporary solution and protection of possession²⁰⁷ until the respective claims could be finally determined. That it was the primary function of *uti possidetis* to exclude otherwise valid claims of title to territory made on the basis of, for example, occupation or prescription, by precluding recognition or acquiescence, explains why the doctrine could be claimed to have legal effect in this respect, while still only being recorded as a temporary solution in relation to where the permanent boundary between the various states would finally be located. In fact, while *uti possidetis* was absent in early boundary agreements, in certain instances other factors were recorded as a basis for the determination of common boundaries.²⁰⁸ It would seem that the leaders were well aware of the fact that agreeing upon and delimiting their common boundaries would not be an easy task, and would require sufficient time and preparation. The agreement to apply *uti possidetis* would not produce an ‘instant Polaroid’ of the boundary.²⁰⁹ Most of the disputed boundaries were later determined by bilateral negotiations, commissions or by arbitration, and often on the basis of actual possession or natural boundaries.²¹⁰

In his account of how the Spanish internal divisions gained support as international divisions, Gordon Ireland calls attention to the perceived practical advantages of the retention rather than any perceived legal obligation:

The first juntas seemed to recognize the general frontiers of their jurisdiction at the boundaries of the former governments in whose capitals they were functioning, and tacitly to recognize the mutual advantages of such limitations, which the vacant and usually non-vital border territory made it easy to observe.²¹¹

John Moore has noted that it was not until years after independence, following armed conflict over Latin American boundaries and new claims to territory being brought, that attempts were made to establish a general principle that would provide a defence against force used to gain

Ireland and Lalonde observed similar temporary character of boundary agreements: Ireland, *supra* note 204, pp. 119, 219, 327; Lalonde, *supra* note 181, pp. 29-30

²⁰⁷ In the Latin American context the possession had to be agreed to exist, as in large areas there was no effective occupation.

²⁰⁸ Moore, *supra* note 143, at 338-44

²⁰⁹ As it was recognised that time would be needed to delimit common boundaries, it does not seem likely that they understood *uti possidetis* to be a tool that provided a clear and unequivocal solution.

²¹⁰ Moore, *supra* note 143, at 339-40, 344, 355-6. See also the large number of Latin American boundary arbitration awards, in: Stuyt, A. M., *Survey of International Arbitrations* (Martinus Nijhoff, The Hague, 1939). In her excellent article of 1972 Munkman discussed various criteria that arbitrators have often used to determine boundaries. Under the heading *Historical Criteria* she referred to *uti possidetis* as the most “familiar of the specified, agreed criteria”. Though noting the utility of *uti possidetis* as excluding claims of title based on occupation, she pointed out its inability to adequately determine boundaries and the use of other criteria. Munkman, A. L. W., “Adjudication and Adjustment – International Judicial Decision and the Settlement of Territorial and Boundary Disputes”, 46 *BYIL* (1972-3) 1-116 at 22

²¹¹ Ireland, *supra* note 204, p. 327

territory,²¹² in effect trying to preclude claims to title based on occupation or prescription by neighbour states. This would explain why the entry of references to *uti possidetis* in agreements between the former Spanish colonial entities increased only after this time.²¹³ If such a principle was established, it was binding on the parties by their consent, and gained its legal effect by the role of consent or acquiescence in consolidating title to territory. The application of *uti possidetis* in the Spanish American context of boundaries is here suggested to have been aimed primarily at denying the validity of claims of title to territory based on occupation or prescription, and played only a smaller role in forming a general and temporary solution to the location of boundaries, pending labour-intensive agreements. In each case of application, without exception, the basis for such an application was the consent of the parties. There is no evidence of *opinio iuris* in the Latin American practice.

With regard to the main international border delimiting the American dominions of Portugal and Spain, the successor states agreed that the principle of *uti possidetis* was to be applied. The international boundary between Portugal and Spain in South America had been decreed by papal bull in 1493, was modified by the Treaty of Tordesillas in 1494, but was found to be “impossible to apply” at demarcation.²¹⁴ In 1750 the two states therefore, “abandoning the imaginary lines of Pope Alexander VI”,²¹⁵ decided to declare both documents null and void, and agreed to two rules – the first of using natural boundaries, and the second of recognising actual possession of territory. The effect was to recognise Portuguese territorial advances past earlier agreements. In practice, however, the newly-agreed boundary was not demarcated.²¹⁶ The principle of possession was retained at decolonisation, and in bilateral agreements between independent Brazil and bordering states Uruguay,²¹⁷ Peru,²¹⁸ Venezuela,²¹⁹ Paraguay,²²⁰ Argentina,²²¹ and Bolivia²²² *uti possidetis* was

²¹² Moore, *supra* note 143, at 344-5

²¹³ Lalonde, *supra* note 181, p. 41

²¹⁴ Moore, *supra* note 143, at 334-5

²¹⁵ Ireland, *supra* note 204, p. 323

²¹⁶ The 1750 Madrid treaty was later also annulled; however, the new 1777 San Ildefonso treaty generally followed the content of the Madrid Treaty of Possession. Ireland, *supra* note 204, pp. 12, 323-5. Also Moore, *supra* note 143, at 335

²¹⁷ This October 12, 1851 treaty is interesting as the parties agreed to consider as null and void earlier territorial treaties (from 1819 and 1821) and instead recognise *uti possidetis* as the basis for their common boundary regulation. Ireland, *supra* note 204, pp. 132-3

²¹⁸ Under the bilateral treaty of October 23, 1851 the principle of *uti possidetis* was accepted, though adjustments could be agreed upon. *Ibid.*, p. 125

²¹⁹ Note, however, that the treaty of November 25, 1852 mentioning *uti possidetis* failed to be ratified by Venezuela, while a new March 5, 1859 treaty omitting *uti possidetis* but stating the same boundary was instead accepted. *Ibid.*, pp. 138-41

²²⁰ An 1856 treaty stated that until a final agreement could be concluded the *uti possidetis* was to be respected. *Ibid.*, pp. 117-23

explicitly referred to as the basis for the determination of their common boundaries.²²³ The *uti possidetis* referred to had *de facto* character as it was based on actual possession, and resembled the post-war peace treaty assumption of *statu quo post bellum* – legalising the territorial *status quo* after conflict. In this way, both the Portuguese colonial and the Brazilian post-colonial territorial expansion beyond the international Portuguese-Spanish agreement could be justified.²²⁴ The agreement to apply *uti possidetis* meant that effective possession was recognised as proving title to territory, either because there was no binding pre-existing agreement, as Brazil argued, or by modifying or replacing the pre-existing agreement.²²⁵

Brazil also bordered French, British and Dutch Guyana. The various settlements of the common boundaries were produced in different manners, and the context was also different, as Brazil was the sole independent state among the four states concerned. No references were here made to *uti possidetis*. Some of the boundaries had already been bilaterally agreed, and no claims of title on other bases would then be considered. The issue in such cases focused instead on actual interpretation of the treaty terms. Where no boundary had been agreed upon before Brazil's independence, *uti possidetis* would serve little purpose if there were no agreed unit boundaries to refer to, and the determination of the 'better' title to territory would instead constitute the paramount issue. The Brazilian and French boundary was settled by arbitration in 1900, the task of the arbitrators being that of determining the identity of a river referred to in the existing French-Portuguese Treaty of Utrecht of 1713.²²⁶ The boundary dispute between French and Dutch Guyana also concerned a river boundary. The parties had agreed that the river Maroni was to act as their common boundary, but unfortunately the river divided into two branches, and each party claimed the boundary followed different branches. The issue was settled by arbitration in 1891.²²⁷ The boundary between Portugal and Britain had not

²²¹ The boundary was determined by an arbiter, whose decision was based on the Treaty of San Ildefonso and a treaty from 1885. *Ibid.*, pp. 10-17

²²² Treaty of March 27, 1867. *Ibid.*, p. 40

²²³ Moore, *supra* note 143, at 335-6

²²⁴ Portugal argued that the 1493/4 boundary was invalid, and possession should form the basis of title to territory beyond the boundary, which resulted in the 1750 and 1777 border agreements; the Brazilians similarly claimed that the 1777 Treaty of San Ildefonso had become invalid, and possession, or *uti possidetis de facto*, should be recognised as granting title to territory beyond that line. Ganzert, Frederic, "The Boundary Controversy in the Upper Amazon between Brazil, Bolivia, and Peru, 1903-9", 14 *The Hispanic American Historical Review* 4 (1934) 427-49 at 428-30

²²⁵ Lalonde writes that Brazil argued that the 1777 Treaty of San Ildefonso, which followed the 1750 Spanish-Portuguese treaty, was inapplicable, as the post-conflict Badajoz Peace Treaty of 1801 had not reconfirmed it, and therefore only effective occupation could form title to territory. Lalonde, *supra* note 181, p. 32

²²⁶ By Article 8 of the 1713 treaty France gave up claims of land south of the Japoc of Vicente Pinzón. The Swiss Federal Council was to determine whether this referred to the river Oyapock or the Arawari. Ireland, *supra* note 204, pp. 144-51

²²⁷ The award of 25 May, 1891 was rendered by the Emperor of Russia, Alexander III. Stuyt, *supra* note 210, p. 161

previously been agreed, and the case between Brazil and Britain was decided by arbitration. The King of Italy rendered the award in 1904 and based title to the disputed territory solely on occupation, which resulted in Britain receiving all the area claimed by it.²²⁸ The boundary between Brazil and the Netherlands had, similarly, not been agreed upon earlier, but was delimited by a bilateral treaty concluded in Rio de Janeiro in 1906.²²⁹ Venezuela bordered British Guyana. That boundary had been disputed already between Spain and the Netherlands, and was only determined by arbitration in 1899 after US involvement.²³⁰

The differing arguments for the application of *uti possidetis* in Latin America have often been summarised in two theories termed *uti possidetis de facto* and *uti possidetis juris*, referring to actual or rightful occupation at the time of independence.²³¹ There are three fundamental questions that *uti possidetis* does not answer, and which must be determined before and in order for *uti possidetis* to be applied in boundary cases. At what point in time does *uti possidetis* stop the clock, turning control or a claim into legal entitlement?²³² To which unit's boundaries is *uti possidetis* to be applied? Will it be control (*de facto*) or rightful claim (*juris*) of the territory that will be the determining factor?²³³ In practice the distinction between the *de jure* and *de facto* aspects of *uti possidetis* has not been absolute, and in several

²²⁸ In 1926 Brazil and Britain agreed by treaty to remedy certain inaccuracies in the award. Ireland, *supra* note 204, pp. 152-8

²²⁹ *Ibid.*, pp. 158-60

²³⁰ Though neither party was granted its entire claim, the line followed the British proposition more closely. *Ibid.*, pp. 230-43. See also Stuyt, *supra* note 210, pp. 216-7. Venezuela reasserted its claim to the disputed territory in the 1960s. Kaikobad, K. H., "Some Observations on the Doctrine of Continuity and Finality of Boundaries", 44 *BYIL* (1983) 119-41 at 125. In 1970 a 12-year moratorium on the dispute was agreed between Guyana, Britain and Venezuela. Venezuela recently renewed its claims to the territory. See Guyana and Venezuela in 'The World Factbook' at: <http://www.cia.gov/cia/publications/factbook/index.html> (updated 18 December 2003)

²³¹ Blum, Yehuda, *Historic Titles in International Law* (Martinus Nijhoff, The Hague, 1965) p. 341; Cukwurah, *supra* note 181, pp. 114-5. Latin American states other than Brazil have relied on *uti possidetis de facto* to support claims. In a boundary dispute between Guatemala and Honduras the former argued for *uti possidetis de facto* to be applied by the special tribunal determining the claims, while the latter argued for a *de jure* application. The Tribunal found no consensus of opinion among eminent jurists establishing a definite criterion for the application of *uti possidetis*, and attempted to determine the dispute on the basis of administrative control based on 'the will of the Spanish monarch'. The tribunal still found the 1821 *uti possidetis* line difficult to establish for lack of reliable pre-independence information. 2 *RIAA* 1307 (1933) recounted in: McEwen, *supra* note 191, p. 29

²³² In relation to the century-long boundary conflict between Peru and Ecuador, Woolsey asked whether the principle of *uti possidetis* in the case "refer[s] to the date of 1810 as generally adopted in South America, or to the date of proclamation of independence, or to the date of the achievement of independence, and do these dates apply to separate colonial provinces or of the group that became an independent state?" Woolsey, L. H., "The Ecuador-Peru Boundary Controversy", 31 *AJIL* 1 (1937) 97-100 at 99

²³³ Ireland writes that "merely to invoke the *uti possidetis* at a given time does not of itself determine the solution of conflicting claims, since the boundaries as set down on paper of an administrative, judicial, or even ecclesiastical division often differ materially from the lines to which permanent occupation or occasional jurisdictional authority has actually been carried." Ireland, *supra* note 204, p. 329

cases where it was agreed to apply *uti possidetis juris*, other factors such as *effectivités*²³⁴ and equity had to be considered, as the application of *uti possidetis juris* simply could not provide enough evidence to delimit a boundary on that basis.²³⁵ Because of the complex aspects involved – at what point in time *uti possidetis* turns a fact into a legal argument, whether control or legal claim will be determinant, and the uncertainty as to which unit is to be preserved and the precise location of the administrative internal borders²³⁶ – it is not surprising that the application of *uti possidetis* to boundaries in Latin America had to be, and also was, based on voluntariness and agreement between the parties in each case. It thus lacked any normative or binding character of itself apart from agreement to apply it:

A rule derogating to generally accepted customary international law is binding only on those persons which have, by a Convention, expressly agreed to it.²³⁷

The Latin American practice is inconclusive on *uti possidetis* in relation to boundaries.

Treaties between or constitutions of the newly independent states often lacked mention of the

²³⁴ Evidence of “continuous and peaceful display of State authority”; definition given of what may be evidence of the effective possession of a state, in the arbitration award Island of Palmas (Netherlands v. US) 2 *RIAA* (1928) 829 at 869. See also the Clipperton Island case (France/Mexico), Arbitral Award of 28 January 1931, in: 26 *AJIL* (1932) 390; Case Concerning the Legal Status of Eastern Greenland (Denmark/Norway), PCIJ (1933), Ser. A/B, No. 53. The definition in the Eritrea-Yemen Arbitration, Award, Phase I (9 October 1998), chapter VII was “Evidences of the Display of Functions of State and Government Authorities”.

²³⁵ Moore writes that *juris* to a certain degree included *de facto* possession: “To say that the word ‘*juris*’ excludes altogether the consideration of possession *de facto*, is to make the words self-destructive. The judgment of ‘*uti possidetis*’ cannot be predicated of a situation from which the thought of continued physical possession is wholly excluded. Such a use of terms would be purely fanciful.” Moore, *supra* note 143, at 350. In the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), ICJ Rep. (1992) 351 at 514, the Chamber applied “equity *infra legem*” to determine parts of the boundary where “the line of the *uti possidetis juris* in this area is impossible to determine”, and also considered evidence of *effectivités* by both parties (e.g. at 515-16). Another example of the use of equity *infra legem* when the *uti possidetis* line could not be fully established is found in the Case Concerning the Frontier Dispute (Burkina Faso/Mali) ICJ Rep. (1986) 554 at 633, where the Chamber concluded that “in the absence of any precise indication in the texts of the position of the frontier line, the line should divide the pool of Soum in two, in an equitable manner.” For an overview, see Sharma, *supra* note 190, pp. 92-97

²³⁶ As to unit and location, see ICJ’s observations on the complexity in the Latin American context; Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), ICJ Rep. (1992) 351 at 387 (paragraph 43). Note the observation that “indeed the territories which became El Salvador and Honduras were, before 1821, all part of the same larger administrative area, the Captaincy-General or Kingdom of Guatemala.” Thus it was not the case that the next unit down was the one selected for independent statehood.

²³⁷ Bloomfield, Louis, *Egypt, Israel and the Gulf of Aquaba* (Carswell Co., Ltd., Toronto, 1957) pp. 98-108. Cf. The oft-quoted arbitral award of the Swiss Federal Council of March 24, 1922, concerning certain boundary questions between Colombia and Venezuela, stated: “When the Spanish Colonies of Central and South America proclaimed themselves independent in the second decade of the twentieth century, they adopted a principle of constitutional and international law to which they gave the name UTI POSSIDETIS JURIS of 1810, with the effect of laying down the rule that the bounds of the newly created Republics should be the frontiers of the Spanish Provinces for which they were established.” Citation in: Cukwurah, *supra* note 181, p. 113. Though this is not entirely correct, as certain Spanish provinces claimed other dates, apart from this it should be noted that the Council spoke only of the Spanish colonies, which naturally claimed legal documents over occupation, in contrast with Brazil. The award is only in error cited to argue for a Latin American or South American practice of *uti possidetis juris* of 1810.

phrase, and instead referred to the colonial *status quo*. Treaties that did refer to the concept were concluded both on the basis of *uti possidetis juris* and *de facto*. Different level units became independent and territorial transfers of land occurred at and after independence.²³⁸ There was permanent disagreement as to the date when ‘the clock stopped’,²³⁹ and *uti possidetis* was applied in relation to the former international boundary, between the Spanish and Portuguese possessions, while there was little uniformity in relation to the Spanish internal administrative boundaries.

In a boundary case involving El Salvador and Honduras the ICJ stated that the application of *uti possidetis* can ‘preserve’ something that was meant to have a different purpose:

[U]ti possidetis juris is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.²⁴⁰

The preservation was nevertheless always based on an agreement to preserve the boundary in question. American state practice in relation to *uti possidetis* is clear on the effect of excluding foreign claims to territory, but does not provide much more clarity than that. Because of the lack of *usus* and *opinio iuris*, the Latin American practice cannot be accepted to have created rules of regional customary law, much less a norm of general customary international law. As consent in its various forms plays an important role in the consolidation of title to territory, the agreements made between the newly independent states to claim the validity of *uti possidetis* as a presumption of possession gained legal effect through precisely that – the special role of consent. *Uti possidetis* was applicable only to Latin American territory through agreement of the parties claiming succession to Spanish title.²⁴¹ On the issue of internal boundaries generally gaining international status, the newly independent states agreed that they ‘succeeded’ to the former Spanish boundaries as a method whereby their title was consolidated. Claims on other bases were entirely possible to make, but effective occupation would then be required for title to territory to arise. Logically then, if occupation was a legal option, *uti possidetis* could only provide an alternative to such occupation where

²³⁸ Lalonde writes that none of the treaties concluded between Spanish republics from 1811 to 1850 makes reference to *uti possidetis*, even though boundary provisions were made in 31 of the 50 agreements. Between 1850 and 1900 five treaties, three of them arbitration treaties, out of 77 treaties referred to *uti possidetis*. Lalonde, *supra* note 181, pp. 28-51. Since the treaties with Brazil included references to *uti possidetis* the countries must have been well aware of the concept.

²³⁹ Moore, *supra* note 143, at 344. See e.g. Haitian suggestion of *uti possidetis* of 1874 and Dominican *uti possidetis* of 1856. Lalonde, *supra* note 181, p. 42

²⁴⁰ Land, Island and Maritime Dispute case (El Salvador v. Honduras) ICJ Rep. (1992) 351 at 388, paragraph 43

²⁴¹ Bloomfield discussed acquisition of territory and *uti possidetis*, and points out the American irregularity of applying *uti possidetis*. He argued that the principle “insists on occupation as a basis for sovereignty” and is derogatory to international law. Bloomfield, *supra* note 237, pp. 98-108

all parties agreed not to use the option of force – where all parties agreed for another source of title, in this case *uti possidetis*, to be determinant.²⁴² This does not turn their choices into law for later states. Instead, it illustrates that the option required consent by all as a presupposition for it to function. It is then an option that is contextual – agreement will always be needed for it to function – and it can then, by definition, never turn into a legal rule that applies without the consent of the parties in each case.²⁴³

In summarising the Latin American experience of *uti possidetis*, its two applications therefore need to be distinguished. The first consisted of agreeing that the titles to territory of the newly independent states were ‘coextensive’ with the title of the former Spanish Empire, in a form of succession to territory under no effective control, which pre-empted *inter alia* foreign claims of title to territory based on occupation or prescription. The second application concerned the determination of the precise location of the boundaries, where the point of departure was previous administrative divisions of different levels, with consideration nevertheless given to other factors, such as natural boundaries, evidence of *effectivités*, and even equity. It is undisputed that all cases where *uti possidetis* was applied in Latin America, in issues of title and boundary determination, were based on agreement between Latin American states to apply the doctrine. They differed on basically all aspects of how the doctrine should be interpreted and applied, but it was never imposed on the parties without their consent.

The Latin American experience of *uti possidetis* as a tool for boundary delimitation shows that the use of the principle is, at best, flawed. S. Whittemore Boggs’ epitaph on the American episode was that applying the principle to boundaries proved to be much more complex than expected: “its use seldom if ever removes ambiguity.”²⁴⁴ Moore’s summary was that the principle “has not been so constantly invoked nor has its practical effect been by any means so important as writers and learned advocates have sometimes asserted”.²⁴⁵

Though at this point it might seem natural to proceed straight to the fifties and African decolonisation in an account of *uti possidetis*, there is a prior period that is relevant to the

²⁴² It must not be forgotten that there have indeed been a number of wars concerning territory between Latin American states, which means either that *uti possidetis* was not uniformly applied, or it did not always provide a satisfactory solution for the parties.

²⁴³ If any rule had come about, it would have been that when an empire breaks down no unit of any level is prohibited from claiming independence.

²⁴⁴ Boggs, *supra* note 205, p. 80. Boggs continues: “If there had been no debate regarding the place where the boundary rightly belonged, there would have been no occasion to employ the term *uti possidetis*; but the use of the term implied only an abstract principle and did not dispose of the problem of territorial delimitation to which it was meant to be applied.”

²⁴⁵ Moore, *supra* note 143, at 344

discussion of the development of *uti possidetis* into law. A question spurred by later interpretations of the Latin American experience is whether the Latin American application concerned cases of state succession generally or was only related to decolonisation. The question is relevant, because while the ICJ limited its application to decolonisation, the Badinter Commission claimed it was also binding in cases of non-colonial state succession. The component of *uti possidetis* that was held to be binding in the latter case was not in validating claims to unadministered territory, but that at decolonisation or dissolution of a state, the highest former administrative boundaries should become international unless the parties agree otherwise. The result of that is that units which become independent then would gain title to the entire territory delimited by the former administrative boundary by default.

3.3.2 Post-first world war settlements

The post-first world war settlement led to a redrawing of European boundaries as well as change of rulership or administration of the colonies of the losing powers. Self-determination was coupled with the principle of nationalities, which led to a great shifting of boundaries according to nationality – not to prior administrative divisions. Certain existing states were enlarged or reduced, while a few new states came into existence. Self-determination was then not only connected with issues of independence, but of national consideration by various modes of implementation.

Self-determination + consideration of nationalities = boundary changes (alternatively: minority protection systems)

The question of the Åland Islands, which was raised before the League of Nations at the independence of Finland from Russia, is interesting in this context. While the islands had formed part of the Grand Duchy of Finland, a majority of the islanders wished to become part of Sweden. The committee of jurists who determined the legal issues that had been referred to the League of Nations stated:

The Aaland Islands were undoubtedly part of Finland during the period of Russian rule. Must they, for this reason alone, be considered as definitely incorporated *de jure* in the

State of Finland which was formed as a result of the events described above? The Commission finds it impossible to admit this.²⁴⁶

The Commission of Rapporteurs recommended, on the basis that self-determination was “not, properly speaking a rule of international law”,²⁴⁷ that the Åland Islands should remain in Finland, though they warned that if Finland rejected their proposal of minority guarantees they would be forced to recommend that the islands be separated from Finland in accordance with the inhabitants’ wishes.²⁴⁸ Rigo Sureda’s discussion of the Åland Islands case does not mention *uti possidetis*, but describes the central issue thus: “[S]hould the people be delimited according to objective criteria of nationality [the Finnish thesis] or according to the subjective expression of the people’s wishes [the Swedish thesis]?” He viewed the situation as one concerning the wishes of people – the question revolved primarily around which group this was – and concluded:

[The Council] accepted the Finnish thesis. The disposal of the territory corresponded to the wishes of all Finnish nationals, including the inhabitants of the Aaland Islands and the mainland. A strict criterion of territorial nationality was adopted in the sense that ‘the people’ was taken to be all the people within the entire territory and not only those within the part seeking secession.²⁴⁹

On no occasion during the treatment of the question before the League was *uti possidetis* mentioned, though Finland had been under foreign administration. Suzanne Lalonde has concluded:

If a principle of general international law had existed that was binding on the parties and that provided a clear solution – Finland’s pre-independence boundaries were to be respected – it seems likely that the Council would have seized on the doctrine of *uti possidetis* as a legal justification for its resolution of the dispute in the favour of Finland.²⁵⁰

Perhaps being under any foreign administration is not what activates *uti possidetis*, but instead the component of geographically distant administration – such as Spain in relation to Latin

²⁴⁶ Report of the International Committee of Jurists, 9, in: Lalonde, *supra* note 181, p. 77. As the PCIJ had not yet been established, a special commission of jurists was appointed to determine *inter alia* whether the League could treat the Åland Islands issue, or whether the situation fell within the internal affairs of Finland. After the Committee’s decision, a commission of rapporteurs was established to recommend a decision. *Ibid.*, p. 68

²⁴⁷ The Committee of Jurists had also held that, “The recognition of this principle in a certain number of international Treaties cannot be considered as sufficient to put it on the same footing as a positive rule of the Law of Nations.” Cited in the Report by the Commission of Rapporteurs, 27. *Ibid.*, p. 74

²⁴⁸ Crawford calls this “*carence de souveraineté*”. Crawford, *supra* note 137, p. 86

²⁴⁹ Sureda, *supra* note 6, pp. 116-17. He nevertheless admits that “[t]here is strong evidence that the solution recommended by the Rapporteurs, and later adopted by the Council, was taken on geographical grounds; geologically the Aaland Islands are part of Finland and it would be difficult to draw a boundary between Finland and the Country owning them.” *Ibid.*, p. 235, footnote 26

America. The vital component could not have been race, as the newly independent Latin American countries were still ruled by second-generation European settlers. Possibly the vital component could instead have been ‘salt-water’, the idea used to identify entities of colonial type which were granted self-determination through the later UNGA Resolutions 1514 and 1541 (1960).²⁵¹ This could technically explain the non-applicability of *uti possidetis* to Finland and even post-first world war cases that could have been argued to have had colonial characteristics, such as Bosnia and Hercegovina, Slovenia, Croatia and Egypt. The boundaries of the ‘United Kingdom of Serbs, Croats and Slovenes’ were determined in Paris in 1919, and no former Austrian and Hungarian divisions were retained. Clearly *uti possidetis* was not applied or claimed to be relevant. While Egypt’s pre-independence boundaries were retained in 1922, Britain had been a party to the Ottoman Sinai division of 1906 and the border had therefore already been internationally agreed, though it formally enjoyed the status of an internal administrative boundary. Still, in the case no reference was made to *uti possidetis*.²⁵² The League of Nations’ approach also supports the non-applicability of any inter-war *uti possidetis*, as the Council could decide on the alteration of faraway colonial boundaries.²⁵³

In the recent Eritrea-Yemen Arbitration concerning claims to a number of uninhabited islands and maritime delimitation between the two states in the Red Sea, Yemen argued that it had title to the islands on the basis *inter alia* of *uti possidetis*. In the 1998 award the Tribunal examined the claim under the doctrine of inter-temporal law and found that at the close of the first world war the principle of *uti possidetis* was thought to be limited to Latin America.²⁵⁴ The Spanish American practice had not then created a rule of customary international law in relation to all cases of independence. Indeed, post-first world war practice shows that boundaries were redrawn and new states born without any reference to the concept, since it was not perceived to apply.

²⁵⁰ Lalonde, *supra* note 181, p. 78

²⁵¹ UNGA Res. 1514 and 1541 (XV); *supra* chapter 2.1.1.1, v.

²⁵² Lalonde, *supra* note 181, pp. 78-89

²⁵³ Nevertheless, no such case was ever raised before the League. Instead, the UN General Assembly decided that the mandate of Palestine was to be partitioned, and two separate states established. Other examples of UNGA-sanctioned partitions are British Cameroon and Ruanda-Urundi. Sureda, *supra* note 6, pp. 35-53

²⁵⁴ Eritrea-Yemen Arbitration, Award, Phase I (9 October 1998), paragraph 99

3.3.3 Africa

At post-second world war decolonisation the former colonial boundaries in Africa were, with certain exceptions,²⁵⁵ accepted as the international borders of independent states.²⁵⁶ The term *uti possidetis* was, however, not used in any bilateral or multilateral agreements. Most African boundaries had previously been internationally agreed and were based on already existing agreements between foreign powers. The African boundary situation was then the reverse of the Latin American position. In the former only a minority of the boundaries had been the internal boundaries of one power.²⁵⁷

The existence of these boundary treaties allowed for another argument to retain the colonial boundaries as part of a legal requirement: as the boundaries were treaty-based and internationally agreed, thus falling within the ambit of international law, they have been argued to gain permanent character on that very basis.²⁵⁸ However, because of the *tabula rasa* doctrine of the law of state succession and the principle of *pacta tertiis nec nocent nec prosunt*, the argument was not that the boundary treaties themselves devolved on the new states, irrespective of consent by a kind of automatic succession.²⁵⁹ Instead, a distinction was made between the treaties themselves and the boundaries that had been agreed therein. The boundary within the treaty was presented as having moved from that of being part of the agreement into becoming an independent ‘fact’.²⁶⁰

²⁵⁵ The Belgian Trust territory Ruanda-Urundi was on a recommendation by a UN Commission referring to a “psychosis of mutual distrust” partitioned instead of becoming independent as one unit. See UNGA Res. 1746 (XV). Shaw, *supra* note 17, pp. 113-14, 268, footnote 64. Enclaves, such as Walvis Bay and Ifni, reverted to the territory in which they were located, British and Italian Somaliland were united, as were Ethiopia and Eritrea. The former German part of Togo at independence became part of Ghana instead of Togo, and the northern part of British Cameroun became part of Nigeria (the southern part united with the former French Cameroun to become independent Cameroun). Regarding enclaves, see Sureda, *supra* note 6, p. 219, 222

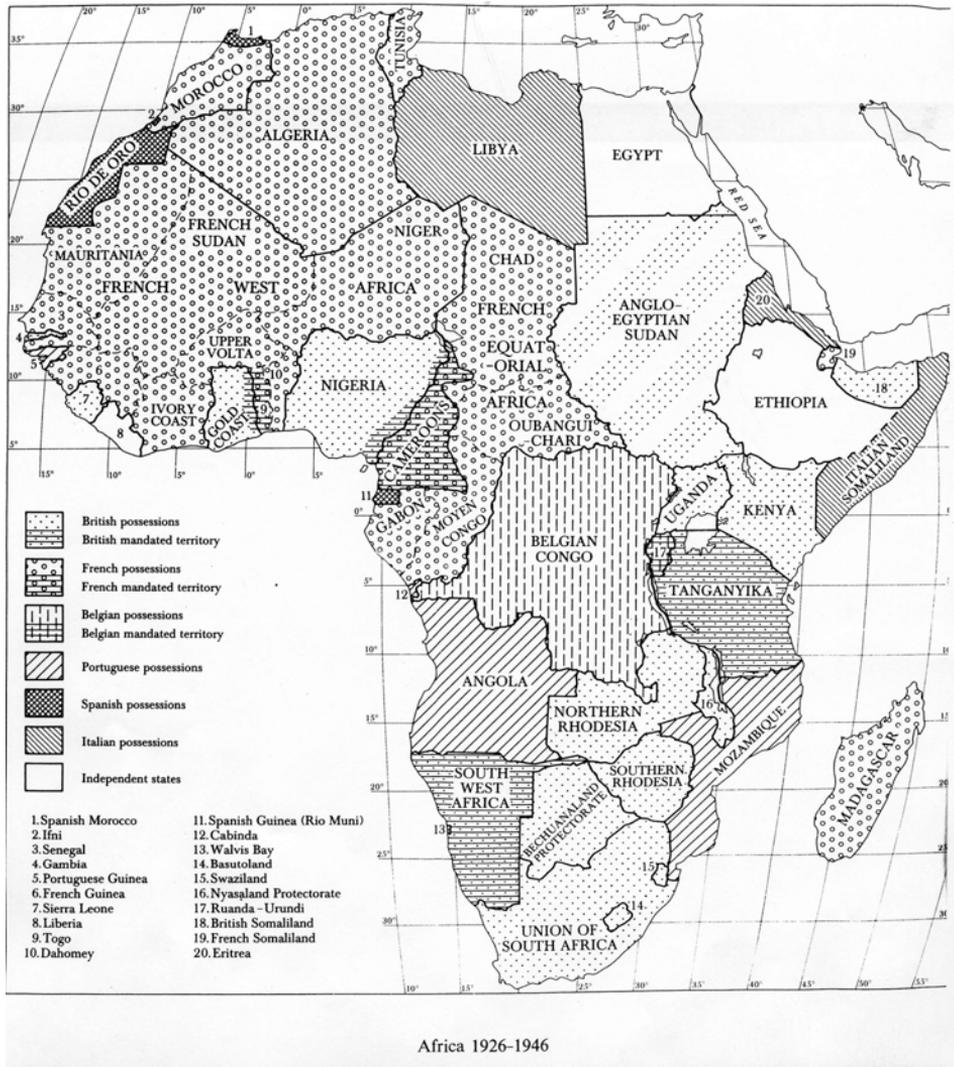
²⁵⁶ As the former boundaries were not always clear, *uti possidetis* did not provide an easy solution. Brownlie, Ian, *African Boundaries: A Legal and Diplomatic Encyclopedia* (Hurst, London, 1979) p. 849

²⁵⁷ France had in two cases organised its colonies in blocks with smaller units contained within. The two French blocks were French West Africa (Afrique Occidentale Française, AOF) containing eight colonies and French Equatorial Africa (Afrique Équatoriale Française, AEF) with four colonies. Britain was the only other European state in Africa with internal colonial boundaries.

²⁵⁸ *Infra* chapter 4.1.1. For the connection between treaty succession and the specific African context, see Ratner, *supra* note 180, at 596 and 600

²⁵⁹ Craven, Matthew, “The Genocide Case, the Law of Treaties and State Succession” 68 *BYIL* (1997) 127-63 at 152-3

²⁶⁰ International Law Association, *The Effect of Independence on Treaties: A Handbook* (Stevens & Sons, London, 1965) pp. 352-3, 361. For discussion and doctrine see references in: Akweenda, *supra* note 166, pp. 42-47. See the Convention on Succession of States in Respect of Treaties (1978) Article 11 and VCLT (1969) Article 62 excluding boundary treaties from the exception of *rebus sic stantibus*. Jennings and Watts note, however, that though succession of states and fundamentally changed circumstances are not exceptions which allow for changes to boundaries established by treaty “it does not follow that boundaries established by treaties are never to be questioned”. Jennings, R. & Watts, A. (eds.), *Oppenheim’s International Law*, 9th ed., vol. I (Longman, London, 1992) p. 663. The ILC has specifically commented on Article 62, reporting to the UNGA that the “article would not exclude the operation of the principle of self-determination in any case where the



Map 2. Colonial Africa, 1926-46, in: Brownlie, Ian, *African Boundaries: A Legal and Diplomatic Encyclopedia* (C. Hurst and Co., London, 1979) With kind permission of C. Hurst and Co.

The law was formulated as decreeing that new states ‘succeeded’ to the borders of the old unit, and not to the border treaty itself,²⁶¹ an acceptable exception to the doctrine of *tabula*

conditions for its legitimate operation existed.” UN Doc. A/6309/Rev. 1. See Ratner, *supra* note 180, at 600, footnote 81. If the theory of exceptions from ordinary treaty law rules applying to boundary treaties is based on Article 62, VCLT, and not customary international law, then Article 73 should play a role, as it states: “The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.”

²⁶¹ Cukwurah, *supra* note 181, pp. 105-10

rasa.²⁶² There are two bases for making this argument: the principle of the stability of boundaries, and the existence of *regimes* or effects resulting from boundary treaties.

The argument of international boundaries surviving past the lifespan of the treaty setting them up has been based upon the fundamental principle of the stability of boundaries.²⁶³ If a boundary has been agreed by treaty, even after the treaty has ceased to be binding, the boundary will continue, unless both states separated by the boundary agree to alter it.²⁶⁴ The stability of boundaries principle nevertheless only protects a boundary that has been delimited by international treaty, and which at least one party claims is correct. If neither party desires the continuation of a boundary, the principle of the stability of boundaries has, so far, not formed the basis for the continuation of such a boundary. It only functions as a kind of estoppel and a method of interpretation with regard to boundary treaties, rather than as a rule of international law requiring the continuation of all boundaries that applies irrespective of the will of the parties concerned. It deserves to be clarified then, that in the cases that refer either to the stability of boundaries or merely stability, issues of succession to boundaries and *tabula rasa* have not been broached. In the Temple of Preah Vihear case,²⁶⁵ the Aegean Sea Continental Shelf case,²⁶⁶ the Continental Shelf case,²⁶⁷ and the Territorial Dispute case²⁶⁸ the boundaries in dispute were all established by international treaties, and in each case one of the parties relied on the boundary established by the treaty. It should also be noted that in each of

²⁶² There is still a *lacunae*; rules on succession do not determine the succeeding entity, but presuppose its existence. For an entity to qualify for succession it must have a territory prior to succession (without which its claim cannot succeed). Rules on succession only determine the rights, duties and titles that follow succession, and cannot determine the extent of the territory of new states, which precedes their claims of rights granted through succession. Sharma, *supra* note 190, pp. 166-7

²⁶³ *Infra* chapter 3.4

²⁶⁴ “The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the life of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court. [...] A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary.” Case Concerning the Territorial Dispute (Libya/Chad) ICJ Rep. 6 at 37

²⁶⁵ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) ICJ Rep. (1962) 6. Thailand, whose boundary claim was denied on the basis of the principle of stability, had been an original party to the treaty in question.

²⁶⁶ Aegean Sea Continental Shelf case, ICJ Rep. (1978) 2

²⁶⁷ Continental Shelf case (Tunisia/Libya), ICJ Rep. (1982) 18 at 66. Here the Court merely observed that the parties had accepted the land boundary, which was used by the Court in the delimitation of the continental shelf: “Thus the permanence and stability of the land frontiers is one of the points where the Parties are in full agreement.” This adds little or nothing to the understanding of the principle, as the parties were in agreement over that boundary.

²⁶⁸ Case Concerning the Territorial Dispute (Libya/Chad) ICJ Rep. (1994) 6. Only Chad, a decolonised successor state, could have referred to *tabula rasa* in order not to be bound by the treaty boundary, but in the case it relied on the 1955 treaty for its claim. Libya, who denied that the 1955 treaty was in fact a basis for an existing boundary, had been an original party to the treaty and could make no such argument. Libya did, however, argue that in its interpretation the Court should consider Libya’s negotiation “disadvantage” due to lack of experience and knowledge of relevant facts. Case Concerning the Territorial Dispute (Libya/Chad) ICJ Rep. (1994) 6 at 20

the above cases, the party against which the principle of the stability of boundaries was used had been a signatory to the treaty in question. If a principle of stability requires the continuation of a boundary apart from the will of any of the parties affected, this is not supported by or evidenced in any legal decisions rendered so far. It should also be mentioned that the cases applying the principle of stability of boundaries necessarily involve two parties, where the agreement was made between the states concerned. The observation is pertinent, as pre-independence or devolution agreements were often concluded between the metropolitan state and the entity which was to gain independence.²⁶⁹

Succession to boundaries has also been argued on the basis of what the boundary has created in the way of rights or *regimes*. The classification of ‘dispositive’ or ‘territorial’ treaties existed prior to decolonisation,²⁷⁰ and was *inter alia* used to distinguish treaties that established regimes that affected other parties.²⁷¹ The legitimacy of requiring the continuity of certain regimes that affect many parties is understandable, for example, regarding international waterways.²⁷² The traditional justifications for ‘objective regimes’ either focus on the ‘law-making’ effect of such treaties or on acceptance of the regimes by third states. New states are arguably not bound by the regime by succession to the treaty itself, but because they, as all states, are bound by customary international law; the territorial regime is protected under customary international law. The argument has also been used in relation to boundaries, claiming that these fall within the same area and are therefore protected under customary international law. The issue is then not one of actual succession to boundaries, but of new states being bound by the customary law source of international law²⁷³ relating to the boundary, despite *tabula rasa*.²⁷⁴ A somewhat similar reasoning is that at the entry into force

²⁶⁹ Crawford, *supra* note 137, pp. 393-4

²⁷⁰ Matthew Craven attributes the term to Westlake (*International Law*, 1904) and quotes McNair’s explanation (*The Law of Treaties*, 1961) that their special characteristics are that they “recognize or grant or transfer ‘real rights’, that is, rights *in rem*”, the existence and validity of which are “independent of the treaties which created or transferred them”. Craven, *supra* note 259, at 154

²⁷¹ Craven notes that the ILC commentary to draft Article 11 of the 1978 Vienna Convention stated that “the rule should relate to the legal situation – the regime – resulting from the dispositive effects of the treaty rather than to succession in respect of the treaty”. *Ibid.*, at 154

²⁷² Craven terms these ‘objective treaty regimes’ which are binding *erga omnes*. *Ibid.*, at 156

²⁷³ *Ibid.*, at 156-7

²⁷⁴ A weakness of the boundary regime theory seems to be that if its binding character is the basis for continuity at succession, it would also seem to exclude later bilateral agreement to alter it by the consent of the two neighbours, as it benefits third parties. All states would have to consent to any alteration. It is difficult to see how boundaries other than those consisting of rivers would have third party effect, and it therefore seems that the protection of customary law only covers specific rights arising from special boundary functions. All boundaries cannot be understood to perform such functions.

of a boundary treaty, it is held to be executed, and then “acts as a kind of conveyance”, which is also binding on successor states.²⁷⁵

The principle *nemo dat quod non habet*, which precludes a state from transferring anything other than that which lay within its own competence, is closely related to territorial regime theory.²⁷⁶ In effect, what is suggested by its connection not only to rights attached to a territory, but to the territory itself, is that a state can only succeed to the territory of the preceding state, not more.²⁷⁷ If it desires more territory, it may of course claim title to it, but the only territory to which it enjoys title by succession is that which lay within the former international boundaries. The connection between boundary continuity and *nemo dat quod non habet* is, however, only valid in one regard – in the transferral of sovereignty over territory from one sovereign to another. The former sovereign cannot give what was not his,²⁷⁸ but this says nought of the creation of new states or the relationship or borders between such states. It is here suggested that it only functions in precluding, for example, Chad from gaining title to territory on the basis of claims of succession to an administrative unit, designated by France in independence agreements with Chad as including certain territory, but which in fact was under Libyan sovereignty.²⁷⁹

Nemo dat quod non habet then only regulates the extent of title to territory based on claims of succession. But in the matter of the birth of a new state, rules of succession play no part.²⁸⁰

²⁷⁵ Shaw, *supra* note 28, at 88; Kaikobad, *supra* note 230, at 126-9

²⁷⁶ Lalonde, *supra* note 181, pp. 150-1. In the Case Concerning the International Status of South-West Africa (Adv. Op.), ICJ Rep. (1950) 128 at 154-7 (sep. op. McNair) Judge McNair argued that the Mandatory system created an “objective” territorial regime with “real” rights that “acquire an objective existence which is more resistant than are personal rights of the dislocating effects of international events.” South Africa’s obligations under the LoN’s Mandate system continued with the territory of South West Africa despite the dissolution of the League itself. Berman, *supra* note 7, at 76-7

²⁷⁷ Shaw, *supra* note 28, at 88

²⁷⁸ See the Island of Palmas case, where Arbitrator Max Huber stated: “It is evident that Spain could not transfer more rights than she herself possessed.” Island of Palmas, (Netherlands/U.S.A) 2 *RIAA* (1928) 829 at 842

²⁷⁹ The case of continuity is similar in practice, though here it is not a question of the transferral of rights and duties from e.g. an administering entity to another entity (thus the principle of *nemo dat quod non habet* is inapplicable), but of the change of ‘status’ of one entity, from e.g. being a protectorate to becoming an independent state (e.g. the international protectorates of Morocco and Tunisia); the rights and obligations of the entity continue. Title to territory continues, as do claims to territory. On continuity, see Crawford, *supra* note 137, pp. 392, 400-416

²⁸⁰ In his first report on succession of states in respect of rights and duties resulting from sources other than treaties, Special Rapporteur M. Bedjaoui noted that traditional state succession did not cover the establishment of new states. In regard to boundaries he wrote: “In principle the territory devolves upon the successor State on the basis of the pre-existent boundaries. These boundaries will have been established by a treaty, an instrument issuing from an international conference, a statute or regulation of the predecessor State, or a *de facto* situation sanctioned by the passage of time.” Doc. A/CN.4/204, pp. 100, 112, in: *YBILC* (1968), vol. II. Jennings argues that the creation of new states does not fit into existing legal moulds: the traditional modes of acquiring title to territory “all assume some activity by an existing person”; similarly, the law of succession has little to say “on the method by which the change was brought about.” Jennings therefore agrees with Oppenheim that, “The formation of a new State is [...] a matter of fact and not of law.” His conclusions in relation to title and new states is that “one may, therefore, regard the title to territory as arising simply from the fact of the emergence of a

Rules on succession regulate the transfer of rights and duties, and presuppose the existence of a succeeding unit. They speak on what is transferred from one state to another, but say nothing of the birth or mode of creation of states. They follow from the independence of a state, and do not precede it.²⁸¹ Rules of succession can therefore, by definition, have nothing to say about the boundaries prior to independence.

The argument for required boundary continuity at succession or decolonisation has one main benefit – that of claiming the character of law. No consent or agreement is required of states, which is quite likely the very object of the exercise. The ICJ has expressed its view

new State, or one may regard it perhaps as having been constituted by recognition”. Jennings, *supra* note 189, pp. 6-12. A distinction between issues of identity and succession has been explained as: “the former relate to the existence and identification of the legal subject, and the latter to the rights and duties that are to be assumed by a legal subject once it comes into existence or when it takes over responsibility for a new piece of territory. As such, the problem of State succession only arises once a conclusion is reached as to the issue of State personality.” Craven also remarks that the 1978 and 1983 Vienna Conventions on succession of states “assumes that the question of personality has already been determined.” Craven, Matthew, “The European Community Arbitration Commission on Yugoslavia”, 66 *BYIL* (1995), 333-413 at 356-7 (also footnote 136). In his 1997 Expert Report “State Practice and International Law in Relation to Unilateral Secession” in the case Reference re Secession of Quebec, (1998) 2 S.C.R. 217, James Crawford wrote that the term *state succession* concerns “the consequences of a change of sovereignty [...] It should be stressed that the law of state succession assumes that a change of sovereignty has occurred in accordance with international law. It does not purport to regulate the process of transfer of sovereignty or creation of statehood which underlies the succession.” Report of February 19, 1997, paragraph 6 at: <http://canada.justice.gc.ca/en/news/nr/1997/factum/craw.html>

²⁸¹ The observation of Jennings and Oppenheim – on the creation of new states as a question of fact and not law – seems pertinent in this specific sense. ‘Fact’ is here interpreted in a slightly different sense than its original constitutive position; it is understood in the sense of ‘objectively’ fulfilling certain legal criteria (territory, people, effective control) but subject to extra-legal considerations as a part of recognition for its existence – a position extracting parts of both theories. An entity is not going to be able to function fully as a state unless it is accepted into the international community, and recognition opens the door to this community. Because violations of *ius cogens* norms or ‘sensitive’ cases of secession often cause states to withhold recognition, it could be held that in ‘ordinary’ cases, recognition is declarative, while in ‘special’ cases, absence of recognition means that the state will find it difficult to function, as it cannot exercise its rights and duties fully. In this case recognition has a constitutive effect. This illustrates that the birth of states falls both within and outside the ambit of law, being subject to extra-legal considerations. Law cannot fully explain their creation. And succession follows from the prior existence of states. See Crawford, *supra* note 137, pp. 3-5, 21-4, 29. Jennings quotes from Oppenheim: “It is through recognition, which is a matter of law, that such new [*sic*] State becomes a subject of International Law. As soon as recognition is given, the new State’s territory is recognized as the territory of a subject of international law, and it matters not how this territory was acquired before recognition.” Jennings, *supra* note 189, p. 8. The theory views recognition as constitutive, which is a position that seemed rejected for some time, but corresponds in practice with the European response to the secession of former Yugoslav federal entities. The EC Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union” offered recognition at the fulfilment of certain conditions that went beyond the traditional requirements of established territory, people and effective control. In the case of both Bosnia and Croatia effective control was disregarded as a criterion, as was, in the case of Croatia, the specified requirement in the Guidelines themselves of minority protection. See the ‘Guidelines’ adopted at the Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991, S/23293, Annex II. See Raič, *supra* note 36, pp. 89 ff. on the prohibition of premature recognition, and the legal implications of the exercise of self-determination. He notes that the EC Declaration was not intended to support constitutive recognition, but provide additional requirements for recognition after traditional statehood had been established. Whether it was constitutive or not depends not on intent, but on how the criterion of effective control is understood – if control has to be complete or if it is sufficient to have partial control over state territory. In the case of Bosnia-Herzegovina and Croatia, their exercise of self-determination seems to have been understood to replace the criterion of effective control.

clearly in the Frontier Dispute case, its most important treatment of the internationalisation of internal boundaries:

There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.²⁸²

If pre-existing international boundaries are succeeded to by law, what is the role of *uti possidetis*? In the *obiter dicta*²⁸³ above from the Frontier Dispute case the ICJ spoke only of “pre-existing international frontiers”, leaving administrative boundaries unmentioned. What rules should be applied in cases of the independence of units administered by the same foreign power? In relation to a dissolving empire, where units delimited by internal boundaries achieve independence, there are, by definition, no international conventions that clarify the boundaries and no agreements regulated by international law. No regimes that create customary international law can have come about and there is no legal conveyance. As the theories are limited to the effects of international boundary treaties, they are not applicable to internal boundaries, which leaves a possible ‘task’ for *uti possidetis*. The content of *uti possidetis* could then be to transform former internal colonial boundaries into new international ones at succession. Similarly to the legal obligation arising under customary international law rules related to the continuity of international boundaries, the continuation of internal boundaries could then also constitute a requirement under law. The argument nevertheless relies on the status of *uti possidetis* as customary international law.

The different legal propositions would look something like this:

²⁸² The Frontier Dispute case (Burkina Faso/Mali), ICJ Rep. (1986) 554 at 566 (paragraph 24)

²⁸³ In the Special Agreement submitting the dispute to the ICJ the parties had accepted that the dispute be determined in accordance with “respect for the principle of the intangibility of frontiers inherited from colonization.” Pomerance, Michla, “The Badinter Commission: The Use and Misuse of the International Court of Justice’s Jurisprudence”, 20 *MJIL* (1998) 31-58 at 55. The parties had then accepted the colonial boundary as their common international boundary, and there was no need for the ICJ to pronounce anything more on the issue. Its only task was to determine where that boundary lay.

- 1 a) International boundary treaty → boundary = boundary fact
Succession → boundary fact = continuity/no change of boundary
 - b) Rules of customary international law → international boundary regime/conveyance = continuation of international boundary after independence
 - c) *Nemo dat quod non habet* → territory = succession → territory of preceding unit
 - d) Decolonisation = succession to some previous territorial unit
- 2 *Uti possidetis* → internal boundary = continuation of internal boundary as international after independence

Some go even further. The Arbitration Tribunal that pronounced the 1985 award in the maritime delimitation case of Guinea v. Guinea-Bissau²⁸⁴ held that an 1886 colonial convention,

remained in force between France and Portugal until the end of the colonial period, and became binding between the successor States by virtue of the principle of *uti possidetis*.²⁸⁵

As illustrated above, conflating the continuation of international boundaries with *uti possidetis* is not uncommon. Here perhaps lies the key to the compulsion to connect *uti possidetis* with all boundaries. There is no clear and uncontroversial basis upon which boundaries may be ‘extracted’ from the international treaties in which they are contained (apart from actually having created rights for third parties) other than ‘*uti possidetis* as law’. Succession to boundary treaties cannot demand the continuation of former boundaries, as the general rule of succession is *tabula rasa*. The conveyance idea is unsupported by legal evidence, and all boundaries do not lead to regimes.²⁸⁶ The principle *nemo dat quod non habet* relates to issues of title to territory, but functions only to limit the originator’s options (who

²⁸⁴ Guinea v. Guinea-Bissau, Award of 14 February, 1985, 77 *ILR* 635

²⁸⁵ *Ibid.*, at 656 (§40)

²⁸⁶ Article 11 on ‘Boundary regimes’ of the 1978 Convention on Succession of States in Respect of Treaties states: *A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.* To be noted is that the treaty still enjoys scant support, and is not understood to codify customary international law. As of August 21, 2003, there were 19 signatories and 17 parties to the treaty, which entered into force 1996. Some authors still claim that the continuation of international boundaries at state succession, as formulated in Article 11 of the 1978 Convention enjoys the status of a rule of customary international law. Müllerson writes that this is “[o]ne of the few clear and non-controversial norms governing issues of State succession”. He continues: “Although this rule relates only to international boundaries established by international treaties, the dissolution of the USSR, as well as that of Yugoslavia, confirms the obligatory nature of this norm of customary international law.” Müllerson, Rein, “Law and Politics in Succession of States: International Law on Succession of States”, in: Stern, Brigitte (ed.),

‘cannot give more than is his’), and not the receiver’s options. There is to date an insufficient legal basis to claim that boundaries are a ‘fact’ under customary international law and clearly distinct from the agreements in which they are contained. Only uniform *usus* and *opinio iuris* could create such a rule or principle which would be binding on new entities, but there is yet no widespread agreement between states on the existence of such a norm. A principle, or general rule of international law, does not come into existence merely because the ICJ states its existence as a fact or because respected authors hold its utility to be unquestionable. Referring to *uti possidetis*, therefore, might perhaps form the core of the argument for succession to boundaries apart from treaty succession:

Rules on state succession to international treaties + *uti possidetis* → international and internal boundaries = continuation of ‘all’ boundaries after independence

The consequences of this, however, is the metamorphosis of *uti possidetis* into a different entity and a complete disregard for the process by which norms of international law are agreed usually to come about. It is not entirely unproblematic and without consequence.

In the Frontier Dispute case the ICJ appeared to want it both ways – to have the cake and eat it. It understood the continuation of colonial borders bounding the newly independent states to be based on an existing principle on the continuation of existing international frontiers at succession – on law and not agreement; and *uti possidetis* confirmed this principle with respect to internal boundaries, thus having similar content. In a remarkable statement in 1986 the ICJ confidently held that *uti possidetis* was a “firmly established principle of international law where decolonization [is] concerned.”²⁸⁷ Under such a view the application of *uti possidetis* was not based on agreement between those concerned, but had become a default rule of international law. In the Latin American context the application of *uti possidetis* to internal and international boundaries was always based on agreement,²⁸⁸ and its application to internal boundaries primarily formed a temporary solution pending long-term agreement. Other factors, such as ‘natural’ boundaries or possession, were generally determinant at later delimitation and demarcation. The legal basis and reasoning by the ICJ is therefore unconvincing. For *uti possidetis* to be binding apart from consent in the immediate

Dissolution, Continuation and Succession in Eastern Europe (Kluwer Law International, the Hague, 1998) pp. 5-32 at 19. This claim is nevertheless made without producing evidence of *usus* or *opinio iuris*.

²⁸⁷ Frontier Dispute case (Burkina Faso v. Rep. of Mali) ICJ Rep. (1986) §20

²⁸⁸ Brownlie writes: “It must be emphasized that that the principle [of *uti possidetis*] is by no means mandatory and the states concerned are free to adopt other principles as the basis of a settlement.” He continues that “the general principle, that pre-independence boundaries of former administrative divisions all subject to the same sovereign remain in being, is in accordance with good policy [...]”. Brownlie, *supra* note 189, p. 133

case between two parties it would need to be binding as a rule of customary international law, the existence of which there is scant evidence.

References are commonly made to a 1964 OAU Resolution, agreed upon by a majority of African leaders in Cairo, in order to support the claim that the leaders did indeed apply *uti possidetis*.²⁸⁹ This resolution, which decided upon the retention of former boundaries at independence, was not easily produced. As was noted in relation to territorial integrity, there had been many calls for African colonial boundaries to be rectified,²⁹⁰ but a final majority of African leaders decided that changes would be contrary to their long-term interests.²⁹¹ Serious consideration had thus been given to changing the colonial boundaries, and their retention was in no way self-evident. The OAU Charter of 1963 had not mentioned boundaries or any territorial *status quo*, speaking only of territorial integrity. In the light of several continuing territorial disputes it was therefore decided to lay down the principle of preserving the territorial *status quo*.²⁹² The need arose from the existing differences in position of various African leaders on the continuity of colonial boundaries. It is clear that the discourse concerned the peaceful future of Africa and not whether there existed any legal obligation to preserve the colonial frontiers.²⁹³

The 1964 agreement failed to distinguish between internal administrative or international boundaries; in Point 2 of AGH/Res. 16(1) the Conference “[s]olemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.”²⁹⁴ When a unit became an independent state it was to accept its boundaries. Brownlie writes that “a high proportion of independence movements have adopted the parcels of colonial administration as the units for self-determination.”²⁹⁵ And Lalonde adds: “In Africa, in almost every instance, independence was not achieved through revolution but by virtue of grants of independence. Independence was devolved to a

²⁸⁹ AGH/Res. 16(1), adopted in Cairo on July 21, 1964

²⁹⁰ See the general call for adjustment at the All African People’s Conference in Accra in 1958, in: Touval, Saadia, “Africa’s Frontiers: Reactions to a Colonial Legacy” 42 *International Affairs* 4 (1966) 641-54 at 643

²⁹¹ Only Somalia and Morocco declared themselves not to be bound by AHG/Res. 16(1). Shaw, *supra* note 17, p. 185

²⁹² At the time there were continuing disputes between Morocco-Algeria, Ghana-Upper Volta, and Somalia-Ethiopia-Eritrea. Somalia immediately claimed it was not bound by the resolution. Touval, Saadia, “The Organization of African Unity and African Borders”, 21 *International Organization* 1 (1967) 102-127 at 122-4

²⁹³ In 1968 the existence of a rule did not seem clear. ILC’s Special Rapporteur on Succession of States in respect of rights and duties resulting from sources other than treaties, M. Bedjaoui, expressed the view: “The attitude of the founders of the Organization of Africa Unity, is [*sic*] urging all the new States, after they attained their independence, to respect the *status quo* with regard to boundaries, was inspired by realism and political wisdom. Colonial administrative boundaries were made international boundaries in an effort to avoid throwing the political map of Africa into dangerous confusion.” He adds that the ILC “will have to determine whether a rule exists and, if so, how it should be stated.” Doc. A/CN.4/204, pp. 112-3, in: *YBILC* (1968), vol. II.

²⁹⁴ Text in: Brownlie, *supra* note 256, p. 11

territorially defined colony, irrespective of whether its territorial limits were the product of international or administrative acts.”²⁹⁶ Under sufficient pressure the former administration of an entity would often leave it in its entirety, which meant that areas were politically vacated as units, and also gained independence as units. International law was, in this respect, mute on the issue of determining which units were to become independent; as administrations left, the unit administered merely became independent within the previous limits. This particular aspect is similar to the Latin American picture on decolonisation where different level units – in no case the highest level of viceroalties – became independent within those administrative boundaries.²⁹⁷ In the case of the 1947 independence of British India, two states – not one – were born, with many of the smaller units deciding to which of the new states they would belong.²⁹⁸ It seems then that PIL did not decisively affect the choice of units that through decolonisation became international entities, but the situation on the ground was the determining factor – who had the political and military capacity to take control of certain units. The independence of a unit determined the boundaries that were to be internationalised; never did a selection of boundaries predetermine the unit to achieve independence.

In the Frontier Dispute case the ICJ argued that the retention of African colonial boundaries was based on an existing principle; the African statements on respect for frontiers were merely ‘declarative’ of already binding law. This might, for the sake of argument, be the case for existing international boundaries by the creation of a rule of ‘instant’ customary international law, but for internal boundaries to become international ones under *uti possidetis* as law there must be sufficient evidence of both *usus* and *opinio juris*, which the Latin American practice unquestionably lacks.²⁹⁹ Coupled with the post-first world war practice,

²⁹⁵ *Ibid.*, p. 9

²⁹⁶ Lalonde, *supra* note 181, p. 122. She concludes: “*Uti possidetis* remains an after-the-event presumption as to the boundaries of an entity that *has* achieved independence. It is not a before-the-event norm – at least not one of general application – as to what those boundaries *ought* to be.” *Ibid.*, p. 137

²⁹⁷ For different “kinds or degrees” of administrative boundaries, see Land, Island and Maritime Dispute case (El Salvador v. Honduras) ICJ Rep. (1992) 351 at 387 (paragraph 43). For practice, see Lalonde, *supra* note 181, pp. 35-8

²⁹⁸ See e.g. Fifield, R., “New States in the Indian Realm”, 46 *AJIL* 3 (1952) 450-63

²⁹⁹ In the Asylum case (Colombia v Peru) ICJ Rep. (1950) 266, the ICJ clarified the requirements (in this case on Colombia) to successfully prove the existence of a local custom. The ICJ held that a Party must “prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question”. The court noted that the Colombian government had referred to a large number of treaties as well as to “a large number of particular cases in which diplomatic asylum was in fact granted or respected. But it has not shown that the alleged rule [...] was, apart from conventional stipulations, exercised by the States as a duty incumbent on them and not merely for reasons of political expediency. The facts [...] disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, [...] and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule [...]” See also the North Sea Continental Shelf cases, where the ICJ held that *usus* “must be carried out in such a way, as to be evidence of a belief that this practice is rendered

there is no uniformity in regard to *uti possidetis* and decolonisation. The ICJ attempted to explain that,

The elements of *uti possidetis* were latent in the many declarations made by African leaders in the dawn of independence. These declarations confirmed the maintenance of the territorial status quo at the time of independence, and stated the principle of respect both for the frontiers deriving from international agreements, and for those resulting from mere internal administrative divisions.³⁰⁰

This seems an unusual legal exercise: what the African leaders said was merely declarative, but, nevertheless, *uti possidetis* was binding on them even though they did not mention it, as it was ‘latent’ in their declarations and confirmed a customary law principle. Examining the historical evidence, the declarations were produced in light of claims made which seemed to threaten the stability of Africa. The leaders showed no signs of feeling under any legal obligation whatsoever. The Court still appeared to suggest that *uti possidetis* was relevant both to international and internal boundaries. They also suggested that it was not based on agreement, as the leaders were bound by the pre-existing principle, which seems the equivalent to territorial *status quo*. Yet their statements appear to have been interpreted as a form of *opinio iuris* – *uti possidetis* was binding on the leaders because they latently referred to it, even though the African leaders did not expressly refer to the concept in any document.³⁰¹ If this is what the Court was doing, it amounts to a rewriting of the African political history of the 1960s. However the events are formulated, the basis for the retention of the colonial boundaries was agreement.

Even apart from the discussion of international boundaries, regarding internal boundaries there is no law apart from ‘*uti possidetis* as law’ that could legally require the internationalisation of former internal boundaries, as state succession to treaties, boundaries or boundary regimes is not relevant to those cases. Repeating this once again, in no respect does this version of *uti possidetis* correspond to the Latin American usage, even if that usage would, by *usus* and *opinio iuris*, have developed into customary international law.

obligatory by the existence of a rule of law requiring it.” North Sea Continental Shelf cases (FRG v Denmark; FRG v the Netherlands) ICJ Rep. (1969) 4, at 44

³⁰⁰ Frontier Dispute case (Burkina Faso v. Rep. of Mali) ICJ Rep. (1986) at 565 (paragraph 22). In the Guinea-Bissau v. Senegal Maritime Delimitation case the arbitrators stated *inter alia* that, “the two Parties have recognized the principle of the African *uti possidetis* proclaimed by the Organization of African Unity [...]” Guinea-Bissau v. Senegal Maritime Delimitation case, Award of July 31, 1989, 83 *ILR* 1 at 22

³⁰¹ There are two alternatives: either there existed a principle that bound the leaders, whereby their statements are legally unimportant; or their statements are important to show *opinio iuris* because in fact there existed no principle that required the continuation of the colonial boundaries. Both options cannot be claimed to be valid simultaneously.

There are certain similarities between the Latin American and African contexts, but the differences are greater. The Latin American context was similar to the African one in that the borders retained were both internal administrative and international boundaries – unnegotiated and negotiated borders. However, as already mentioned, while the majority of borders retained in Latin America had been internal administrative, most African boundaries retained had been internationally agreed.³⁰² Another similarity is the time when the clock was deemed to have stopped: at independence.³⁰³ The criteria to determine what was to be considered at that point nevertheless differed within Latin American application. The *de jure* argument was generally chosen by states earlier bounded by internal borders for the ‘stop-the-clock’ point in time. On the other hand, recognising the *de facto* situation – beneficial to states with claims based on possession that went beyond earlier agreement or administrative decision – was the basis selected for the agreements between Brazil and most of its neighbour states regarding the former international boundary. The African position was the reverse, in that it was the *de jure* situation of the internationally agreed boundaries that was to be retained. The argument for maintaining them was, however, not formulated by the states as an application of *uti possidetis*. The ICJ expressed the view that the retention was based on a general rule or principle of law applicable at succession. As has been discussed, with that development boundary retention shifted from being seen as an option to instead being formulated as constituting an obligation under international law in cases of succession. According to the ICJ, the declarations made by African leaders, which were held ‘latently’ to include *uti possidetis*, had no legal effect in themselves, as the leaders were instead bound by the pre-existing principle. *Uti possidetis* does not seem to form the basis for the principle. However, the principle that the ICJ refers to could only be relevant to international boundaries, as succession is related to prior international obligations, not internal structures.

Was there then only a legal obligation to maintain the international borders, and not the internal ones? *Uti possidetis juris* had previously only been applicable to internal colonial boundaries, and could be argued to ‘cover’ the internal African boundaries; yet it is in the context of internal boundaries in Latin America that the application of *uti possidetis* is most unclear. It has already been argued that the Latin American application of *uti possidetis* was based on agreement. The ICJ has expressed the opinion that the retention of international African colonial boundaries was due to an obligation under international law. They are not as

³⁰² More on African boundaries, *infra* chapter 6.2.3.1

³⁰³ In AGH/Res. 16(1) the Assembly declared their respect for “*the frontiers existing on their achievement of national independence*”. Text in: Akweenda, *supra* note 166, p. 51

clear with regard to internal boundaries, and the view on those boundaries must be either that: 1) the new African states were not under any obligation to maintain former internal boundaries; or 2) the new states were under such an obligation. If the new states were not under such an obligation, there was no rule, and it is hard to argue in later cases that *uti possidetis* is law. This would be more in line with Latin American practice, where consent was a prerequisite for boundary agreements. If the new states were, however, under such an obligation, this could only be on the basis of *uti possidetis*, which must then have enjoyed the status of customary international law at the time. It could nevertheless only have become customary law through the Latin American practice. The African leaders gave no indication that they thought this was the case, making it difficult to argue for the existence of even regional *opinio iuris*, nor did the leaders mention the phrase in their 1964 resolution.

A further disparity between the two contexts was the purpose that the retention of colonial borders was to have. In Latin America *uti possidetis* was originally used both to provide a temporary solution until long-term agreements could be reached, and to extinguish the possibility of foreign, specifically non-American, claims. In Africa the purpose of its application was to exclude territorial claims made by neighbouring states and constitute a permanent solution. The threat was not renewed colonialism, but inter-African conflict.³⁰⁴ Lastly, while units of all different levels gained independence in Latin America, in Africa the only former internal boundaries that became international were those of ‘federal-level’ entities.

	International borders	Internal borders	Legal basis
South American decolonisation	<i>Uti possidetis de facto</i> recognised possession as granting territorial title between Latin American states. Between Latin American and European states different bases: primarily possession or earlier treaties.	<i>Uti possidetis juris</i> as basis for negotiations and pending final agreement. Later <i>uti possidetis juris</i> developed into an argument against title by possession	Agreement
African decolonisation	A general rule or principle at State succession permanented the <i>de jure</i> territorial <i>status quo</i> .	<i>Uti possidetis juris</i> permanented <i>de jure</i> administrative divisions.	Customary international law

³⁰⁴ McEwen has explained that while the Latin American *uti possidetis* was an attempt to establish title of unoccupied territory, the African context was different in that it had been agreed that territorial claims could not be supported without effective occupation. McEwen, *supra* note 191, pp. 29-31

The Frontier Dispute case was followed a few years later by the Guinea-Bissau v. Senegal arbitration case, where *uti possidetis* was applied to maritime boundaries. The arbitration Tribunal claimed that the African *uti possidetis* had a broader meaning than the Latin American one,

because it concerns both the boundaries of countries born of the same colonial empire and boundaries which during the colonial era had already an international character because they separated colonies belonging to different colonial empires.³⁰⁵

Scant evidence for this proposition was given, but it was noted that the parties had agreed that colonial boundary treaties continued to be valid between the new states. The Tribunal also referred to the fact that both parties had accepted the 1964 OAU Declaration.³⁰⁶ In his dissenting opinion, arbitrator Judge Mohammed Bedjaoui rejected the African *uti possidetis* as unfounded: “The Award introduces here an innovation which could have unforeseen consequences and of no proven usefulness.”³⁰⁷ After elaborating on the object of the 1964 Declaration – where he claimed, “At no time was there any thought for maritime frontiers, which could only relate to a different horizon, namely the water environment, where ethnic problems by definition did not arise” – he continued somewhat later:

I fail to see, in the present state of the law, what principle could be invoked to justify the automatic application of *uti possidetis* to two different types of space, and to do so for a principle which, like *uti possidetis*, constitutes an exception to *tabula rasa* and to State sovereignty, and which must therefore be interpreted restrictively.³⁰⁸

The legitimacy of the policy of maintaining colonial boundaries as the boundaries of independent states was defended by the objective of inter-state peace. The ICJ admitted that retaining the colonial boundaries, and thus the *status quo*, was contrary to respect for the self-determination of peoples, though it argued that,

The maintenance of the territorial status quo in Africa is seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence,

³⁰⁵ Guinea-Bissau v. Senegal Maritime Delimitation case, Award of July 31, 1989, 83 *ILR* 1 at 35 (§61)

³⁰⁶ AGH/Res. 16(1), adopted in Cairo on July 21, 1964. The relevance of this is not entirely convincing, as the Resolution’s text whereby “*all Member States pledge themselves to respect the borders existing on their achievement of national independence*” only carries implications for those boundaries that are agreed to exist. The dispute in the case centred on whether or not there in fact existed a maritime boundary between Guinea-Bissau and Senegal. Of course the reasons for the Tribunal’s reference is that it held that the parties thereby also accepted *uti possidetis* as binding on them.

³⁰⁷ Guinea-Bissau v. Senegal Maritime Delimitation case, Award of July 31, 1989, 83 *ILR* 1 at 58 (§19), Dissenting Opinion (Bedjaoui)

³⁰⁸ *Ibid.*, at 61, 63 (§§27, 32), Dissenting Opinion (Bedjaoui)

and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice.³⁰⁹

That maintaining the colonial boundaries seemed to be the wisest solution in order to avoid conflict in the African context is here not under challenge. However, that the rationale in that context is argued to constitute a binding rule for all other contexts is nevertheless more problematic. As the ICJ perceived that *uti possidetis* was applied in Latin America, it should simultaneously have observed that the Latin American record of territorial and boundary conflicts showed that *uti possidetis* was no panacea for territorial disputes. If the retention of colonial boundaries in Africa has indeed lessened conflict and preserved stability,³¹⁰ this is surely linked to the consent of the parties to maintain the boundaries.³¹¹ Despite this expressed consent numerous border conflicts occurred between African states after the 1960s,³¹² and a substantial number of territorial disputes from both continents have been referred to the ICJ and the Permanent Court of Arbitration (PCA). If consent to maintain the boundaries had been lacking and the boundaries were instead imposed, the scenario is unlikely to have been as relatively peaceful as it has been.

3.3.4 Yugoslavia

In the 1900s the concept of *uti possidetis* was again advanced to try to resolve a territorial conflict. An arbitration commission, led by the French constitutional Judge Robert Badinter, had been set up within the European Conference on Yugoslavia (ECY) to deal with issues relating to the conflict and the various claims by the federal units making up Josip Broz Tito's Yugoslavia. The Badinter Arbitration Commission began issuing Opinions in 1991 in response to questions posed within the ECY, which began in August 1991 as a response to the

³⁰⁹ Frontier Dispute case (Burkina Faso v. Mali) ICJ Rep. (1986) §25. This rings similar to the preamble text of the OAU Charter (1963) which declares that the Heads of African States and Governments are “[d]etermined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states”. Text at: http://www.au2002.gov.za/docs/key_oau/oau_charter.htm (accessed 6/12/2002)

³¹⁰ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) ICJ Rep. (1962) 6 at 34

³¹¹ See also the importance of boundary functionality, *infra* chapter 6.2.1.2

³¹² Ramutsindela, Maano, “African Boundaries and Their Interpreters”, 4 *Geopolitics* 2 (1999) pp. 180-198. Radan lists a number of such American and African disputes; Radan, Peter, *The Break-up of Yugoslavia and International Law* (Routledge, London, 2002) p. 236. Anthony Asiwaju writes that as everything in relation to African borders was inherited from Europe it is “[l]ittle wonder then that border relations in Africa have continued to feature the same kind of mutual jealousy, conflict and tension, and have continued to be managed within the framework of the same kind of diplomacy and laws that govern such relations in Europe of the nation-state.” Asiwaju, A., “Borders and Borderlands as Linchpins for Regional Integration in Africa”, in: Schofield, Clive (ed.), *Global Boundaries* (Routledge, London, 1994) at 61

conflict that had broken out that same year.³¹³ Answering *inter alia* the question of whether the Serbian population in Croatia and Bosnia-Herzegovina had the right to self-determination, the Commission held in Opinion No. 2 that “the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”³¹⁴ On the question as to whether the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia should be regarded as borders in terms of PIL, the Commission held in Opinion No. 3 that,

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis* [...] is today recognized as a general principle [...].³¹⁵

There has been much written on the Badinter Opinions – some writers bearing praise, others expressing scathing criticism.³¹⁶ The discussion will here focus on the issue of *uti possidetis* as law from several angles. Firstly, whether it should be viewed as the only law at independence; secondly, whether it should be viewed as law in light of the UN Charter Purposes; and, thirdly, whether there is sufficient evidence to treat it as general customary international law which is applicable in all cases of independence or where entities gain statehood.

3.3.4.1 Consent in relation to boundary changes and *uti possidetis*

Prior to the Arbitration Commission beginning its work, it seems that the EC countries made a decision to exclude the option of discussing border changes in the Yugoslav conflict.³¹⁷ Border changes brought about by violent means have often been condemned by the international community, but the EC went further in its position in 1991, as border changes were ruled out *per se* as a solution to the pending conflict. The decision had many

³¹³ See chapter 7.1.3 on the Yugoslav conflict.

³¹⁴ On the principle, see e.g. Ratner, *supra* note 180; and Shaw, *supra* note 28

³¹⁵ The Opinions can be found in their entirety in: Conference on Yugoslavia (Arbitration Commission), 92 *ILR* (1993) pp. 162-211, and were to have binding force. It is interesting that the Commission even refers to the ICJ in support of this last claim, while disregarding the fact that the ICJ admitted that *uti possidetis* in the case of African decolonisation conflicts with the right of peoples to self-determination. *Frontier Dispute case*, ICJ Rep. 1986, 554 at 566-7. For more comments on the Commission, see Pomerance, *supra* note 283

³¹⁶ See e.g. Pellet, *supra* note 141; Craven, *supra* note 280; Pomerance, *supra* note 283; Terrett, Steve, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-making Efforts in the Post-Cold War World* (Ashgate, Aldershot, 2000); Knop, *supra* note 36, pp. 167-90; Lalonde, *supra* note 181, pp. 172-229; Radan, *supra* note 312, pp. 204-43; Castellino & Allen, *supra* note 194, pp. 157-98

implications in the area of law and was based on several presumptions about peace, about the internal functionality of states as well as of boundaries.

With regard to international law, the EC position was that even the consent of the parties was not a basis for territorial changes. This is problematic for at least two reasons. Firstly, peaceful territorial change has never been prohibited under international law, and agreements on territorial changes are still made between states.³¹⁸ Secondly, consent has always formed a vital component of the law of territory for very sound reasons – if the parties agree to a territorial solution the likelihood of war is significantly reduced. The underestimation of the importance of consent with regard to territorial changes, at decolonisation and other cases of independence, may have caused the misunderstanding of the function that *uti possidetis* has played as a conflict-reducing mechanism.³¹⁹ That certain borders in the past have been retained during upheavals must have seemed a panacea to territorial conflicts, but that the retention of boundaries at independence in past cases had always been based on the consent of the parties, was disregarded or simply missed.

The ICJ *dicta* in the 1986 Frontier Dispute case may be partly to blame for this. The retention of colonial boundaries in South and Central America and Africa was consistently based on agreement, however the ICJ wished to reformulate the reasons for the retention. Where agreement was lacking or has later been withdrawn there has instead often been violent conflict. For peace the most important factor must then be to reach an agreement between states to a territorial solution – gaining consent – and not the retention of the boundaries. The retention of colonial boundaries is very likely the wisest and most practical solution, but it requires the consent of the parties in order to provide a peaceful solution to various territorial claims. Without this, the retention will not lead to peace. Aggression towards other states is prohibited under PIL, as are unilateral territorial changes, but this does not change the fact that states do still wage war over territory, and the best way to reduce the likelihood of such conflicts over territory is to seek, promote and facilitate agreements. In light of this, the EC ministers' decision to rule out the option of discussing border changes should have been identified as unrealistic and potentially dangerous.

³¹⁷ See chapter 7.1.2

³¹⁸ E.g. in 1996 and 1999 China and Kyrgyzstan agreed to boundary shifts of territory. See “China Nibbles Away at Kyrgyz Border” Institute for War and Peace Reporting, Central Asia (IWPR, RCA) No. 58, June 29, 2001 at: <http://www.iwpr.net>

³¹⁹ Ratner has recognised the importance of consent for the success of *uti possidetis* by a slightly different approach, where he applies precommitment theory to boundaries in the Yugoslav context. Ratner, Steven R., “Precommitment Theory and International Law: Starting a Conversation”, 81 *TXLR* 2055 at 2065-8

There are several practical difficulties with the application of *uti possidetis* apart from agreement. The first is that where the border between states is unclear *uti possidetis* is not helpful, unless based on agreement. For it to be applied effectively, too much needs to be clarified. The second objection to its application, apart from the necessity of consent, is that if the conflicting parties cannot agree on how a border should be constructed, then they probably will not agree to preserve the former boundaries either – very likely leading to continued conflict. If the parties want to reach an agreement, then *uti possidetis* might provide a method for an acceptable solution based on earlier practice. However, if one or both parties do not want a solution, it seems futile to refer to a concept that requires clarification – as well as agreement as to its ‘finding’ international borders – on several fundamental points. Which entities are the ones designated to be preserved? What point in time or which map is valid for this purpose? *Uti possidetis* is mute on those questions.

3.3.4.2 *Uti possidetis* as law in light of the UN Charter Purposes

The reference to *uti possidetis* then seems to have borne little actual relation to the problem in the Yugoslav situation, and failed to provide a peaceful solution as it was only based on a prohibition of using unilateral force to alter the boundaries. It might even prolong a conflict in as much as it reduces the options for a peaceful solution. Raising *uti possidetis* to the status of a rule of international law has the logical effect of minimising options within PIL to deal with boundary tensions – offering “neither liberty nor flexibility”.³²⁰ It must be considered important to examine whether this is beneficial or detrimental to peace.

It is fundamental to define the problem, or problems, in tense situations in order to devise the necessary response to satisfy the need peacefully.³²¹ Where *uti possidetis* earlier provided a dispute-reducing mechanism in cases where the parties desired a quick and temporary solution pending a final solution, the principle in Yugoslavia came to mean the legal

³²⁰ McCorquodale, Robert, “International Law, Boundaries, and Imagination”, in: Miller, D. & Hashmi, S., *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press, Princeton, 2001) pp. 136-63 at 140

³²¹ This method could be criticised for merely constituting Chamberlainian appeasement. The difference is that the teleological approach proposed is long-term peace, which means determining the needs of the parties that deserve protection and coming to a solution that responds to some of the issues of all sides. Where self-determination comes into the equation is in laying down considerations that must be taken of the borderlanders, focusing on the functionality of the boundary and special considerations taken so that long-term internal peace is supported. It may serve to mention that the harsh Paris Peace imposed on Germany provided a platform for determined politicians to reverse the ‘unjust’ terms. Similarly, one could argue that the rigid international

protection of the territorial changes of one party from the use of force by the other party. The fusion between the prohibition of the use of force and *uti possidetis* in relation to federal boundaries is difficult to find to be anything other than a policy decision.

The prohibition against the use of force is an inter-state principle contained in UN Charter Article 2(4). But referring to the principle, that force may not be used to change boundaries, was not helpful in the Yugoslav conflict, as the dispute did not concern two or more states. It had never before been accepted as protecting secessionist attempts of entities within states, even federal ones. The response to secessionist attempts had previously been either to condemn them, or to grant recognition where the secessionist entity enjoyed effective control over the territory.

International law has earlier not treated internal boundaries as falling within the international domain, whether federal borders or not. In the Yugoslav context, the secessionist attempts of two federal units were claimed to enjoy the protection of international law, and force used to hinder the secessions was argued to be prohibited under UN Charter Article 2(4).³²² In its first response to the Yugoslav conflict the UN Security Council adopted a resolution granting the federal boundaries international protection:

[r]ecalling the relevant principles enshrined in the UN Charter, and in this context taking note of the declaration of 3 September 1991 of the States participation in the [CSCE] that no territorial gains or changes within Yugoslavia brought about by violence are acceptable [...]³²³

In 1993 Hurst Hannum wrote:

The principle that borders should not be altered except by mutual agreement has been elevated to a hypocritical immutability that is contradicted by the very act of recognizing secessionist states. The traditional international practice of non-intervention in civil wars has been replaced by a selective rule which prohibits some central governments (for example, Belgrade) from suppressing secession by force, accepts the use of force by others (for example, Colombo and New Delhi), and has yet to make up its mind about even more compelling cases (for example, Kurds and Tibetans).³²⁴

response to the Yugoslav internal crisis provided a platform for determined politicians to change the situation by force, as no legal means were available.

³²² For criticism, see Hannum, Hurst, "Self-Determination, Yugoslavia and Europe: Old Wine in New Bottles?" 3 *Transnational Law and Contemporary Problems* 57 (1993) 57-69 at 59-62; Higgins, *supra* note 13, p. 34; Pomerance, *supra* note 283, at 54. Calling the Yugoslav break-up 'dissolution' does not change the fact that it was the claims of independence that began the process of dissolution; the dissolution did not precede the calls for independence and the conflict that erupted. According to the Badinter Arbitration Commission, the process of disintegration began on November 29, 1991, which was *preceded* by the independent statehood of Croatia and Slovenia gained on October 8, 1991, more than one month and a half earlier. Craven, *supra* note 280, at 377

³²³ UNSC Res. 713, September 25, 1991. For background, see Weller, Marc, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" 86 *AJIL* 3 (1992) 569-607 at 577-81

The European response contained the seeds of another problematic response: the Yugoslav conflict should have sufficiently cautioned the new states from making any federal arrangements within their own states, whereby such units could likewise have seceded under the same ‘law’.³²⁵

If one party has no legal possibility to discuss boundary changes, the only remaining alternatives are unconditional acceptance or the use of force to create a *de facto* boundary. If the party chooses to use force, the international community will be called upon by the weaker party to uphold the *de jure* boundary, which in turn escalates the military conflict³²⁶ merely because discussion was precluded. The choice to preclude discussion cannot then be understood to be based on an overriding desire to maintain international peace, but is instead founded on an ideological position that certain boundaries should not, for various reasons, be changed, whether or not this results in armed conflict. ‘*Uti possidetis* as law’ cannot be reconciled to the main UN Charter Purpose of maintaining international peace and security, because – as a rule of PIL – it would not consider context and probable result, as well as reducing the options available to find a peaceful solution, if uniformly applied in all cases.

3.3.4.3 *Uti possidetis* as general customary international law: context ignored?

Similarly to the Latin American and African context, the need in Yugoslavia was to avoid conflict over territory and grant permanency to borders. The Latin American context partly concerned potential foreign or non-American claims to territory and partly former internal boundaries, where upon agreement of the parties *uti possidetis* originally formed a temporary solution. Most of the African boundaries delimiting the newly independent states were already

³²⁴ Hannum, *supra* note 322, at 68

³²⁵ Under *uti possidetis à la Badinter* federal structures are at risk, which is evident from the 1994 discussions of a possible federal solution for the Serbian minority in Croatia. The suggested arrangement was rejected on the basis of the likely lawful ‘secession’ of such a Serbian entity, in the same fashion that the Croats had just applied. Based on the Yugoslav practice all federal states should live in fear of attempts at separation, as they would not be able to use force to stop the attempt, and the federal boundary would under law become the international border. *Uti possidetis* applied this way thus risks limiting possible solutions within states that consider the special interests of minorities, such as federalism. Radan notes that Turkey rejected a federal solution of Turkish and Kurdish units, as this has been understood to be the first step towards secession. Radan, *supra* note 312, pp. 239-240

³²⁶ Radan, Peter, “Yugoslavia’s Internal Borders as International Borders: A Question of Appropriateness”, 33 *East European Quarterly* 2 (1999) 137-52. Radan writes that where a large part of the population rejects a boundary, it will have to be sustained by force. He continues: “The consequences of such a war are either the forced imposition of these borders upon the rebel population, or its forced expulsion.” He exemplifies this in the Yugoslav context by the 1995 Croatian expulsions of the Krajina Serbs in ‘Operation Storm’. Radan, *supra* note 312, p. 236. On ‘Operation Storm’, *infra* footnote 727

earlier agreed in treaties, and no specific references to *uti possidetis* were made. African leaders had agreed by the 1964 Declaration that they would retain the colonial boundaries. The Yugoslav boundaries under dispute were internal administrative boundaries. Differing from the first Latin American context, the Yugoslav application was not understood to require the agreement of the parties affected, but was, as earlier argued by the ICJ regarding the African context, claimed to constitute a legal requirement. The facts are, nonetheless, that both the African and Spanish American boundaries were retained by agreement between the parties concerned.³²⁷ In the Yugoslav context, instead of attempting to shore up agreement to use *uti possidetis*, it was argued that *uti possidetis* would be applied if the parties could *not* come to an agreement – by default.³²⁸

Colonialism provides another major difference between the Latin American and African context and the Yugoslav situation. In the Latin American context *uti possidetis* was applied as a method to ‘find’ the international borders of those units that had gained independence from foreign, dominant and exploiting rulers. The African 1964 Declaration only referred to the boundaries existing at independence, and made no reference to the colonial boundaries themselves, thus leaving open any later discussions of *uti possidetis juris* or *de facto*. The situation in the USSR had certain colonial characteristics, especially in relation to the Central Asian Federal Republics, but this did not apply to the second Yugoslavia.³²⁹ If *uti possidetis* did enjoy any legal character in 1991, which seems doubtful when considering its fundamental dependence on agreement for effect, and the non-conformity of its application as well as lack of *opinio iuris*, it was clearly limited to the colonial context.³³⁰ The Commission’s reference to the ICJ *dicta* in the Frontier Dispute case, in support of the claim that *uti possidetis* was “recognised as a general principle”, omitted the clarification that it was a “firmly established principle of international law where decolonization [is] concerned.” The Commission also omitted to mention what the ICJ described to be the context of the purpose of *uti possidetis*, to prevent instability of the new states by struggles, “provoked by the

³²⁷ See the OAU agreements of 1963 and 1964. Those who did not agree evidently did not feel that they were under any legal obligation to do so.

³²⁸ Ratner criticises this, writing that “condemnation of force to change the status quo [...] does not coincide with a legal transformation of the status quo into a permanent solution by default.” Ratner, *supra* note 180, at 618

³²⁹ If it did apply in any sense, it would only have been to Kosovo. With respect to that unit, there has never been any substantial international support for its boundaries to gain international status.

³³⁰ As Robert McCorquodale points out with reference to *uti possidetis* “incorrectly” applied in Yugoslavia by the Badinter Commission: “However, the former Yugoslavia was never a colony, and the relevant boundaries in issue were internal federal boundaries, not preexisting colonial boundaries.” McCorquodale, *supra* note 320, at 138, footnote 18

challenging of frontiers following the withdrawal of the administering power.”³³¹ Secession is an entirely different situation from that of mass decolonisation where former administrations have suddenly departed. Secession is by definition a unilateral decision to secede from an entity which has not consented to this action.³³²

A further difference between the application of *uti possidetis* in the colonial context and the Yugoslav situation concerned the borders to be internationalised. In the Latin American context agreement was required on several points to be able to apply the concept, as the Spanish internal borders had been unclear. There was no uniformity in the actual units that became independent.³³³ In the African situation borders were not always clear, but there did exist a number of agreements between the colonial powers which had worked out the borders, some even considering the populations affected.³³⁴ The Yugoslav borders enjoyed little similarity to the previous contexts. The borders to be preserved were internal and had enjoyed little practical, beyond an economic, effect, as Yugoslavia was not a political democracy and was still centralised to a large degree. The borders had been decided upon by Tito and a small group. The parliament was almost entirely excluded from the process and little information is available as to the background of the process. The borders had been selected partly for the purpose of dividing up the largest ethnic group, so that the federation could become possible at all; the boundary purposes were therefore to unify the state. The delimitation process was conducted after a civil war where gross and systematic violations of persons on the basis of ethnicity had taken place, and as the state policy was to attain peace by silence, no studies of the effects of such practices as the ‘ethnic cleansing’ of villages were made when the boundaries were constructed.³³⁵ That the ordered retention of such borders without discussion

³³¹ *Frontier Dispute case* (Burkina Faso v. Rep. of Mali) ICJ Rep. (1986) 554, at 565. Hannum notes that as the agreement between the parties on submitting the dispute to the ICJ was based not on *uti possidetis*, but on “respect for the principle of the intangibility of frontiers inherited from colonization”, the Court’s comments on *uti possidetis* are only *dicta*. Hannum, *supra* note 322, at 66

³³² In cases of secession the entity seceded from has not agreed to partition of territory, and so effective control will be determinant – if there is no such control, the secession will be unsuccessful. Lack of effective control will more likely lead to a prolonged conflict, as the ‘remaining’ state will attempt to reunite the territory. At secession, the ‘remaining’ entity loses land and thus has vital interests affected. For the remaining power this is a lose-lose situation, and a shifting of the border to consider the interests of the remaining state may therefore facilitate peaceful partition. For the retention of an internal border as the new international border at decolonization, two ‘new’ states have both just ‘gained’ territory, and are thus not in a situation of double loss. *Uti possidetis* as a rule of international law outside the colonial context does not necessarily promote peace, but may cause the exact opposite, and without effective control it is unrealistic and even potentially dangerous.

³³³ Lalonde writes that “no particular colonial unit was necessarily adhered to.” At the time of independence in Spanish Latin America there were four viceroyalties, none of which became independent states. In regard to the 11 audiencias “the strict adherence to the circumscription of the old audiencias appears to be the exception rather than the rule.” Lalonde, *supra* note 181, pp. 26-7, 35-6

³³⁴ See chapter 6.2

³³⁵ *Infra* chapters 6.2.3.3, 7.1.1.3 and 7.1.2.1, *i*.

or agreement could have been thought to be unproblematic reveals either ignorance or a lack of realism. Yosef Lapid writes:

Operating with a dubious model of identity (which naively affirmed the possibility of constituting new identities within any borders), ignoring profound differences between the vastly different identity functions of internal and external borders, and failing to seriously consider many other predictable complications entailed more generally in the identity-to-border sequence, bordering practices shaped by the *uti possidetis* principle have produced many tragic results.³³⁶

A contextual study is necessary in territorial or boundary disputes arising out of cases of independence, in order to examine whether the retention of specific boundaries will be conducive to long-term peace and stability or not. This necessity provides the rationale for consent as a *sine qua non* for the resolution of boundary disputes. For long-term stability territorial solutions should not be imposed unless outside parties are willing to guard boundary integrity indefinitely. A contextual study would also disclose other vital components relating to territory which actually play a part in the preservation of peace. PIL has not, for example, sufficiently considered the functionality of the colonial boundaries that were preserved at the independence of African states. Because most of those borders have been completely or relatively open, they have caused little hardship for groups in their daily activities, even groups who were or remained divided by them. This has reduced potential tension within and between states, and meant that the retention of the boundaries has had less effect on inhabitants than other international boundaries have had. Applying the African retention of boundaries in the Yugoslav context should have involved a discussion on the effect that the internationalised boundaries would have on the inhabitants. The importance of context and boundary functionality will be further discussed in chapter 6.

Another fundamental difference in the Badinter interpretation of *uti possidetis* and earlier applications is *when* in an independence process it was deemed to be applicable. Matthew Craven has pointed out that when Opinion 3 was delivered, on January 11, 1992, the Commission held that the SFRY still enjoyed international personality. Only in Opinion 8, delivered on July 4, 1992, did the Commission find that the dissolution of the SFRY was complete and “the SFRY no longer exists.”³³⁷ The Commission thus stated its position on the retention of the federal boundaries before the SFRY had ceased to exist:

³³⁶ Lapid, Yosef, “Identities, Borders, Orders: Nudging International Relations Theory in a New Direction”, in: Albert, M., Jacobson, D. & Lapid, Y. (eds), *Identities, Borders, Orders: Rethinking International Relations Theory* (University of Minnesota Press, Minneapolis, 2001) pp. 1-20 at 12

³³⁷ Craven writes: “If the issue is simply whether or not a State continues to exist, it makes no sense to speak of dismemberment as a process. Indeed, the Commission later makes clear that, at the time of its first opinion

The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at.

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*.³³⁸

Lalonde argues that *uti possidetis* à la Badinter was used to “guarantee the internal administrative boundaries of the former republics in advance of formal independence.”³³⁹

Craven has drawn the same conclusion and examines the role of effective control. He notes that the identification of the units which have attained statehood is usually based on effective control or self-determination. The boundaries of a state fall under a different process, and do not have to be precisely determined in order to fulfil the requirements of statehood. The use of *uti possidetis* in the Spanish American context occurred after independence had been attained, and in order to determine the boundaries of the entities after their independence. The Badinter approach was the opposite:

The manner in which the Arbitration Commission addressed the issue, however, was to use *uti possidetis* as a tool for establishing the presumptive statehood of the entities to emerge from the dismemberment of the SFRY and to deny the autonomous Serbian Republics the benefit of that presumption.

Craven continues:

It is also apparent that in the view of the Arbitration Commission the principle of effectiveness had only a subordinate role – it being suggested that in virtue of the internationalization of their borders, each of the constituent Republics of the former SFRY enjoyed prima facie statehood irrespective of the effectiveness of their government. Ultimately, the principle of *uti possidetis* was employed *a priori*, to protect the integrity of the constitutionally-defined units which were then, and only then, able or entitled to exercise some form of self-determination [...] In other words, a principle of boundary delimitation was used as the primary determining tool not only of the shape of the new territorial entities, but also for their international personality as States.³⁴⁰

There is clearly no support for this in earlier applications of *uti possidetis*. Not only is there lack of support for this as a legal application, but claiming legal effects for entities who are

(December, 1991), the SFRY was ‘still an international entity’. If that was the case, one can only understand the Commission’s finding as a prediction about events of which it could only guess, and in which case it should properly have refrained from offering its opinion.” Craven, *supra* note 280, at 369

³³⁸ Second and third principles, in Opinion No. 3 of January 11, 1992, reprinted in: 92 *ILR* (1993) 170-2

³³⁹ Lalonde, *supra* note 181, p. 189

³⁴⁰ Craven, *supra* note 280, at 389-90

not in control of ‘their’ territory poses a grave threat to the internal stability of states. Such a state is by definition unstable, as it is not in control. The situation is different from the Latin American application, where *uti possidetis* replaced the requirement of effective control, as there was agreement between the new states both not to attack one another, and to preserve the earlier colonial boundaries. There was no agreement between the federal units of the SFRY to internationalise the federal boundaries, and where there is no agreement, lack of effective control comes close to a recipe for armed conflict over territory.

3.3.4.4 ‘Badinter law’ expanding? The Canadian response

In 1992 five international scholars presented a study responding to issues relating to the possible secession of the Canadian province of Quebec, focusing on what international law had to say about the permanence of its boundaries.³⁴¹ In the study, a modern form of *uti possidetis* was suggested to be applicable to the Canadian context at and after independence, guarding the boundaries from alterations; while the Canadian constitution would protect Quebec from any territorial changes of federal boundaries before independence, effected without their consent.³⁴²

There is much in the report that can be questioned. Similar to responses made to the Yugoslav tensions the study does not consider whether the conclusions are beneficial to stability and peace in the area and whether or not groups not wanting to be part of the new state will accept the decision of separation gracefully. The study does not consider the colonial implications of their approach; the background to *uti possidetis* was occupation of *terra nullius*, which was only applicable in situations of agreement between several former

³⁴¹ The study, “Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty”, was commissioned by the National Assembly of Quebec, and responded to two questions that concerned whether pre- or post-independence changes to Quebec’s boundaries were legal under international law. Alain Pellet wrote the study in collaboration with Thomas M. Franck, Rosalyn Higgins, Malcolm Shaw and Christian Tomuschat. Study at: <http://www.uni.ca/5experts.html> (accessed 19/11/2003)

³⁴² Pellet wrote that “recent precedents have demonstrated that the principle of *uti possidetis juris* can be transposed to the present case.” (section 2.1) Though the opinion concluded that self-determination did not consistently imply the right to independence, except in certain cases, which did not include the population of Quebec, (3.9) the position presented was that international law was neutral to secessionist attempts. Such attempts could not be made on the basis of self-determination, and depended only on their being effective. If effective, the entity gains sovereignty, and the territory and boundaries gain protection of the principles of *uti possidetis*, territorial integrity and prohibition on force. (3.14-15) *Uti possidetis* requires that the “snapshot photo” of the territory, and not historical considerations, is the basis for the extent of the new state’s territory. But, also before effective independence, *uti possidetis* means that boundaries cannot be changed (2.47)

colonial entities, and a basis of title that is no longer valid in international law.³⁴³ A unilateral declaration of independence would be a secession from a functioning, non-colonial state *without successful negotiations* – an approach contrary to what a society based on democracy, discourse and human rights represents. A non-consideration of other factors, such as groups, when determining the location of the boundaries is both practically dangerous and lacks sufficient legal support today, where self-determination requires participation in important decisions affecting groups. The study also fails to distinguish clearly between the decisive effects of the principle of territorial integrity and *uti possidetis juris* on pre- and post-independence boundaries. Territorial integrity does not mean the continued unity of a state and only prohibits inter-state force to be used against states. It is therefore only applicable after a successful secession and says nothing about the boundaries within which the entity reaches independence. The effect of *uti possidetis* seems primarily aimed at excluding all other factors from boundary location consideration,³⁴⁴ but the study is less than enlightening on the concept³⁴⁵ and does not stop there. The report confidently stated:

The affirmation of the applicability of the principle of *uti possidetis* to all cases of independence, even outside the context of decolonization, is founded on a practice which, owing to recent events, has become fairly common: whether it be the States of the Community of Independent States or those issuing from the dismemberment of Yugoslavia, all have attained independence within the configuration of their former administrative boundaries, recognized by third-party States as their new borders.

But even more so, the reactions of the international community reflect the generalized conviction that, in the case of the secession or dissolution of States, pre-existing administrative boundaries must be maintained to become the borders of the new States and cannot be altered by the threat or use of force, be it on the part of the seceding entity or the State from which it breaks off.³⁴⁶

³⁴³ The concept of *terra nullius* was made both to uninhabited territory as well as to territories inhabited by indigenous groups (see chapter 3.3.1). As such, it no longer enjoys any legal validity. Jennings, *supra* note 189, p. 61. As the application of *uti possidetis* in Latin America denied the interests and claims of indigenous groups, it would seem highly anachronistic and inappropriate to apply the same structure today, without any consideration of their interests.

³⁴⁴ Though Pellet only rules out historical claims to territory, he does not respond to considerations of *inter alia* ethnicity or aboriginal interests for delimitation. Expert report “Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty”, sections 2.3.2 – 2.3.3, *supra* note 341

³⁴⁵ “The administering powers in a colonial setting frequently altered the administrative boundaries separating their various possessions. Yet no one has ever claimed that these possessions should attain independence within their former boundaries. The critical date is the date on which independence is attained: this is the primary meaning of the principle *uti possidetis juris*” (section 2.31). He later states that the universality of the principle can no longer be doubted, and goes on to refer to the same extract of the famous quote from the Frontier Dispute case as the Badinter Opinions, a selection which has been criticised. See chapter 3.3.4.1 and Pomerance *supra* note 283. Pellet’s claims also miss several facts: African leaders had originally rejected the colonial boundaries, and only by agreement between themselves were these accepted as the boundaries of independent states. In the case of Latin American decolonization, *uti possidetis* was only applied (when possible) on the basis of consent between the entities affected. *Supra* chapter 3.3.1

³⁴⁶ Expert report “Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty”, section 2.4.7, *supra* note 341

The first paragraph does not take into account the great distinction between retention of boundaries based on agreement, which have been peaceful, and boundary retentions which have been non-consensual, and have involved violent conflict. The second paragraph blurs the distinction between international law as applicable to post-independence boundaries, and national law as applicable to pre-independence boundaries. Pre-independence boundaries are held to be protected under the principle of *uti possidetis*, and international law thus requires that these borders constitute the international boundaries of the independent state. This formula results in a denial of the need for negotiations, and the need for consideration of those who will be affected. The formula certainly does not accord with the principle of self-determination as the need to pay regard to the legitimate wishes of groups, and its only redeeming feature would be its contribution to peace.

Further, as the study acknowledges the importance of recognition as evidence of effective control which is a requirement of statehood, this complicates the position that there is no period of ‘transition’ where the attempted secession could be judged to be successful or not.³⁴⁷ That ‘in-between’ period in time is more important than the treatment it is accorded and is vital to the legal situation. After an entity has made a unilateral declaration of independence and before other states have recognised the new state, there is no prohibition on the use of federal force to hinder a group attempt within that entity to separate from it.³⁴⁸ This is the situation unless there is a principle of international law that prohibits this specifically, such as Alain Pellet claims. Most importantly, if consent to separation is not reached the situation does not have the same chance of success as that which formed the basis in earlier colonial contexts, but risks the consequences of the context in which consent was lacking – Yugoslavia.

In 1998 the Supreme Court of Canada awarded an advisory opinion on a number of legal issues connected with the possible secession of Quebec.³⁴⁹ The Court concluded that such an action would be unconstitutional, and that in order to allow for such a separation, an amendment would have to be made to the constitution. Within that context the federal boundaries would also be up for discussion.³⁵⁰ Accordingly, the Act adopted by the Canadian

³⁴⁷ Pellet claimed: “the attainment of independence is an instantaneous occurrence, there can be no intermediate situation in which other rules would apply”. *Ibid.*, section 2.1, *supra* note 341

³⁴⁸ Additionally, recognition may be withheld on the basis of a breach of self-determination of unconsidered groups within the entity.

³⁴⁹ Reference re Secession of Quebec, (1998) 2 S.C.R. 217, 37 *ILM* (1998) 1340-76. The case can also be found on page: http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html (accessed 18/11/2003)

³⁵⁰ *Ibid.*, paras. 96-97 (37 *ILM* (1998) 1340 at 1365-6), in which the Court stated: “Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the

Parliament in 2000, in order to give effect to the advisory opinion, laid down that in possible constitutional negotiations on secession, internal boundaries would have to be discussed.³⁵¹ Later that year the Parliament of Quebec responded by adopting its own legislation, which claimed that any boundary changes would require the consent of its parliament, which had a duty to preserve the territorial integrity of Quebec.³⁵² The Badinter interpretation provides one of the primary supports for claiming that negotiations are unnecessary, consent unrequired, and that no consideration of other groups affects the location of the boundaries. However, such a stance is problematic. In the 1998 Supreme Court case, First Nations argued that unilateral secession ignored their considerations and rights, warning that the consequences could be violent.³⁵³ Groups of northern Quebec had previously declared that they would not accept being part of an independent Quebec.³⁵⁴

Though there are clear contextual differences, the situation enjoys important similarities to the SFRY, and to the discussions preceding the secessions of the republics of Croatia and Slovenia. Admitting, for all practical purposes, a right of secession with boundaries intact, unwilling groups contained within, and no negotiations on accommodation required, should, in light of the Yugoslav experience, suggest some caution.³⁵⁵

provincial boundaries of Quebec.” The Court also added: “It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire.” (paragraph 97)

³⁵¹ Article 3 of Federal Bill C-20, also called the ‘Clarity Act’, states: 3. (1) *It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.*

(2) *No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province of Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights.*

³⁵² Article 9 of Bill 99 states: *Le territoire du Québec et ses frontières ne peuvent être modifiés qu’avec le consentement de l’Assemblée nationale. Le gouvernement doit veiller au maintien et au respect de l’intégrité territoriale du Québec.* Document at page: <http://www.cex.gouv.qc.ca/saic/loi-99.html> (accessed 18/11/2003)

³⁵³ “As described in the original Factum of the Intervener [...] unilateral secession of Québec is extremely provocative and likely to lead to chaos, the use of force, violence and a breakdown of the rule of law. In view of the fundamental rights of the James Bay Crees and other Aboriginal peoples and their express opposition to unilateral secession affecting them, the Québec government strategy of effective control is not a legitimate pathway to independence”. Factum of the Intervener, Grand Council of the Crees, Reply to the Factum of Amicus Curiae, January 19, 1998, paragraph 78. At page: http://www.uni.ca/cree_factum.html (accessed 20/11/2003)

³⁵⁴ Came, B. & Wilson-Smith, A., “Border Clash: The War of Words over Quebec’s Territory Heralds a Nasty Fight Over Canada’s Future”, May 30, 1994, 107 *Maclean’s* 22, 10-12; Jenish, D. & Hawaleshka, D., “Battle Over Borders”, December 2, 1996, 109 *Maclean’s* 7; Langan, Fred, “Indians Ask: If Canada Can Be Split, Why Can’t Quebec Too?” January 31, 1996, 88 *Christian Science Monitor* 45, 7; Dallas, Sandra, “Free Quebec? Not if you ask the Cree”, September 3, 1998, *Business Week* 24-25

³⁵⁵ For further comments, see Lalonde, *supra* note 181, chapter 6

3.4 The stability of boundaries

The doctrine of the stability of boundaries has been used to interpret existing boundary treaties, and to function as a kind of estoppel, but it has also been referred to as having been applied in disputes where no boundary had earlier existed. It is suggested that the principle of the stability of boundaries is applicable as a method of interpretation and a form of estoppel in relation to boundaries established by treaty. In its more general form, as a principle of stability, it can be applied in any context and says nothing specific with regard to boundaries.

3.4.1 The principle of the stability of boundaries

In examining the doctrine of the stability of boundaries, reference is often made to the Grisbadarna case of 1909 in which the PCA declared,

It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.³⁵⁶

The context of the case was a dispute over the Grisbadarna banks which were found to be rich in lobster. A 1661 treaty between Denmark and Norway had evidently delimited the banks insufficiently, and the Court was called upon to settle whether the treaty did delimit the maritime boundary, and if not, to delimit the boundary under international law.³⁵⁷ The quote above was made after the Court had noted that Sweden had exercised authority over the disputed area by placing out beacons and installing a light-boat. The Court continued,

This rule is especially applicable in a case of private interests which, if once neglected, can not be effectively safeguarded by any manner of sacrifice on the part of the Government of which the interested parties are subjects; and

Lobster fishing is much the most important fishing on the Grisbadarna banks [...] Fishing is, generally speaking, of more importance to the inhabitants of Koster [Sweden] than to those of Hvaler [Norway], [...]³⁵⁸

The Court thus *inter alia* based the continuation of “the state of things” on the interests of those who were dependent on the resources of the disputed area. One should therefore be cautious about using the *dicta* to support the continuation of all things.

³⁵⁶ “Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden”, 4 *AJIL* 1 (1910), 226-36 at 233

³⁵⁷ Elias, T. O., “The Doctrine of Intertemporal Law”, 74 *AJIL* 2 (1980) 285-307 at 289-90

The principle of the stability of boundaries was nevertheless clearly enunciated in the case of the Temple of Preah Vihear. The case concerned the location of the Temple of Preah Vihear, which, though placed in Thailand by a 1904 treaty between France and Siam, was included within Cambodia on the “Annex I” map of 1907 illustrating the agreed delimitation. Thailand claimed that she had never accepted the line on the map, as it was not the true watershed line; or if she did, it was due to a mistaken belief that the line on the map was correct.³⁵⁹ After some discussion the Court held that “Thailand is now precluded by her conduct from asserting that she did not accept it [the map].”³⁶⁰ The case clearly illustrates the importance of the continuation of existing boundaries, but the facts do not concern themselves with the shift from a colonial boundary to that of an independent state. The discussion centred on whether later evidence could shift the location of a boundary delimited by an international treaty, a reality that the Court recognised as an “interpretation” of the treaty.³⁶¹

The Court went on to explain that,

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a frontier, so far from being stable, would be completely precarious.³⁶²

The Court subsequently emphasised that the intention of the parties in 1904 had been to “achieve certainty and finality” regarding a frontier that had “been a cause of uncertainty, trouble and friction”, leading the Court to “conclude that an important, not to say a paramount object of the settlements of the 1904-1908 period [...] was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality.”³⁶³ The Court went on to find that despite the description of the boundary in the 1904 treaty,

There is, however, no reason to think that the Parties attached any special importance to the line of the watershed as such, as compared with the overriding importance, in the

³⁵⁸ “Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden”, 4 *AJIL* 1 (1910), 226-36 at 234

³⁵⁹ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) ICJ Rep. (1962) 6 at 16-21

³⁶⁰ *Ibid.* at 32

³⁶¹ *Ibid.* at 34. “The real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of the Preah Vihear, thereby conferring on it a binding character. [...] The Court considers that the acceptance of the Annex I map by the Parties caused the map to enter the settlement and to become an integral part of it.” *Ibid.* at 22, 33

³⁶² Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) ICJ Rep. (1962) 6 at 34

³⁶³ *Ibid.* at 34-5

interests of finality, of adhering to the map line as eventually delimited and as accepted by them.³⁶⁴

Paraphrasing the judgment, the ICJ argued that as the most important object of the parties in setting up the treaty was not to find the watershed line, but to settle a frontier that had been a source of inter-state tension, this is what the ICJ also chose to focus on, and use as its ‘object and purpose’ in interpretation. As the line recorded in the 1904 treaty did not in itself seem to enjoy special importance, it was better to base the title to the disputed territory on an interpretation of the original treaty which recognised the acquiescence of Thailand to Cambodia’s exercise of authority over the territory. The argument was not that the acquiescence to Cambodia’s *effectivités* changed the treaty line, but was to be taken into account when interpreting the original treaty.

The case is unconnected to *uti possidetis juris*, as the issue concerned not better title to territory or where the boundary should lie, but, instead, how a treaty accepted by both parties should be interpreted. In the Temple of Preah Vihear case, the Court interpreted the bilateral treaty in light of Thailand’s acquiescence to another state’s show of authority over the disputed territory.³⁶⁵ The principle of stability was then applied by the ICJ so as to make permanent an acquiesced ‘misconception’ or practice, or even a *de facto* situation, by a form of estoppel.³⁶⁶ The principle of stability played no role in how the boundary was agreed upon or constructed in the first place. The alteration, interpretation or ‘error’ of the agreement was that which was ‘protected’ by the principle of stability in the case, and not the text of the original agreement or the colonial boundary; this interpretation was justified on the basis of

³⁶⁴ *Ibid.*, at 35

³⁶⁵ Kaikobad, *supra* note 230, at 122. In the earlier Sovereignty over Certain Frontier Lands case the Netherlands had argued *inter alia* that it gained title to the disputed plots of land by acts of sovereignty exercised after the Boundary Convention had recognised Belgian sovereignty. The Court did not rule out the possibility of acquiescence, and discussed the Belgian response, but concluded that Belgian sovereignty “has not been extinguished”. Case Concerning Sovereignty over Certain Frontier Lands (Belgium/Netherlands) ICJ Rep. (1959) 209 at 227-30. The Fisheries case also concerned acquiescence to a boundary, in this case of British acquiescence to the Norwegian system of straight baselines. The boundary was, however, not agreed upon by treaty and should rather be treated as clear acquiescence than as boundary stability. Fisheries case (United Kingdom v. Norway) ICJ Rep. (1951) 116

³⁶⁶ One could understand the acquiescence as having the effect of estoppel in this case, even though acquiescence often forms “but part of the evidence of sovereignty”. Brownlie warns that it must nevertheless be “used with caution, more particularly in dealing with territorial issues.” Brownlie, *supra* note 189, p. 158. Also Jennings, *supra* note 189, pp. 47-51. See further the Island of Palmas case, where the PCA arbitrator Max Huber held that the Netherlands’ display of sovereignty was “long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.” He notes that until 1906 “no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over [*inter alia* the island] has been recorded.” The Netherlands’ claim to title based on ‘continuous and peaceful display of sovereignty’ over the island was recognised as valid above the

the original *intention* of the parties to the agreement, which was to reduce a source of inter-state tension by delimiting an inter-state boundary.³⁶⁷

The principle of the stability of boundaries as expressed in the Temple of Preah Vihear case could therefore be summarised as a variation of *de facto pacta sunt servanda* with respect to already agreed boundaries. If a boundary has been agreed upon by the parties or accepted in another way, it cannot later be changed by the claim of one of the parties. Its character is as a form of estoppel; it ‘guards’ established boundaries between parties and says nought of their birth or creation in the first place. The principle of the stability of boundaries as developed in the Temple of Preah Vihear case is then only correctly used to preclude later claims made by a party when a boundary agreement has earlier been made.

The principle of the stability of boundaries also presupposes that one of the treaty parties or successors desires the continuation of the boundary. If both parties agree to change the boundary, there is nothing to stop them from doing so. The ICJ stated this clearly in its treatment of the principle of the stability of boundaries in the Territorial Dispute case:

This is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent, but when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.³⁶⁸

The principle of the stability of boundaries then does not carry with it any *erga omnes* effect, in the sense that other third parties could claim that the boundary not be changed if the two parties concerned had agreed thereto. It is therefore not a relevant basis upon which to require the continuation of all boundaries in all circumstances.³⁶⁹ Additionally, it was not relevant in the context of the federal boundaries of the second Yugoslavia, as these were not established by bilateral agreements. It cannot then lend support to a general obligation under customary international law not to alter boundaries, as boundaries are changed, sometimes by bilateral agreement, and in several instances by imposition of strong, non-contiguous states.³⁷⁰

US claim of succession to Spain’s discovery of the island (inchoate title). Island of Palmas case, (Netherlands/U.S.A) 2 *RIAA* 829 (1928) at 867-8

³⁶⁷ Other cases support the interpretation of boundary treaties as guided by a ‘common intention’ to settle the respective boundary, whether focusing on permanency or not leaving sections of the boundary unsettled; see Case Concerning Sovereignty over Certain Frontier Lands (Belgium/Netherlands) ICJ Rep. (1959) 209 at 221-22; and Case Concerning the Territorial Dispute (Libya/Chad), ICJ Rep. (1994) 6 at 24

³⁶⁸ Case Concerning the Territorial Dispute (Libya/Chad), ICJ Rep. (1994) 6 at 37

³⁶⁹ With regard to Africa it is incorrect to claim that the intention of the parties establishing the boundaries was to have stable boundaries for all future time. The purpose of the boundaries was to delimit claims by other colonial states, and not settle the kind of boundary tensions that the Temple of Preah Vihear case concerned. *Infra* chapter 6.2.3.1

³⁷⁰ The post-first world war rearrangements contradict suggestions that boundary changes can only legally occur by the consent of the states delimited by the boundary; the new post-first world war boundaries were imposed by

In the Territorial Dispute case³⁷¹ Libya argued that a 1955 treaty concluded between itself and France had not determined the frontier between Libya and Chad, formerly a colony within French Equatorial Africa. The Court discussed the principles of interpretation relating to boundary provisions, and it referred to the common intention of the parties to boundary treaties, as well as to the principle of effectiveness. The ICJ considered that the 1955 treaty “was aimed at settling all the frontier questions, and not just some of them.”³⁷² The ICJ held that a frontier had in fact resulted from the 1955 treaty, and that it “was accepted and acted upon by the Parties.”³⁷³ It concluded that the treaty had to be understood to have determined a permanent frontier, and continued:

The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the life of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court.³⁷⁴

The cases referred to by the Court are the Temple of Preah Vihear and the Aegean Sea Continental Shelf case.³⁷⁵ In the latter case, Greece had instituted proceedings against Turkey with regard to a dispute concerning the delimitation of their respective continental shelves. As Greece argued that the Court had jurisdiction in the case, while Turkey claimed it did not, this issue had to be settled by the ICJ before any other questions could be determined. One of Turkey’s arguments for the non-competence of the Court to determine the case was a reservation that Greece itself had made to a 1928 treaty for the pacific settlement of international disputes, and which could have formed a basis for the jurisdiction of the Court.³⁷⁶ The Court examined the Greek suggestion that “delimitation is entirely extraneous to the notion of territorial status”, and found that they, on the contrary, are closely related. It is in this context that the Court reminded the parties of what the dispute really consisted of – the determination of the continental shelf – and that for this purpose it is necessary “to draw the exact line” where the “powers and rights of Greece meet those of Turkey.” The Court continued:

a few strong and (generally) non-contiguous states. It could perhaps be argued that the legal basis for the territorial rearrangements was the surrender of the states who had lost the war.

³⁷¹ Case Concerning the Territorial Dispute (Libya/Chad) ICJ Rep. (1994) 6

³⁷² *Ibid.*, at 23-5

³⁷³ *Ibid.*, at 35

³⁷⁴ *Ibid.*, at 37

³⁷⁵ Aegean Sea Continental Shelf case (Greece v. Turkey), ICJ Rep. (1978) 3

³⁷⁶ The Greek reservation at its accession had excluded *inter alia* the following disputes from the treaty procedures: (b) *disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication.* *Ibid.*, at 20-1

Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.³⁷⁷

The reference to this “element of stability” is not employed for any special purpose in the case, such as for interpretation, but is mentioned only as a passing reference. It does not seem to add much to the understanding of the implications of the principle of stability, as the Court only determined the question of jurisdiction in a dispute where there was no pre-existing agreement on the delimitation of the continental shelf or a line resulting from any other developments. The Court nevertheless noted the connection between stability, boundary treaties and their exclusion from the possibility of fundamental change of circumstances. The principle of the stability of boundaries provides not only a method of boundary treaty interpretation, and the function of estoppel, but also a basis for the exclusion of boundary treaties from ordinary treaty options under which they may be altered. Note that the principle is always applied in relation to treaties.³⁷⁸

3.4.2 International stability

Apart from the Aegean Sea Continental Shelf case, the cases examined above relate to the interpretation of existing boundary treaties. The principle of stability has nevertheless also been referred to in cases where there are no boundary treaties to interpret. It is suggested that in this later form it provides a means whereby title can be recognised on the basis of other than traditional legal claims. It refers not to the stability of the boundaries themselves, but to a boundary solution that is understood to facilitate international stability. It is also in this form that it has permeated much of the law on territory and justified, for example, the great importance placed on effective possession in determining valid title to territory for the purpose of international stability. It might be suggested that it forms a contextual or ‘realist’ contribution to the law of title to, or acquisition of, territory.

³⁷⁷ Aegean Sea Continental Shelf case (Greece v. Turkey), ICJ Rep. (1978) 3 at 35-6

³⁷⁸ See Judge Shahabuddeen’s comment in the Territorial Dispute case (Sep. Op.): “The principle of the stability of boundaries, as it applies to a boundary fixed by agreement, hinges on there being an agreement for the establishment of a boundary; it comes into play only after the existence of such an agreement is established and is directed to giving proper effect to the agreement. It does not operate to bring into existence a boundary agreement where there was none.” Territorial Dispute case (Libya/Chad) ICJ Rep. (1994) 6 at 45

In the Rann of Kutch case³⁷⁹ the Tribunal was called upon to determine *inter alia* the boundary in an area where there existed neither any clear prior colonial boundary nor any boundary agreed by treaty.³⁸⁰ The Tribunal generally based its award on evidence of *effectivités*, but two inlets were awarded to Pakistan despite evidence of an Indian display of authority. The Chairman of the Tribunal, Judge Gunnar Lagergren, explained that granting this territory to India would have been “conducive to friction and conflict”. He continued: “The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory which is wholly surrounded by Pakistan territory, also be regarded as such.”³⁸¹

The same reasoning can be applied in the treatment of enclaves at decolonisation. The colonial boundaries that bounded them were generally not preserved, but enclaves were integrated into the territories by which they were surrounded.³⁸² The stability of boundaries in this version does not protect boundaries that have been established by treaty, but will deny validity to boundaries that are projected to cause friction in the relations between states. The principle seems to support the selection of boundaries that are perceived to have a peaceful future before them. It would seem that the retention of colonial boundaries, boundaries established by treaty, or traditional claims of title (in this case, based on evidence of the exercise of state authority) could be set aside for a boundary that on the basis of its ‘nature’ or character is thought to be the cause of less tension and friction between states.

The principle of the stability of boundaries, as applied in cases of boundaries established by treaty, forms a method of treaty interpretation and a basis for a kind of estoppel at acquiescence. As a general principle with regard to territory, it only provides a means for giving consideration to other than legal factors, for example, to the situation or location of a specific territory, such as an enclave that is surrounded by another state on all sides.

³⁷⁹ Indo-Pakistan Western Boundary case, 50 *ILR* 2

³⁸⁰ *Ibid.*, at 493

³⁸¹ *Ibid.*, at 520

³⁸² Crawford nevertheless discusses this from the viewpoint of their non-viability, not from the perspective of stability. Crawford, *supra* note 137, pp. 377-84. Kaikobad presents ‘the Rule on Enclaves’ as a reversion of sovereignty to the dismembered state. How what was not earlier a state could have enjoyed sovereignty over the territory in question is not discussed. Kaikobad, K. H., “Self-Determination, Territorial Disputes and International Law: An Analysis of UN and State Practice” 1 *Geopolitics & International Boundaries* 1 (1996) 15-54 at 20-1, 31-2, 44-47

3.5 Some conclusions that relate to self-determination

It has already been mentioned that it is quite common to refer to territorial integrity, *uti possidetis* and the stability of boundaries as though they are interchangeable concepts or enjoy the same status and function in law. In this chapter it has been argued that they are of quite different character and function, and carry with them varying implications.

The principle of territorial integrity is not synonymous with *uti possidetis* either in legal status, in content and purpose, or regarding its subjects. While territorial integrity relates to illegal force used against already established state territory and prohibits inter-state aggression, *uti possidetis* is a method of settling claims to territory or boundaries which is based on the consent of the parties for a peaceful solution. The principle of territorial integrity prohibits aggression against other states, including annexation, and the principle of self-determination cannot legitimise the annexation of the territory of another state, or unilateral use of force against another state other than in self-defence. Appeals to the self-determination of peoples cannot justify force used against other states other than by decisions of the UN Security Council. The principle of territorial integrity does not, however, protect states against all changes, or guarantee any territorial *status quo*, and so the creation of new states, even by secession, does not fall within the ambit of territorial integrity other than in inter-state aspects.

Uti possidetis should not be understood as constituting a rule of PIL, as there is insufficient evidence of either *opinio iuris* or *usus*. Furthermore, as a rule it would exclude other options to solve territorial disputes peacefully, and thus would not be in conformity with the Purposes of the UN Charter. Additionally, in the application of *uti possidetis* as a rule in the former Yugoslavia, where it was applied without the consent of all parties, there are no indications whatsoever of its having been conducive to a peaceful solution. The importance of consent to peace cannot be overestimated. As *uti possidetis* does not enjoy the status of a rule or principle of international law, either by treaty or custom, it cannot legally be understood to limit the principle of self-determination or reduce its effect to nothing. In fact, its application as a rule of international law denies any need for negotiations in order to find a satisfactory solution, and as such, detracts from the requirements that provide a stable basis for peace and stability. Where boundaries have been peacefully retained at independence, such retentions have been based on agreement by the parties concerned. Applied as a rule of international law not requiring the consent of all parties for application, *uti possidetis* has proved to reduce the options for settlement to either acceptance or the use of force. As a rule it does not harmonise with the primary goal of peace laid down in the UN Charter, and in that light can have no

impact on self-determination, other than as one option to be applied in boundary disputes by the consent of the parties. The denial of ‘*uti possidetis* as law’, that consideration of the interests of all groups within a state entity, not the subjection of the minority by the majority, is fundamental to peace within and between states, provides one of its most important flaws.

The principle of the stability of boundaries provides a method of interpreting boundary treaties where at least one of the parties relies on the treaty for its case, treating the intention of the original parties as desiring long-term stability. It might also form the basis for a kind of estoppel, where acquiescence to actions modifying the treaty boundary line might cause the change to become ‘included’ within the treaty by interpretation. The principle is inapplicable where no boundary treaty exists, and is not a separate rule of international law that can neutralise the effects of the principle of self-determination.

There are today no legal norms prohibiting territorial changes *per se*. The prohibition on inter-state force is connected precisely to force, and harmonises with the primary goal of international peace and security. Territorial integrity cannot shield the state from necessary changes from within that respond *inter alia* to the security and livelihood of its population and create the proper conditions for stability. Indeed, one of the aims of the principle of self-determination, as interpreted in the light of the goal of international peace and security, is to promote stability within and between states by paying due “regard to the freely expressed will of peoples”.³⁸³ If the highest aim is peace, then there must exist requirements upon states to take measures necessary, and possible, to reach that goal. The core of self-determination fully supports the continuation of states that serve their inhabitants by respecting them and seeking their consent on issues of importance to them. One could refer to the parallel of good faith,³⁸⁴ in that states cannot ignore the wishes of their inhabitants and then refer to principles shielding them from the consequences of unrest within. But applying self-determination does not automatically imply independence, or the change of a boundary’s location, merely on the grounds of respect for national groupings. The options available are not limited to allowing the breaking away of territory, and there are many other possible approaches before the

³⁸³ *Western Sahara, Adv. Op.* (1975) ICJ Rep. 12 at 33 (paragraph 58-9)

³⁸⁴ Enshrined in Article 2(2) of the UN Charter: *All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.* Regarding treaty performance and interpretation it is laid down in the preamble and Articles 26 and 31(1) of the VCLT, 1969. Article 26: *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.* Article 31(1): *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

separation of territory need occur. Chapter 5 will examine such options more closely. The next chapter will instead study the principle of self-determination in its context in order to lay the basis for an inter-relational interpretation of the UN Charter Purposes.

4. THE LEGAL FRAMEWORK and SOME FUNDAMENTAL ISSUES

Fact situations do not await us neatly labelled, creased and folded, nor is their legal classification written on them to be simply read off them by a judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision. ... If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction...
In this area men cannot live by deduction alone.³⁸⁵

4.1 The nature of the UN Charter

Moving on to the principle of self-determination as contained in the UN Charter, a few issues in relation to the Charter first need to be examined. In order to interpret an international treaty correctly its character must be taken into account. As the UN Charter is multifaceted, it becomes important to examine its ‘real’ character as a legal document. Is it a multilateral treaty, the founding document or constitution of an international organisation, or possibly even the constitution of the international community? The answer to these questions will inform how the Charter is to be approached and what its ‘context’ is for the purposes of interpretation.

4.1.1 Different types of treaty

Most treaties or conventions are agreements between states. States are generally considered to be the creators of agreements and norms of PIL, and without their consent nothing can be legislated and considered binding upon them. In the Lotus case the Permanent Court of International Justice (PCIJ) expressed its view on the creation of rules of international law thus:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent

³⁸⁵ Hart, H. L. A., “Positivism and the Separation of Law and Morals”, in: Dworkin (ed.), *The Philosophy of Law* (Oxford University Press, Oxford, 1977), 17-37 at 23

communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.³⁸⁶

This is the traditional view of the basis of PIL – as consensual – and much has already been written on the topic. Treaties must be signed and ratified, acceded or succeeded to in order for a state to become bound by their contents. The character of treaty obligations are reciprocal, which forms the basis of the Vienna Convention on the Law of Treaties (hereafter VCLT) rules on, for example, withdrawal from treaties.³⁸⁷ However easy and dominant the theory of absolute consent is, it becomes problematic in several areas and requires some modification. It does not account for or explain the character of all treaties, and in certain cases is even faulty.³⁸⁸ Before the different approaches to the UN Charter are described and discussed, a short outline of different types of treaty that force an expanded view of *inter alia* treaty interpretation will be given below.

It is not a new exercise to distinguish between different types of treaty.³⁸⁹ It is easy to accept that a technical bilateral treaty is based on full reciprocity. If one party defaults on its performance, the other party might decide to terminate the agreement. Treaties setting up international organisations have been suggested to be less reciprocal, as the organisation often receives some autonomy from its member states, leading to its status in international law as a limited legal subject. Even before the existence of the United Nations, Maurice Hauriou distinguished between reciprocal treaties and constituent treaties for institutions which have a common purpose.³⁹⁰ The 1969 VCLT reveals an awareness of the different character of

³⁸⁶ S.S. Lotus (France v. Turkey), PCIJ, Judgment 9, September 7, 1927, Ser. A, No. 10, at 18.

³⁸⁷ Article 60 allows a party to terminate or suspend a bilateral treaty as a consequence of its breach by the other party.

³⁸⁸ Unequal treaties, such as the 1898 Convention of Peking agreed between China and Britain on the 99-year lease of Hong Kong, are clearly neither equal nor reciprocal, but have still been considered as binding under PIL. This is at least the case if the treaty was concluded before the entry into force of e.g. Article 52 of the 1969 VCLT. Wesley-Smith, Peter, *Unequal Treaty 1989-1997: China, Great Britain and Hong Kong's New Territories* (Oxford University Press, Hong Kong, 1998) pp. 298-301. For the ICJ's opinion on changing circumstances and continuing treaties, see Legal Consequences for States on the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, *Adv. Op.* (1970), ICJ Rep. 1971, 16 at 31; also Elias, *supra* note 357, at 286; Sharma, *supra* note 190, pp. 98-9

³⁸⁹ Jenks, C. W., "The Conflict of Law-Making Treaties", 30 *BYIL* (1953) 401 at 436-7, suggesting that Article 20 of the League of Nations Covenant reveals an understanding that certain treaties transcend ordinary treaties because of their character and subject-matter. See also Legal Consequences for States on the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, *Adv. Op.* (1970), ICJ Rep. 1971, 16 at 51-8; Gordon, Edward, "The World Court and the Interpretation of Constitutive Treaties", 59 *AJIL* (1965), 794-833 at 797, speaks of a "continuum" of treaties instead of "kinds", with bilateral conventions on one side and multilateral treaties establishing organisations on the extreme other.

³⁹⁰ Hauriou, M., "La théorie de l'institution et de la fondation essai de vitalisme social", in: *La cité moderne et la transformations du droit, Cahiers de la nouvelle journée*, n° 4, 1925, 1 at 11, in: Suy, Eric, "The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms", in: Beyerlin, U. *et al*, *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht; Festschrift für Rudolf Bernhardt* (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, Heidelberg, 1995) at 275

treaties. Article 20(3) regulates that in the case of reservations to constituent instruments of international organisations it is not only the will of states, but also that of the competent organ of the organisation, that must be taken into account when ruling on the acceptability of a reservation.³⁹¹ This is a departure from strict bilateralism, and admits a certain autonomy on the part of the organisation. It could still be argued that it is states that agree to give an organisation its autonomy to make decisions that may be binding on the states, and is similar to the effect of customary international law, where states in theory become bound by their practice, and then may not change the rules individually. There are nevertheless two categories of convention that clearly do not fit the consensual model: agreements benefiting third parties other than states; and territorial treaties.

The treaties benefiting third parties that have a special character are primarily those that lay down humanitarian and human rights standards.³⁹² It is well established that human rights treaties, which benefit non-contracting parties other than states, have a different character than reciprocal treaties.³⁹³ They are “not a web of inter-State exchanges of mutual obligations”,³⁹⁴ leading to consequences for their interpretation, succession and with regard to reservations.³⁹⁵ The VCLT also makes special regulations for humanitarian treaties. Article 60(5) lays down the rule that in the event of a breach of a treaty, the purpose of which is the protection of the human person, the breach does not entitle the other party to the treaty to terminate it or suspend its operation.³⁹⁶ As the beneficiaries are not the States Parties, it would be unjust for the beneficiaries of the remaining Parties to suffer because another Party violated its

³⁹¹ Article 20: *Acceptance of and objection to reservations*, [...] 3. *When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.*”

³⁹² The ICJ noted the special character of the Genocide Convention in the case *Reservations to the Genocide Convention*, Adv. Op., ICJ Rep. (1951) 15 at 23: “In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.”

³⁹³ *The Effect of Reservations on the Entry into force of the American Convention of Human Rights* (Advisory Opinion OC-2/82, 1982) § 29; *Temeltasch case*, Report of May 5, 1982, D&R 31 (1983), at 120 (144-5), UN Commission of Human Rights (CHR), Res. 1993/23 and 1994/16; *Soering v. Germany*, ECHR Judgment of July 7, 1989, §87; *Loizidou v Turkey*, ECHR Judgment of March 23, 1995, §43 *et al*

³⁹⁴ HRC, General Comment 24 (1994), paragraph 17

³⁹⁵ For an interesting repertoire on reservations to HRs treaties and state consent, see Goodman, Ryan, “Human Rights Treaties, Invalid Reservations, and State Consent”, 96 *AJIL* 3 (2002) 531-60

³⁹⁶ Article 60: *Termination or suspension of the operation of a treaty as a consequence of its breach*
5. *Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.*

obligations towards its beneficiaries.³⁹⁷ In the two cases of international organisations and humanitarian treaties the VCLT takes the different natures of them into account, and thus departs from the theory of strict reciprocity between states.

Boundary treaties are another type of agreement that cannot be categorised as strict reciprocal treaties. In relation to boundary treaties a special theory has been proposed that, once agreed upon, boundaries are transformed from being based on reciprocal agreements into unquestionable facts.³⁹⁸ They would thus have a different effect from ordinary international treaties. The ICJ has stated that “when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.”³⁹⁹ The argument seems to have been originally developed to take the interests of other states that had consented to a territorial regime into account,⁴⁰⁰ but was also claimed to be valid at decolonisation. Despite the effect of the doctrine of *tabula rasa*, new states were explained to be bound by customary international law that had been created by a territorial regime. A somewhat similar argument claims that once a territorial treaty is ratified it is also held to be executed, and thereafter “acts as a kind of conveyance”.⁴⁰¹ The new states were then not seen to succeed to the boundary treaties, but to the boundaries themselves.⁴⁰² The doctrine of *tabula rasa* has also been challenged with regard to earlier accepted human rights obligations; states are often claimed to succeed to

³⁹⁷ If the Article is just to be understood as one covering humanitarian obligations, the argument is still valid that the treaty has a special character due to the importance of the subject matter - the human person. Therefore the obligations are not to be viewed as simply reciprocal, entitling the other party to end its commitments in the event of a breach by the other party.

³⁹⁸ *Supra* chapter 3.3.3

³⁹⁹ *Case Concerning the Territorial Dispute (Libya/Chad)* ICJ Rep. (1994) at 37, paragraph 73

⁴⁰⁰ Craven, *supra* note 259, at 156-7

⁴⁰¹ Shaw, *supra* note 28, at 88

⁴⁰² Cukwurah, *supra* note 181, pp. 105-10; Udokang, Okon, *Succession of New States to International Treaties* (Oceana Publ., Dobbs Ferry, N.Y., 1972), pp. 377-402. See the Convention on Succession of States in Respect of Treaties (1978) Article 11: *A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.* There are some complications with the inheritance theory, such as the existing rule regarding the effect of the commencement of an independence process on the treaty-making capacities of the administering state. In the 1989 *Guinea-Bissau v. Senegal Maritime Delimitation case* the arbitrators stated: “A State born of a process of national liberation has the right to accept or reject any treaties concluded by the colonial State after the initiation of that process.” The effect does not start at independence, but begins at “the moment from which its [a national liberation movement] activity acquired an international impact.” Consequently, “Senegal had therefore total and absolute freedom to accept or reject the 1960 Agreement.” *Guinea-Bissau v. Senegal Maritime Delimitation*, Award of July 31, 1989, 83 *ILR* 1 at 26, 27, 29. The main question in the case concerned the 1960 colonial agreement which delimited the maritime boundary between Guinea-Bissau and Senegal. Possible legal interpretations are: maritime boundaries are different from land boundaries and only the latter gain permanent character (this distinction the Tribunal denied, pp. 36-8); once an independence movement has gained ground, territorial shifts cannot be made; or there is no binding rule that all boundaries have a life apart from consensualism. If the second option is correct, then the theory would have to be that boundary provisions are separable from treaties concluded only prior to effective independence movements.

them automatically, implying a denial of the ‘clean slate’ doctrine with regard to this kind of treaty.⁴⁰³ By theoretically separating the international colonial boundaries from the treaties themselves, the continuity of the boundaries was argued to be based on a specific legal requirement, and not on succession to the boundary treaty.⁴⁰⁴

This separation from treaties of boundary provisions further supports the claim that a boundary cannot be called into question in the same way that other treaty provisions can be, by challenges under treaty law, such as by *rebus sic stantibus* – fundamental change of circumstances – and also terminated under treaty law, as seen in Article 62 of the VCLT.⁴⁰⁵ There are, nevertheless, alternative ways of presenting the special character of boundary treaties. While reciprocal treaties generally can be terminated if a party fails to fulfil its obligations, the object of a boundary treaty is different; it is most often a bilateral attempt to agree upon a final delimitation between the territory of two states for the purposes of reducing or pre-empting inter-state tension. The treaty often aims to continue indefinitely, and is not premised on the assumption that if one party does not fulfil its treaty obligations to respect the boundary, the other party may terminate the agreement. As the object generally is to settle the boundary permanently and not leave room for unilateral departure from the treaty, this might explain both how it can be argued that an international boundary, once agreed, ‘exists’ apart from the treaty setting it up and the continued consent of states that the agreement represents, as well as why the consent of both parties to the treaty or later, the states separated by the boundary (which are not necessarily bound by the treaty), is necessary if the boundary is to be legally altered. That this potentially binds parties who have not given their consent can be based upon different arguments: either, that the continuation of boundaries is necessary for the continuation of states, which form the basic units of the international system of states and of PIL, which is a precondition for the continuity of the entire system; or, that this is a

⁴⁰³ Reports of the HRC, A/48/40, paragraph 36, 41 and A/49/40, paragraph 48-9. For discussion, see Kamminga, Menno, “State Succession in Respect of Human Rights Treaties”, 7 *EJIL* 4 (1996) 469-484; also Craven, *supra* note 259, at 152-3. Polat notes contrary practice by the Central Asian USSR successor states with respect to HRs treaties. Polat, Necati, *Boundary Issues in Central Asia* (Transnational Publ., Ardsley, 2002) pp. 12-13

⁴⁰⁴ *Supra*, chapter 3.3.3. In his dissenting opinion in the 1989 Guinea-Bissau v. Senegal Maritime Delimitation case Judge Bedjaoui referred to *uti possidetis* as the basis for succession to boundary treaties. Award of July 31, 1989, 83 *ILR* 1 at 74-5 (§53)

⁴⁰⁵ Article 62 of the 1969 VCLT: 2. *A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary.* The ILC has used a slightly different approach, focusing on the treaty type itself, and stated that the category of territorial treaties are unaffected by state succession. ILC Commentary on the Draft Articles on Succession of States in Respect of Treaties, quoted in: Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997, § 123.

principle protected by law, as it is necessary for the maintenance of international peace and security.⁴⁰⁶

Water-related treaties similarly fall under the category of dispositive treaties, though they differ in character from boundary treaties. While boundary treaties are to lay down a continuing delimitation between states, water-related treaties concern the use of resources. It has been argued that their special character requires a specific mode of interpretation, because of the fact that their long-term implementation requires special flexibility.⁴⁰⁷

It may then be concluded that under PIL there does exist different types or kinds of treaty, the characters of which determine their function and appropriate methods of interpretation.

4.1.2 Different approaches to the UN Charter

4.1.2.1 Multilateral treaty

To see the Charter solely as a multilateral convention is a view that is statist in its point of departure. It builds on the traditional view of the sovereignty of states and their position as the main actors on the international stage. Based on this position the UN Charter is to be interpreted textually, according to the natural meaning of the words, and in the light of the intention of the parties to the agreement and using the *travaux préparatoires*. The UN Charter is no more than an ordinary treaty.⁴⁰⁸ In light of the previous section, however, it seems clear that treaties do actually differ, and that strict reciprocity does not characterise all treaties. As the UN Charter is a treaty setting up an international organisation one must go beyond ordinary multilateralism and take its special character into account. Some of the common categories the Charter falls under are those of its being a political treaty, the

⁴⁰⁶ Evidence of causality would nevertheless have to be presented for the arguments to be acceptable.

⁴⁰⁷ These treaties are termed 'relational' as opposed to 'discrete' contracts. The substance of the latter type are replaceable within the market, whereas relational agreements include future co-operation that is risky in light of possible changes, thereby requiring inter-party trust. Such agreements cannot always be precise to guard against future eventualities, and will therefore lay down procedures as well as include vague standards such as 'best efforts'. More flexible standards should then be applied to relational than to discrete treaties. Benvenisti, Eyal, "Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law", 90 *AJIL* 3 (1996) 384-415 at 409-10. The ICJ has also noted the indication by the ILC that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties". ILC Commentary on the Draft Articles on Succession of States in Respect of Treaties, quoted in: Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997, § 123

⁴⁰⁸ Weil, Prosper, "Towards Relative Normativity in International Law?", 77 *AJIL* (1983) 413-42 at 425

constitution of an international organisation, or the constitution of the international community.

4.1.2.2 Political treaty

Designating a treaty a ‘political’ treaty cannot mean that it is not legally binding or that certain treaties are not political. All treaties are negotiated and accepted on the basis of political decisions, so the designation ‘political’ must be taken to have an extra-legal meaning, and thus not enlightening as a legal characterisation of a document. The designation as a political treaty implies instead that the subject matter it regulates lies within the sphere which is of the highest sensitivity for states, and that interpretation thus perhaps needs to take changing situations and developments into account to a higher degree than would be likely for other treaties.⁴⁰⁹

When examining norms of international law it is possible to distinguish *inter alia* between norms regarding the international system, the actors of the system and their very existence, and norms which have the purpose of facilitating additional co-operation between states.⁴¹⁰ The former could be characterised as norms the purpose of which are to protect the functioning of the system itself and to prevent conflicts which would threaten the existence of the system and its actors. This could be likened to the skeleton of the system. The latter could be characterised as norms which have as their function to regulate additional co-operation between states beyond the basics of existence, and which do not alter the basic rules of the system and the co-existence of states, but have as their point of departure the accepted premises of the system. This could be likened to the flesh of the system.⁴¹¹ In this sense the classification of the UN Charter as a political treaty becomes more understandable. It is not a technical treaty on co-operation between states, but *inter alia* regulates the use of force between states, which is a question that concerns the very existence of states and the way in which they are to relate and resolve fundamental issues.

⁴⁰⁹ Pollux, “The Interpretation of the Charter”, 23 *BYIL* (1946) 54-82 at 55, 69. It might be interesting to note the advisory jurisdiction of the PCIJ regarding “any dispute or question referred to it” being changed to the ICJ’s advisory jurisdiction over “any legal question”; Article 14, Covenant of the League of Nations, and Article 65 of the Statute of the ICJ. Observation by Gordon, *supra* note 389, at 800

⁴¹⁰ Mosler, Hermann, *The International Society as a Legal Community* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) pp. 68-9

⁴¹¹ The picture is not useful to a greater extent, as even a flesh wound can lead to a lethal infection. The failure of a treaty of commerce would most likely not lead to the demise of the entire system.

Approaching the UN Charter as a political treaty would seem to imply that the norms are binding to the extent that they do not threaten the existence of the international system and of states, and that it can be legitimate to disregard them or interpret them so as not to come into conflict with the fundamentals of the system. International norms are thus understood as created by states to regulate the relations between existing actors within the international system, and the norms cannot therefore change the structure of the system and the existence of the actors. International law could never, for example, prohibit a state to defend its continued existence if attacked. While at first glance this view seems to respect the sovereignty of states and their need not to become bound by obligations that threaten their survival, this understanding of international law posits that states cannot legislate in all matters, and that the existence of the states-structure cannot be altered by the states themselves through their will as international legislators. The will of states is understood to be a result of, and subject to, the existence of states – not the other way round. The view admits that some norms are then held to exist which precede the will of states as legislators and which determine the existence of the international system. The sum is the same for all PIL positions: however one twists and turns the arguments, there can be no victory for the absolute requirement of state consent for all international law norms to be binding on states if there is to be a system of binding international law.

4.1.2.3 The constitution of an international organisation

It is not uncommon to refer frequently to constituent treaties of international organisations as being ‘constitutional’. This can be for the purpose of legitimising extensive interpretation, as this is ‘constitutional interpretation’.⁴¹² The UN Charter has from the beginning been noted to be the constitution of an organisation and therefore not an ordinary treaty.⁴¹³ A distinction needs to be made between organisations which are merely co-operative, and therefore without

⁴¹² Suy, Eric, “The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms”, in: Beyerlin, U. *et al*, *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht; Festschrift für Rudolf Bernhardt* (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, Heidelberg, 1995) at 267

⁴¹³ Goodrich, Hambro & Simons, *supra* note 8, p. 13. Goodrich *et al* observe the formal Charter amendment procedure and note that a special majority may amend the treaty, binding the minority. This is also unlike strictly reciprocal treaties.

autonomy, and organisations which enjoy great autonomy.⁴¹⁴ It has been suggested that the autonomy of an organisation is that which legitimises its legal personality.

An international organization becomes an actor to the extent that it has (or develops) the ability to influence its environment, i.e. when the organization's institutional output affects the international system instead of simply reflecting it in the organization.⁴¹⁵

James Crawford distinguishes between two types of international constitution: 1) constitution in a weak sense – the constituent document of an organisation; and 2) constitution in a strong sense – the constituent document of a society.⁴¹⁶ The necessary questions to determine are what character the organisation has and the extent of its autonomy. In examining the autonomy of the UN as an organisation Crawford suggests that the UN Charter possibly is a constitution in the strong sense for several reasons: the UN has international legal personality, implying autonomy;⁴¹⁷ its powers as well as limitations on those powers are regulated; and there is near-universal membership in the organisation.⁴¹⁸ It is thus arguably not enough to qualify the UN Charter as the constitution of an international organisation or as a constitution in the weak sense.

There is nevertheless still validity in taking into account the view that the UN Charter is the constitution of an international organisation. When interpreting the Charter this is one of several factors to consider.

4.1.2.4 The constitution of the international community

It is not unusual to refer to the UN Charter as the constitution of the international community.⁴¹⁹ Understanding the Charter as the constitution of the international community

⁴¹⁴ Virally, Michel, "Definition and Classification of International Organizations: A Legal Approach", in: Abi-Saab, Georges, (ed.), *The Concept of International Organization* (UNESCO, Paris, 1981) at 54-5

⁴¹⁵ Abi-Saab, Georges, (ed.), *The Concept of International Organization* (UNESCO, Paris, 1981) at 17

⁴¹⁶ Crawford, James, "The Charter of the United Nations as a Constitution", in: Abi-Saab, Georges *et al*, *The Changing Constitution of the United Nations* (The British Institute of International and Comparative Law, London, 1997) 3-16 at 8

⁴¹⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, *Adv. Op.* (1949), 4 ICJ Rep. at 178-9

⁴¹⁸ Crawford, *supra* note 416, at 11

⁴¹⁹ Verdross, *Völkerrecht* (5th ed. 1964) at 136; Tomuschat, C., "Obligations Arising for States Without or Against Their Will", 241 *RdC* 195 at 269 (1993 IV); Abi-Saab, Georges, "The Role of International Law in the Peace Strategy of the Charter", in: UN Department of Public Information, *Is Universality in Jeopardy? Report of a Symposium Organized by the United Nations in Connection with the Commemoration of the Fortieth Anniversary of the Organization (Geneva, 16-17 December 1985)* (UN, New York, 1987) at 36; Ress, G., "The Interpretation of the Charter", in: Simma, Bruno, *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 1994) p. 27

involves several legal hurdles. The first is that a constitution requires the existence of a community which it is to regulate. Whether the community precedes or follows from the constitution is a problem which will not be discussed here. But if such a community does not exist, no constitution will either. What are the necessary characteristics of such a community? Another question to be examined is the function of a constitution in such a community. If an international community exists, does the UN Charter fill the role of the constitution of such a community or not?

Arguments for a constitutional view of the Charter also imply that a move must be made from the bilateralist or consensualist camp to the ‘community’, decision-by-majority, or constitutionalist camp. This understanding of the UN Charter entails a clear break with the traditional understanding of international law as state-created solely on the basis of consensus.⁴²⁰ The concrete legal questions that must be solved are *inter alia* how states could be bound without their consent, and the autonomous role of the UN organs in the interpretation of the Charter.

4.1.3 Is there an international community?

4.1.3.1 The existence of an international community

Does an international community exist? If it does, how does its constitution look? Does the UN Charter qualify as such a document? These questions can be approached from different angles. Martin Wight has suggested that legal tradition offers three ways of viewing international society.⁴²¹ He outlined three general perspectives, the proponents of which he calls “Realists”, “Rationalists” and “Revolutionists”.⁴²² The “Realists” were suggested to include Thomas Hobbes, Jean Bodin, Benedict Spinoza, Rousseau and Hegel, and the common denominator is their contractual view on obligations. In the pre-contractual condition there is only the state of nature, which means war and anarchy. The voluntaristic approach to the creation of international legal obligations based on the sovereignty of states can therefore

⁴²⁰ Fassbender, Bardo, *UN Security Council Reform and the Right of Veto* (Kluwer Law, 1998), at 1-2; Simma, Bruno, “From Bilateralism to Community Interest”, 250 *RdC* (1994) 217-384 at 235-6

⁴²¹ The term international society is used interchangeably with the terms “the family of nations, the states-system, the society of states, the international community”. Wight, Martin, *Power Politics* (Leicester University Press, London, 1978, reprint 1999) at 105

⁴²² Wight, Martin, *International Theory: The Three Traditions / Martin Wight* (Wight, G. & Porter, B. [eds]), (Leicester University Press for the RIIA, London, 1994)

not coexist with the concept of a legal community of states. There cannot be an international society, but only a world state with a Hobbesian sovereign based on contract.⁴²³ Wight stated:

The equation between the state of nature and the state of war demands the drastic remedy of the unlimited contract, and the complete surrender of rights in a state of nature to a despot, who may then retrogrant such civil rights as he sees fit.⁴²⁴

It is evident that a move away from voluntarism is necessary in order to argue credibly about an international community, as a community implies the existence of at least a few norms that are binding on the members of the community.⁴²⁵ For the “Realists” an international community is an impossibility; the only alternatives are one state or a state of anarchy. While some describe the 1648 Treaty of Westphalia as the first international constitution, or that it at least contained the first traces of international constitutional law, others take a contrary view:

Instead of heralding the era of a genuine international community of nations subordinated to the rule of the law of nations, it led to the era of absolutist states, jealous of their territorial sovereignty to a point where the idea of an international community became an almost empty phrase and where international law came to depend upon the will of states more concerned with the preservation and expansion of their power than with the establishment of the rule of law.⁴²⁶

The criticism has been strong; while the Treaty of Westphalia played a part in the seeming birth of a “new international society of nations”, the order, which promoted the secularisation of international law by divorcing it from any particular religious background, and basing itself upon the idea of the equality of all states whatever their form of government, was perceived to be “as utterly remote as possible from a juridical order founded on a common respect for law”.⁴²⁷ What the Treaty of Westphalia did, nevertheless, was to recognise that the sovereignty of the new states could not be absolute. If the claim of any state was to be respected on the basis of law – not only power – the state would also have to respect the claims of others.⁴²⁸ The doctrine of the legal equality of states was agreed upon, and this was

⁴²³ The closest alternative would be a system of suzerainty, which would not qualify as a state-system.

⁴²⁴ Wight, *supra* note 422, p. 33

⁴²⁵ See Weil’s “voluntaristic” refutation of the concept of community, in: Weil, *supra* note 408, at 426-7. Martin Wight understood the existence of international law as “the most essential evidence for the existence of an international society.” Wight, *supra* note 421, p. 107

⁴²⁶ Gross, Leo, “The Peace of Westphalia, 1648-1948” 42 *AJIL* (1948), 20-41 at 38

⁴²⁷ de la Brière, Yves, *La Société des Nations?* (1918) p. 53, in: Gross, *ibid.*, at 29

⁴²⁸ Wight compares this to the Greek *poleis* and the Hellenistic Kingdoms, which claimed sovereignty with recognition of one another. He also holds that the legal equality of states is a necessity for a system of states to exist. Wight, Martin, *Systems of States* (Leicester University Press, Leicester, 1977) at 23. Mosler claims that Jean Bodin saw that sovereignty must mean that any prince’s claim to it was of equal value: “so a little king is as

a fundamental startingpoint for a system of legal relations between the new states. Thus strict voluntarism must end even before it has begun to be effective as an argument in international law. International law cannot solely be based upon the consent of individual states⁴²⁹ because the very existence of international law as a system binding on states entails prior subordination to the rule of equality, as well as to the principle of *pacta sunt servanda* regarding agreements made between them.⁴³⁰ The conclusion to all this seems to be that for any system of states or international community or legal order to exist, some basic norms of coexistence must be beyond dispute and out of reach of states. These norms could be called ‘constitutional’.⁴³¹

[...] States live, as from their birth, within a legal framework of a limited number of basic rules which determine their basic rights and obligations with or without their will [...] One may call this framework, from which every State receives its legal entitlement to be respected as a sovereign entity, the constitution of international society or, preferably, the constitution of the international community, community being a term suitable to indicate a closer union than between members of a society. [...] [T]he international community can indeed be conceived of as a legal entity, governed by a constitution, a term which [...] serves to denote the basic functions of governance within that entity.⁴³²

However, all do not agree that basic norms of co-existence are enough to characterise the relations of states as those of a community. Brierly stated in 1949:

[I]t is still a misnomer to speak of the society of states as a genuine community. It is not a community because its parts have not yet any strongly held common purpose of loyalty, and so long as the present ideological rift between the East and the West continues to divide our world into two rival power systems, we cannot look for the development of community on a world scale.⁴³³

well as Souveraine as the greatest Monarch in the world”. Quote from Bodin, J., *The Six Bookes of a Commonweale, done into English by R. Knolles* (1606), Booke 1, Ch. II, p. 10, in: Mosler, *supra* note 410, p. 8
⁴²⁹ *Pacta sunt servanda* as the principle which validates agreement. See Brierly, J. L., *The Basis of Obligation in International Law* (Scientia Verlag, Aalen, 1977) at 11-12, on the necessity of the principle of *pacta sunt servanda* as the basis for binding obligations based on consent; see Fitzmaurice, Gerald, “The Foundations of the Authority of International Law and the Problem of Enforcement”, 19 *Modern Law Review* 1 (1956) at 9 on consent as a “method” of creating rules without capacity in itself to make rules binding; also Ross, Alf, *Constitution of the United Nations: Analysis of Structure and Function* (Ejnar Munksgaard, Copenhagen, 1950) at 31; see Koskenniemi, *supra* note 16, pp. 268-72, on standard objections to full consensualism.

⁴³⁰ Hart, H. L. A., *The Concept of Law* (Clarendon Press, Oxford, 1961) pp. 208-31, held that a condition of membership in a community included associative obligations to abide by the existing norms.

⁴³¹ Brownlie prefers keeping the two mutually exclusive principles simultaneously; he suggests that both sovereignty and equality of states could be the “basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform personality”. Brownlie, *supra* note 189, p. 287

⁴³² Tomuschat, *supra* note 419, at 211 and 236

⁴³³ Brierly, “The Sovereign State Today”, in: Lauterpacht & Waldock (eds), *The Basis of Obligation in International Law and Other Papers*, (1958) at 348, 357; Bull, Hedley, *The Anarchical Society: a Study of Order in World Politics* (London, Macmillan, 1977) agrees: “The idea of international community implies some notion of common values, not just the several interests of individual states.” Carl Schmitt argued that the old European international law order was obsolete after universalisation as it had rested on a “concrete order”, which was

The criticism raised with regard to the Treaty of Westphalia can be justified in that states constantly hail mutually exclusive principles: an international system and the sovereignty of states – not submitting to any norms to which one has not consented. Hans Kelsen asks how it is possible for many international legal theorists to agree on the binding character of law based on common consent, while admitting that many states are bound without even having given tacit consent. ‘Common consent’ is then only an overwhelming majority of the members of the international community, and the dissenters are overruled. An overwhelming majority is not unanimity; thus the common consent idea (of the majority) existing together with the belief in state sovereignty is a fiction.⁴³⁴ But another dimension may also be relevant. The “purpose of loyalty” of which Brierly spoke could be called common values. The most important end value today is suggested to be long-term international peace. By definition, an international society or community does not only contain ‘procedural’ principles, such as equality of states, but also ‘ends’ or “substantive”⁴³⁵ principles, which is suggested to correspond with common values. This has implications for the presumption of sovereignty in international law. Where there are common values, the presumption when interpreting principles and rules and applying them in a context has to be community – not an interpretation that prioritises individual state consent above community interests.

Wight’s “Rationalists” would hold to the existence of international society, though admitting its lack of institutions and common superior, or judiciary. They would argue that law is the source of society, and not the other way around. Wight placed Hugo Grotius, John Locke and Francisco Suarez in this group. Suarez argued that every state is a member of a universal body, the membership of which is the basis of international law. The Rationalist view would accept the state as the central international actor, at the same time as rejecting violence as the natural state of nature between states.⁴³⁶ It has been suggested that parts of Grotius’ legacy are that: 1) though sovereign states are the primary actors of international law, rights and duties are still accorded the individual; and 2) states are essentially sociable;

“common discussion, common viewpoints, common efforts to create order [*Ordnungsaktionen*]”. Quoted by Stirk, *supra* note 106, at 365. See also Falk, Richard A., “The Pathways of Global Constitutionalism”, in: Falk, R., Johansen, R. & Kim, S. (eds), *The Constitutional Foundations of World Peace* (State University of N.Y. Press, Albany, 1993) pp. 13-38. For an author not accepting the idea of a real international legal community, see Arangio-Ruiz, Gaetano, “Discussion”, in: Cassese, A. & Weiler, J. (eds), *Change and Stability in International Law-Making* (Walter de Gruyter, Berlin, 1988) at 131

⁴³⁴ Kelsen, H., *Principles of International Law*, 2nd ed. (1966) at 448

⁴³⁵ The distinction between *constitutive* and *derivative* commitments is taken from Dworkin’s discussion of liberal society, though applied slightly differently here. ‘Constitutive’ signifies values that are ends in themselves, while ‘derivative’ refers to strategies to achieve the constitutive end. Dworkin, “Liberalism”, in: Hampshire, S. (ed.), *Public and Private Morality* (Cambridge University Press, Cambridge 1978) pp. 113-43 at 116

international relations do not have to be characterised by perpetual conflict. His great society of states is characterised by common norms and customs embodied in the law of nations and natural law.⁴³⁷

4.1.3.2 Validity and normativity in international law

Perhaps one can liken the difference between the “Realists” and the “Rationalists” to that of John Austin and H. L. A. Hart, where Austin saw force as the basis for law while Hart pointed to legitimacy. Austin did not take normativity seriously into account, as he considered rules to be only the general commands of the one strong enough to enforce them. Sanctions thus play an important part in this view.⁴³⁸ Hart explained that the normativity of rules set them apart from the mere threat of force, because they are normative by authority.⁴³⁹ The “rule of recognition”, which determines how the material rules of the legal system are to be identified, and which forms the basis for the legal system, cannot validate itself, however, but must be accepted and submitted to in order for the system to function.⁴⁴⁰ Where the final authority lies, whether this is to be found in the legislature or in a Constitution, there the supreme criteria of the “rule of recognition” will also be found.

For legal relations based upon agreement to be possible it must be admitted that once an agreement is made it must be kept – the ‘should’ or validation of *pacta sunt servanda*. Without this, the act of concluding an agreement carries with it no legal effect. Moving from this basic presupposition, and from the domestic to the international scene, an earlier presupposition for the existence of an international system must be the equality of states. For a system to exist there must be actors in it. The UN Charter itself states that the Organisation is based not on the unlimited sovereignty of its Member States, but on their “sovereign

⁴³⁶ Wight, *supra* note 422, at 38-40

⁴³⁷ Fawn, R. & Larkins, J. (eds), *International Society after the Cold War: Anarchy and Order Reconsidered* (London: MacMillan Press Ltd., 1996) at 3-4

⁴³⁸ Another weakness in Austin’s reasoning is the non-recognition between specific and general situations or states; the distinction between commands and commandments: “While commands are situation-specific, commandments (which show rule-like features) are always thought to be applicable to broad classes of events. [...] After all, the famous gunman asking for your wallet is not claiming to have established a rule or norm also applicable to *himself*.” Kratochwil, Friedrich V., *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, Cambridge, 1989)

⁴³⁹ Hart, *supra* note 385, at 18-19

⁴⁴⁰ Hart, *supra* note 430, at 104; Carritt has written: “everything that can be proved is proved from something more evident than itself, ultimately from something self-evident, and by arguments whose validity is self-evident

equality”.⁴⁴¹ Could this be an international “rule of recognition”? The two principles could be understood to be part of the unchangeable constitution of the international community, beyond the reach of states, or as preconditions for the international legal system; a functional necessity. The question answered is not necessarily by what authority these principles are established. The question is not why states are to be considered equal or why agreements are to be kept at all. If there is to be any kind of system between states, these two principles must simply be accepted as foundations.⁴⁴²

Kelsen gave two explanations for the validity of norms. According to the “static” principle the validity of the highest norm, from which the lower norms derive their validity, is self-evident or assumed to be so; while according to the “dynamic” principle, the highest norm has a source of authority which is then delegated to lower norms.⁴⁴³ Whichever approach one chooses, the validation of norms is a necessity in order to have a normative system. Hart’s distinction between primary and secondary rules helps clarify the position that if international law is normative there cannot exist only rules of international law, but several levels of rules must exist, without which the binding nature of international law would only be founded on the threat of force, not a normative quality. Beyond the aspect of power there must be legitimacy or validation.⁴⁴⁴ Martti Koskenniemi formulated it in this way: “Authority is a

and cannot be proved. If everything had to be proved, nothing could be, for the process would be infinite [...]” Carritt, E. F., *The Theory of Morals* (Westport, Conn. 1974) at 28, in: Brierly, *supra* note 429, p. 66

⁴⁴¹ Kelsen, H., *Peace Through Law* (1944): The Moscow Conference, October 1943, declared that the principle of “sovereign equality” was to be the basis for international organisation after the second world war (Part I, §4); Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 110: “Sovereignty, as a concept excluding legal superiority of any one state over another, is not at odds with a greater role of the international community *vis-à-vis* all its members. All that states, with reference to their sovereignty, can ask for from the community is to be treated equally in and before the law.” See also Article 13 of the 1949 ILC Draft Declaration on the Rights and Duties of States: “Every State has the duty to conduct its relations with other States in accordance with international law, and the sovereignty of the State is subject to the limitations of international law.” *YBILC*, 1949 (UN, N.Y., 1956) p. 106. On the four components of this new concept of ‘sovereign equality’, see the Rapporteur of Technical Committee I to Commission I (General Provisions), Mr. Zeinidine’s (Syria) report, in: *Documents, UNCIO*, vol. VI, *supra* note 153, pp. 397-8

⁴⁴² Perhaps the view of the equality of States should only be discussed in the context of the existence of States, as a precondition and not a rule. How is it that the system has any actors? Did the actors create the system or the system create the actors? From where do the actors get a ‘green card’ to join the community? Before the 1200s not many independent States existed (as we classify modern States). It is clear that the rules for the recognition of new States were developed after this time, changing its effect from constitutive to declaratory. But if in theory one attempts to understand the significance of these rules, it seems one has several alternatives. Either the validation is considered to have begun e.g. with Innocent III recognising the claim of the French king to have no political superior in the decretal *Per Venerabilem* of 1202, or the beginning of the system is clearly Austinian. This line of questioning merits further reflection. For discussion see e.g. Henkin, L., *International Law: Politics and Values* (Martinus Nijhoff Publ., Dordrecht, 1995) at 27-36

⁴⁴³ Kelsen, *supra* note 434, at 556-9

⁴⁴⁴ See also Franck, Thomas M., *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990)

normative and not a factual category.”⁴⁴⁵ Where this validation comes from might be the place where the “rule of recognition” or constitution (in a wide sense) might also be found.

4.1.3.3 The role and proposed content of constitutional norms

At this point the function of an international constitution or constitutional norms should be discussed. Kelsen distinguished between constitutions in the 1) logical sense (the ‘Grundnorm’) and in the 2) positive sense. He subdivided the positive sense into the a) formal sense (the written constitution)⁴⁴⁶ and the b) material sense (the norms which have as their function to clarify the division of powers and their delegation in a society).⁴⁴⁷

The constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. The constitution in the material sense consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes ... [I]t is in order to safeguard the norms determining the organs and the procedure of legislation that a special solemn document is drafted and that the changing of its rules is made especially difficult ... [A] constitution in the formal sense of the term is not indispensable, whereas the material constitution ... is an essential element of every legal order.⁴⁴⁸

Kelsen suggested that the ‘constitution’ of international law is the set of rules of international law which regulate the creation of international law – those which determine its ‘sources’.⁴⁴⁹ The rules determining the sources of international law would, however, also have to be validated and by themselves, therefore, cannot be the supreme criterion of validation of the legal system. A supreme criterion above the other content of the “rule of recognition”, which itself cannot be validated, is still necessary for this purpose. The rules which determine the sources would thus only form part of the constitution, and would have to contain at least one additional rule.

The suggestions so far are that the principles of the legal equality of states and of *pacta sunt servanda*, together with the rules that determine the sources of international law, could be

⁴⁴⁵ Koskenniemi, M., “The Police in the Temple. Order, Justice and the UN: A Dialectical View”, 6 *EJIL* (1995), 325-48 at 327

⁴⁴⁶ Kelsen distinguished between the constitution *sensu stricto* (principles on law creation and law’s enforcement functions) and the constitution *sensu lato* (rules determining “the province of future legislative acts”)

⁴⁴⁷ Kelsen, *Allgemeine Staatslehre*, (1925, photo.reprint 1993) pp. 248-54

⁴⁴⁸ Kelsen, *General Theory of Law and State* (1945), quote in: Fassbender, *supra* note 420, pp. 1-2; Simma, *supra* note 420, at 27

⁴⁴⁹ Kelsen, *supra* note 434, p. 437. Mosler has agreed that any society’s essential constitutional rule is that according to which law is created and developed. Mosler, *supra* note 410, p. 16

constitutional norms. If one looks again at Hart's theory regarding domestic situations, one finds a likeness to the international system and the possible role of the UN Charter as containing international constitutional norms. For a constitutionally unlimited legislature, as exists in the United Kingdom, part of the "rule of recognition" in such a system is that the legislature's enactment is the supreme criterion of validity. For a legislature limited by an unamendable constitution, as in the United States, the ultimate "rule of recognition" contains the constitution, which has priority over the legislature and is the supreme criterion of validity.⁴⁵⁰

In the international system the primary actors, though not the only actors, are states. The existence of the system is based on a few unlimitable principles which could be called a kind of constitution for the community. These unlimitable principles are the supreme criterion of validity in the international system, though the fact that states do in fact create law by their agreements forms part of the rules of recognition. The will of individual states in the creation of international law thus forms a part of the "rule of recognition", but is not the supreme criterion of validation. In this way it is similar to the US legislature. Evidence for this is seen in the fact that states have to submit to norms in order to enter the international legal system, that they can be bound by norms even against their will, and that they cannot legislate contrary to peremptory norms. To use the will of states solely as the basis of obligations in international law – as the reason for the normativity of norms – means replacing Hart and the validation of rules with Austin and the importance of power over normativity, an international transformation of Hobbes' *Leviathan*. There would be no system, no community, and discussing normativity or norms at all appears irrelevant from such a position.

As suggested above, one piece of evidence for the correctness of using Hart's reasoning in this context is the existence of norms having the character of *ius cogens*. This category of law denies states the freedom to conclude agreements which contravene it. Plainly, norms of *ius cogens* express that law 'properly' enacted is not always necessarily law at all – if a treaty contravenes a certain basic principle it is not only immoral, but legally null and void. This category has been suggested to form a part of constitutional law.⁴⁵¹ Some even compare the character of constitutional law to that of norms of *ius cogens* :

Constitutional law is peremptory. It overrides any law incompatible with it and cannot be modified by agreement between individual parties. It is *ius cogens*, as distinct from

⁴⁵⁰ Hart, *supra* note 430, at 103

⁴⁵¹ van Hoof, G. J. H., *Rethinking the Sources of International Law* (Kluwer, Deventer, 1983), p. 157

jus dispositivum. It is the legal apex of the de facto order which constitutes the foundation of any legal system.⁴⁵²

Continuing on the function of constitutions, it has been suggested that the principle of the balance of power was understood to be the constitution of international society in the 1700s.⁴⁵³ Kelsen suggested that one characterisation of constitutions was constitution in the material sense. This consisted of the norms which have as their function to clarify the division of powers and their delegation in a society.⁴⁵⁴ This would mean that an international constitution could, and even perhaps ought, to include rules as to the division of powers and delegation.

It must nevertheless be noted that an unqualified transfer of the principles of domestic constitutions to international situations is not always appropriate. When comparing domestic constitutions with the UN Charter, the proposed constitutionality of the latter for the international community, as well as its character as the constitution of an organisation, must be taken into account. The structures of the international community are also different to those that characterise domestic situations. A difference between organisations and states is that states generally have a clearer division of powers: legislative, executive and judiciary. The ‘pedigree’ of a rule is easy to trace. However, states do not correspond to any world parliament and are not the sole PIL legislators. The United Nations enjoys a certain autonomy, but the legal effect of a document that is produced in the Organisation is not always clear. Does it create law or not? What about other subjects of international law and their effect on norms of international law?

Georges Abi-Saab has suggested a distinction in the division of powers regarding international organisation between two levels: 1) taking a position (legislative / judicial), and 2) taking action (executive).⁴⁵⁵ This is not entirely helpful when examining the UN, because the practice of the organs is part of the formation of norms of international law, either as customary law and/or as interpretations of the Charter developing constitutional law. By whatever means one chooses to view this, many legal authors criticise the view of the constitutionality of the UN Charter exactly on this point: the division of powers is insufficient, and this is unacceptable for a constitution.⁴⁵⁶ For example, some of the arguments criticise the

⁴⁵² Schwarzenberger, G., “International Constitutional Law”, *International Law as Applied by International Courts and Tribunals*, Vol. III, (Stevens, London, 1976) pp. 116-7

⁴⁵³ Wight, *supra* note 422, at 165

⁴⁵⁴ Kelsen, *Allgemeine Staatslehre*, (1925, photo. reprint 1993) at 248-54

⁴⁵⁵ Abi-Saab, *supra* note 415, at 16

⁴⁵⁶ Crawford, *supra* note 416, at 11-13

Security Council for acting as legislator, when the Charter does not support this.⁴⁵⁷ This is still claimed to be the prerogative of states. Also, the decisions of the Security Council apparently cannot be challenged. If that is the case, there is no division of powers at all.⁴⁵⁸ Arguments as to other unconstitutional actions of the UN point to a lack of the rule of law, to the unaccountability of the UN towards states, and of states to other states unless consent has been given.⁴⁵⁹

Koskenniemi suggests that the UN Charter was structured differently from national constitutions because the purposes and premises were different. The Charter was intended to be based on a separation of functions, rather than powers.⁴⁶⁰

The Charter deals with the relationship between order and justice through a procedural mechanism that uses the two main organs so as to allow the treatment of both types of problem simultaneously and to ensure that neither is fully overtaken by or collapsed into the other. The competence, composition and procedures of each organ is justifiable only as a separation of powers arrangement which seeks to provide optimal efficiency in policing the world as well as a forum for seeking agreement on various economic, social and humanitarian policies, while trying to keep both in check so as to avoid the dangers inherent in establishing a full precedence of one over the other. [...] The Council's functional effectiveness is a guarantee against the Assembly's inability to agree creating chaos; the Assembly's competence to discuss the benefits of any policy - including the policy of the Council - provides, in principle, a public check on the Great Powers' capacity to turn the organization into an instrument of imperialism.⁴⁶¹

Lastly, the third legal tradition categorised by Martin Wight will be mentioned. Among the "Revolutionists" are Christian Wolff, Francisco de Vitoria and Alberico Gentili, Kant and Guiseppe Mazzini. International society is viewed as a world-state, a *civitas maxima*, where states are citizens, and international relations are assimilated to the conditions of domestic politics. This assimilation can take place in several ways: by national or ideological uniformity; by doctrinal imperialism of a strong force; or by cosmopolitanism. This latter method views international society as being made up of individuals, and Wight claimed that it

⁴⁵⁷ Abi-Saab, Georges, "Membership and Voting in the United Nations", in: Abi-Saab, Georges *et al*, *The Changing Constitution of the United Nations* (The British Institute of International and Comparative Law, London, 1997) 19-39 at 37.

⁴⁵⁸ Reisman, Michael, "The Constitutional Crisis in the United Nations", 87 *AJIL* (1993) 83-100 at 90-3; but see Franck, Thomas M., "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?", 86 *AJIL* (1992), 519-523

⁴⁵⁹ Crawford, *supra* note 416, at 11-13; Reisman, *supra* note 458, at 93-5; Bowett, D. W., "Judicial and Political Functions of the Security Council and the International Court of Justice", in: Abi-Saab, Georges *et al*, *The Changing Constitution of the United Nations* (The British Institute of International and Comparative Law, London, 1997) 73-88, at 78-9

⁴⁶⁰ Koskenniemi, *supra* note 445, at 337

⁴⁶¹ *Ibid.*, at 337-9

is a strand “in the movement for world federations so far as it seeks to adapt the Western tradition of constitutionalism, which is Rationalist, to international relations.”⁴⁶²

The conclusions one may draw from the entire discussion above is that the existence of an international community and the requirements and contents of an international constitution depend entirely on the approach one chooses to adopt. If one holds to the existence of international law as law, one admits to normativity on the basis of preceding rules of validation. It is also admitted that the sovereignty of states is limited and submitted to the principle of the equality of states and *pacta sunt servanda*. States are thus from the beginning bound by rules and principles preceding their very existence. They are not the sole legislators and they are bound by norms to which they have not consented. By recognising the existence of *ius cogens* it is further conceded that states are not in a position of full freedom to decide what norms they will or will not be bound by. The theoretical foundation is thereby laid for the existence of a constitution. It would seem obvious that if a community exists it does so on the basis of a constitution. The question is only what the shape of that constitution is. Our question for consideration is what the role of the UN Charter is in all this.

It has been proposed above that the principle of the legal equality of states, the principle of *pacta sunt servanda*, the norms which determine the sources of international law, peremptory norms, and rules regulating the division of power or functions could be constitutional rules for the international community. The paramount value for that community seems to be one of peace.

4.1.4 Moving from reciprocity and consensualism to community through the UN Charter

4.1.4.1 A short overview

The view of the creation of international law as being completely based on the will of states, with each state only legally bound by what it has consented to, has been discussed sufficiently above, and is viewed by many legal authors to be a fiction. Those authors suggest that states are indeed bound by many and substantial obligations without their having consented to all of

⁴⁶² Wight, *supra* note 422, at 41-5

them, and sometimes even against their will.⁴⁶³ Majority decision-making that allows individual state consent to be overrun further emphasises that there is a society that consists of more than independent billiard balls with veto status. This is an argument for the fact that non-UN members can be bound by obligations under the Charter. Even among those who claim to be positivists, there is today a move away from strict voluntarism. Bruno Simma refers to “enlightened positivism” which focuses less on the state will than previously and takes into account the existence of other actors on the international stage.⁴⁶⁴

The UN Charter was set up differently from the League of Nations, which had a decentralised approach to conflict. As to the use of military sanctions, the League of Nations permitted each state to make up its own mind, and if the Council could not arrive at a unanimous recommendation in situations of conflict, war was not actually prohibited as a means of finally settling the matter.⁴⁶⁵ In the UN Charter the unilateral right to use force, except in self-defence, was completely outlawed. The setting up of the UN Security Council and its powers entailed a move away from strict consensualism in order to protect a vital interest common to the Member States. The decision-making power of a few, and binding on the other Member States, is a clear example of the move towards a community system.⁴⁶⁶

Not only did the UN Charter regulate the relations between the Parties to the Charter, but also indirectly addressed itself to non-Member States. Article 2(6) of the Charter states:

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

This has caused some to use the Article as additional evidence of the Charter’s constitutionality and its binding force even on non-Members, and argue that it is nonsense to contend that so long as non-Members do not contravene the Charter they are not bound by

⁴⁶³ Brierly, J. *The Law of Nations* (Clarendon Press, Oxford, 1963), pp. 51-2: “[T]he assumption that international law consists of nothing save what states have consented to is an inadequate account of the system as it can be seen in actual operation [...] . [S]tates are continually treated as bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to [...] .” ; Kelsen, *supra* note 434, at 444-5; Higgins, Rosalyn, “Western Interpretations of International Organization as Reflected in Scholarly Writings”, in: Abi-Saab, Georges, (ed.), *The Concept of International Organization* (UNESCO, Paris, 1981), at 197; Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 112

⁴⁶⁴ Simma, B. & Paulus, A., in: “Symposium on Method in International Law”, 93 *AJIL* (1999) 291-423 at 306-7

⁴⁶⁵ Covenant of the League of Nations, Articles 12, 15(7), and 16(1) & (2)

⁴⁶⁶ See however Wight’s view on the UN Charter in: Wight, *supra* note 422, p. 33: “The United Nations Charter (with some qualifications) is such an unlimited contract; it is a Hobbesian contract. It is not wholly fanciful to say that the inarticulate premise on which the Charter rests is that there is no such thing as international society, or that international relations are at a state of war. Indeed this is a bare literal description of fact about the condition of things when the Charter was drafted, at Dumbarton Oaks, in the autumn of 1944, and in San

it.⁴⁶⁷ Kelsen stated: “If the Charter attaches a sanction to a certain behaviour on non-Members, it establishes a true obligation of non-Members to observe that behaviour.”⁴⁶⁸ The Charter thereby reveals its recognition of the fact that non-Members are part of an international community which limits their freedom in certain areas.

For the amendment of multilateral treaties consensus is usually required, unless otherwise regulated in the treaty.⁴⁶⁹ With regard to the UN Charter only a two-thirds majority is required, and so the minority will be bound by the amendments.⁴⁷⁰ The possibility of a few Parties agreeing on a change among themselves, as regulated in VCLT Article 41, is not admitted by the Charter, and would not be compatible with Charter Article 103, which holds the primacy of Charter obligations over all other agreements. Very probably this also excludes the possibility of creating even regional custom to alter the content of the treaty.

If the Charter is suggested to bind even non-Members, the alternative of withdrawal from membership in order not to be bound by the Charter obligations also seems unlikely. In contrast with the Covenant of the League of Nations, the UN Charter includes no provision for the withdrawal of a Member State from the Organisation.⁴⁷¹ The original intention was that membership would be permanent and that there would be no right of voluntary withdrawal from the United Nations. At San Francisco, it was nevertheless accepted that states could not be forced to remain within the UN.⁴⁷² Under the Covenant of the League of Nations, amendments would not bind a state that had dissented but such a state would cease to

Francisco, in April 1945, when the Third Reich and the Japanese Empire were still raging undefeated. There was a state of war then; there was no international society, or only potentially so.”

⁴⁶⁷ Ross, *supra* note 429, at 32-3; Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 112-5

⁴⁶⁸ Kelsen, *The Law of the United Nations* (Stevens & Sons, London, 1950) at 107

⁴⁶⁹ VCLT, 1969, Article 40(2) and (4)

⁴⁷⁰ UN Charter, Article 108

⁴⁷¹ Cf. the Covenant of the League of Nations, Article 26

⁴⁷² *Dumbarton Oaks Documents on International Organisation* (Washington, DC: Dept. of State Publication 2192, Conference Series 56, 1944) Cmd. 6571, paragraph 22. The President of Commission I at the San Francisco Conference (1945), stated on the issue of expulsion: “[W]e accepted the proposal of Dumbarton Oaks on that point. [...] In the end, we decided that no mention would be made, but with a very clear understanding that we did not consider that withdrawal ought to be a normal faculty of any member to be exercised at any time without any motives at all. But, on the other hand, we accepted [...] the decision that in some exceptional circumstances [...] withdrawal would be inevitable and ought not to be prevented by the Organization.” Henri Rolin (Belgium), in: *Documents, UNCIO*, vol. VI, *supra* note 153, p. 115; see also pp. 206-7, 233. F. Delgado (Philippine Commonwealth) presented the Commission I report to the 9th plenary session (June 25, 1945), which voted unanimously to adopt the Charter in the form presented. He stated: “The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. [...] [T]he highest duty of the nations which will become members is to continue their cooperation within the Organization [...] If, however, a Member because of exceptional circumstances feels constrained to withdraw [...] it is not the purpose of the Organization to compel that member to continue its cooperation in the Organization. [...] Nor would it be the purpose of the Organization to compel a Member to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept”. *Documents, UNCIO*, vol. I, *supra* note 153, p. 616. See

be a member of the League.⁴⁷³ Bardo Fassbender has suggested that states can cease to take part in the work of the Organisation, but are still bound by the UN Charter, thus concluding that even withdrawal from the UN does not free states from their obligations under the Charter.⁴⁷⁴ This is a necessary position if non-Member States are also to be considered bound by the Charter.

In 1965 Indonesia informed the Secretary-General of the UN that,

Indonesia has decided at this stage and under the present circumstances to withdraw from the United Nations.

In his reply the Secretary-General expressed:

the earnest hope that in due time [Indonesia] will resume full co-operation with the United Nations.⁴⁷⁵

The following year Indonesia informed the Secretary-General that it:

has decided to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly.⁴⁷⁶

The President of the General Assembly stated:

it would appear, therefore, that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action so far taken by the United Nations on this matter would not appear to preclude this view.

There was no objection by any state present at the 1420th plenary meeting to this understanding of the situation.⁴⁷⁷ It thus seems that in the case where a Member State of the UN attempted to withdraw from the UN, what was withdrawn was its full co-operation with the Organisation. Its obligations under the Charter did not cease to be considered binding on it, as was possible regarding the membership of the League of Nations. The reason for this

also Pollux, *supra* note 409, at 72-3, Goodrich, Hambro & Simons, *supra* note 8, p. 13 and Ross, *supra* note 429, at 37-8.

⁴⁷³ Covenant of the League of Nations, Article 1(3)

⁴⁷⁴ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 105-6

⁴⁷⁵ Document A-5857 and Corr.1 and A-5899

⁴⁷⁶ Document A-6419

⁴⁷⁷ See Official Records of the General Assembly, Twenty-first Session, Plenary Meetings, 1420th meeting. For the above account see *Multilateral Treaties Deposited with the Secretary-General*, at: <http://untreaty.un.org>

would be that the obligations of the Charter and the authority of the UN organs are not based upon consent. It was therefore only possible to withdraw from active participation.⁴⁷⁸

Another argument supporting a move away from reciprocity to ‘community’ is the existence of peremptory norms and the fact that certain provisions of the UN Charter are characterised as such norms.⁴⁷⁹ In the creation of such a norm the consent of a very large majority is understood by many to be sufficient.⁴⁸⁰ A single state thus does not have the possibility to veto the creation of the norm, and the state will also be bound by the peremptory norm, despite attempted declarations to the contrary. For a distinction to exist between peremptory norms and customary international law,⁴⁸¹ other than in the legal effect of a conflict with a peremptory norm, it would only seem reasonable that individual states cannot object to being bound by peremptory norms, as is considered possible with regard to norms of general international law.⁴⁸² This argument is further enforced by the existence of obligations *erga omnes*. These obligations were first recognised by the ICJ in the Barcelona Traction case⁴⁸³ as obligations which, because of their importance and nature, are the concern of all states. Even in the absence of community organs to guard and protect these interests, there exist parties that have a legal interest in their protection - all states - regardless of the fact of not having been directly affected by a breach of the obligations. These obligations are a category of international law that, as peremptory norms, reveal that certain obligations or prohibitions under international law enjoy a certain form of precedence, superiority, or a special position in the international legal system.

Constitutional norms of international law can be likened to obligations *erga omnes*, because they are directed to all and all have an interest in their being upheld. But if certain

⁴⁷⁸ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 153

⁴⁷⁹ Verdross, Alfred, “Jus Dispositivum and Jus Cogens in International Law”, 60 *AJIL* (1966) 55-63 at 60-2

⁴⁸⁰ ILC 1976 Report, UN Doc. A/CN.4/SER.A/1976/Add.1, at 119; Macdonald, R. St. J., “The Charter of the United Nations and the Development of Fundamental Principles of International Law”, in: Cheng, Bin & Brown, E. D. (eds.), *Contemporary Problems of International Law: Essays in honour of Georg Schwarzenberger on his eightieth birthday* (Stevens & Sons Ltd., London, 1988) 196-215, at 197-9; Schachter, O., *International Law in Theory and Practice* (Martinus Nijhoff Publ., Dordrecht, 1991), p. 343; Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law* (Lakimiesliiton Kustannus, Helsinki, 1988) pp. 210-15; see discussion in Akehurst, Michael, “Notes: The Hierarchy of the Sources of International Law”, 47 *BYIL* (1974-75) 273-85 at 281-5 and Weil’s attack of the concept in: Weil, *supra* note 408

⁴⁸¹ The term ‘general international law’ may also be used instead of the term ‘customary international law’, as the word ‘customary’ implies a time-element that today is not always understood to be necessary when new rules are formed. For a discussion on traditional and modern approaches, see Roberts, Anthea E., “Traditional and Modern Approaches to Customary International Law: A Reconciliation”, 95 *AJIL* 4 (2001) 757-91

⁴⁸² See Condorelli, Luigi, “Discussion”, in: Cassese, A. & Weiler, J. (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, Berlin, 1988) at 120 (using the case of apartheid in South Africa); for the contrary view, see Cassese, “Discussion”, in: Cassese, A. & Weiler, J. (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, Berlin, 1988) at 112

⁴⁸³ Barcelona Traction case (2nd phase), (1970) ICJ Rep. 3 at 32

norms are to be called constitutional, some suggest that there must also exist effective international organs to safeguard them. Fassbender suggests that the category of obligations *erga omnes* is “an interim phenomenon in the process of constitutionalization of the international community”.⁴⁸⁴ He foresees the replacement of the category with that of “obligations *erga communitatem*”, which will emphasise the authority of community organs with regard to violations of community values instead of the authority of individual states.⁴⁸⁵

Another important observation relates to the membership of the organisation, where worldwide membership generally aims to bring about uniformity in issues that concern all, and limited membership, on the other hand, often “cultivates a particularism”.⁴⁸⁶ The UN certainly qualifies as an organisation that welcomes worldwide membership.

4.1.4.2 The constitutional character of the UN Charter

Several factors need to be considered when examining the constitutionality of the UN Charter. The first consideration is what external evidence there is of the constitutionality of the Charter. How is it understood by observers? A factor linked to this is what evidence the Charter itself gives on its constitutional character. It can be discussed whether this provides a sufficient link on the Charter qualifying as the constitution of the international community. The Charter would also need to be connected to the norms that an international constitution would contain. The issue of whether the Charter merely contains constitutional norms or is itself the constitution of the community is not either sufficiently clear. Perhaps the UN Charter ‘becomes’ the constitution only when its content is constitutional and it is recognised as the constitution of the community.

i: Internal evidence

The name of the constitutive document of the UN itself is argued to be evidence of its character. Historically the term ‘charter’ has a constitutional connotation, and it has been suggested that in 1945 the term ‘charter’ was used as an equivalent of ‘written

⁴⁸⁴ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 126-8

⁴⁸⁵ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 126-8

⁴⁸⁶ Virally, *supra* note 414, at 54-5, 60-1

constitution'.⁴⁸⁷ This can be compared to the term used for the constitutive document of the League of Nations – an organisation which was more individualistic and co-operative in character than the United Nations: the “Covenant of the League of Nations”. The UN Charter was understood to distinguish itself from the very beginning. At the closing plenary session of the 1945 San Francisco conference, US President Harry S. Truman, who was also the conference president, likened the Charter to a constitution and emphasised its character as a ‘living instrument’:

This Charter, like our own Constitution, will be expanded and improved as time goes on. No one claims that it is now a final or a perfect instrument. It has not been poured into a fixed mold. Changing world conditions will require readjustments - but they will be the readjustments of peace and not of war.⁴⁸⁸

The existence of obligations *erga omnes* has been explained as due to the lack of international organs to enforce certain important community interests. Constitutional obligations mean that there are international organs that can safeguard these interests.⁴⁸⁹ The primacy of constitutional obligations over other obligations is suggested to flow from the fact that the power is available to attain the objective of the organisation.⁴⁹⁰ The UN Security Council is an organ which is vested with the right (and duty) to enforce the common interest of international peace and security.⁴⁹¹

Article 103 of the UN Charter is often cited as evidence of the primacy of the Charter over all other legal obligations.⁴⁹² Article 30 of the VCLT also states that successive treaties are subject to Article 103 of the UN Charter.⁴⁹³ The practical effect of Article 103 is that Charter obligations are given a certain *ius cogens* effect that states have accepted; they override other

⁴⁸⁷ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 107; Wolfrum, “Preamble”, in: Simma, Bruno, *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 1994) at 46

⁴⁸⁸ Speech of June 26, 1945, in: *Documents, UNCIO*, vol. I, *supra* note 153, p. 680; Simma, *supra* note 420, at 19-20

⁴⁸⁹ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 126-8

⁴⁹⁰ Suy, *supra* note 412, at 276

⁴⁹¹ For lack of space and time the remaining organs will have to be overlooked.

⁴⁹² Suy, *supra* note 412, at 267; Bernhardt, “Article 103”, in: Simma, Bruno, *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 1994) 1116-25 at 1118, 1125

⁴⁹³ Article 30: *Application of successive treaties relating to the same subject-matter*

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

obligations.⁴⁹⁴ It is not uncommon in treaties or declarations to pronounce a commitment of adherence to the UN Charter and its obligations.⁴⁹⁵

It will also be noted that no reservations have been made to the UN Charter. This could be adduced as additional evidence of the Charter's constitutional character - in the light of the VCLT, Article 20(3), it should at least qualify as evidence of its character as the constitution of an international organisation.⁴⁹⁶

Fassbender suggests that the main purpose of constitutionalism is to promote the legal integration of states.⁴⁹⁷ He also claims that the UN is the main institutional representative of the international community. As the suggestion is that the UN Charter therefore is the constitution of the international community, the question as to the character of the UN and the Charter and their possibilities to effect the legal integration of states might consequently be relevant. What is the precise function of the UN and its Charter? Is it to promote co-operation or integration? The former function leaves the constitution in the hands of the Member States, to be interpreted by them. The latter function is to bring the states closer, partly by giving the organisation some of the states' traditional functions. Having entrusted the UN organs with the interpretation of the Charter, the legal integration of states is a possibility, and reveals the Charter's constitutional nature.

ii: Links between suggested constitutional content and the UN Charter

It was proposed earlier that the principle of the legal equality of states, the principle of *pacta sunt servanda*, the rules that determine the sources of international law, peremptory norms, and rules regulating the division of power or functions could be constitutional norms for the international community.

The Charter undoubtedly contains norms of *ius cogens* and the principle of the equality of states. It also contains rules determining the sources of international law, though it seems that the 'list' in Article 38 of the Statute of the ICJ forms only part of a necessarily developing sources theory. The Charter contains norms regulating the relations between states, between

⁴⁹⁴ See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Order of 14 April, 1992, ICJ Rep. (1992) 114 at 126, paragraph 42

⁴⁹⁵ E.g. Friendly Relations Declaration, UNGA Res. 2625 (XXV), UN Doc. A/8082 (1970), Part 2; the Helsinki Final Act, 1975, Part 1(a); Charter of the Organization of African Unity, 1963, Preamble

⁴⁹⁶ VCLT, Article 20(3): *When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.*

⁴⁹⁷ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 64-5

states and the Organisation, and for the operations within the Organisation itself. The Charter also contains purposes and values committing the Member States, which could be argued to fulfil certain requirements for the existence of a ‘genuine’ community. The value of peace forms the main background to the United Nations and its structure.

Fassbender holds that the Charter “embraces all international law” and that “there is no room for a category of ‘general international law’ independently existing *besides* the Charter.”⁴⁹⁸ He therefore criticises the judgment in the Nicaragua case,⁴⁹⁹ where the Court decided that a certain rule was laid down in the Charter and yet at the same time enjoyed a separate existence as a customary law obligation. Fassbender claims that customary law cannot derogate from or amend Charter norms.⁵⁰⁰ This latter point may be correct, in the light of Article 103 of the UN Charter and the *ius cogens*-like character this confers on to Charter obligations. Several consequences flow from this. Firstly, a Charter obligation binds not only the Parties to the Charter but also non-Members, not as a customary norm, but because of its constitutional character. Secondly, the practice of states becomes unimportant when it comes to the development of international constitutional law. It is the practice of the UN organs which develop this body of law, while the practice of states would be important in the creation of customary international law. When Fassbender speaks of the Charter “embracing” all international law, it is not clear if he suggests that all constitutional law forms part of the Charter, or if there can exist separate constitutional norms which, together with the Charter, constitute international constitutional law.

iii: Consequences of the constitutionality of the UN Charter

Proceeding from the assumption that there exists an international community based upon certain fundamental norms, the next question was whether the UN Charter could be considered to be a part, or the complete constitution, of this community. If the answer to this was satisfactorily found to be affirmative, several consequences flow from this. Non-Member States are obviously bound by the Charter, not as members of the UN, but as members of the international community. Secondly, if the Charter is a constitution it must be interpreted as a constitution. This justifies both the argument that the UN organs are left with more room for

⁴⁹⁸ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 117

⁴⁹⁹ Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), ICJ Rep. (1986) 14

⁵⁰⁰ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 120

manoeuvre, and that this also places even stricter limits on the organisation in the use of its powers. Thirdly, if the Charter is a constitution not only for the Organisation, but for the international community, then interpretation clearly moves beyond remaining a state prerogative, to the UN organs' sphere of competence, in order to attain the common interests of the community. This is an aspect of the autonomy and legal personality of the Organisation.

4.1.5 The Character of Purposes and Principles

4.1.5.1 The Preamble, Purposes and Principles

At Dumbarton Oaks it was proposed by Britain that a state of peace required active co-operation among members to reach the objectives of the United Nations. The Great Powers would have to be unified in their purposes, though procedural rules could not ensure that they were always in agreement. It was therefore thought that laying down certain principles which would regulate their relationships would aid them in working together to fulfil the aims of the organisation, and would also make it possible for other states to join them in that work.⁵⁰¹

The Dumbarton Oaks proposals for a UN Charter did not contain a preamble, but one was later inserted at the San Francisco conference. At the Conference, the Rapporteur of the technical committee working out the text reported:

It was very difficult, practically impossible, to draw up a sharp and clear-cut distinction between what should be included under Preamble or under Purposes and Principles. [...] In fact, some questions were transferred during our deliberations from Purposes, then to Principles, and at last to find their place in the Preamble.⁵⁰²

On the distinction between the preamble, the Purposes and Principles, he expressed that

[T]he Preamble introduces the Charter and sets forth the declared common intentions which brought us together in this Conference and moved us to unite our will and efforts, and to harmonize, regulate, and organize our international action to achieve our common ends. The Purposes on the other hand constitute the *raison d'être* of the Organization. They are the aggregation of those common ends on which our minds met. Hence, they are the cause and object of the Charter, to which member states collectively and severally subscribe. The Chapter of Principles sets in the same order of ideas the methods and regulating norms according to which the Organization and its members

⁵⁰¹ Russell, Ruth, *A History of the United Nations Charter: The Role of the United States 1940-1945* (The Brookings Institution, Washington D.C, 1958) p. 456

⁵⁰² Farid Zeineddine (Syria), in: *Documents, UNCIO*, vol. VI, *supra* note 153, p. 16

shall do their duty and endeavor to achieve the common ends. Their understandings should serve as actual standards of international conduct. The Purposes and Principles thus constitute in practice the test for effectiveness of the Organizations as well as the expected faithful compliance with the provisions of the Charter by all members.⁵⁰³

Leland Goodrich commented:

At Dumbarton Oaks, the view prevailed that the effectiveness of a system for the maintenance of peace and security depended on the unity of purpose of the states possessing the greatest power, and that the cooperation of these states could best be achieved by a commitment to act in accordance with defined purposes and principles of a general nature. With the guiding principles and purposes established, the Security Council would be able to act promptly and effectively whenever conditions were determined to require it and by the means most likely to be efficacious.⁵⁰⁴

Thus the purposes and principles were not merely to have the traditional preamble function,⁵⁰⁵ but provide a legal basis for concrete actions taken. Where the League of Nations had had a more legalistic and formal approach to conflict resolution, the United Nations would instead take political realities into account. The stronger powers would have more options and space to manoeuvre by the goal-oriented articles of the Charter rather than by legislating the exact responses which could be taken under the Covenant.⁵⁰⁶ Thus the negotiations and decisions at San Francisco reveal an approach to the Charter and its function and effect which was not legally restrictive but envisioned goal-oriented methods replacing procedure-orientation.

The British representative in Commission I, which focused on the General Provisions at the San Francisco conference, expressed:

[T]he purposes and principles in Chapters I and II seem to me and to my delegation of the highest importance. I think they introduce a new idea into international relations, for instead of trying to govern the actions of the members and the organs of the United Nations by precise and intricate codes of procedure, we have preferred to lay down purposes and principles under which they are to act. And by that means, we hope to insure that they act in conformity with the express desires of the nations assembled here, while, at the same time, we give them freedom to accommodate their actions to circumstances which today no man can foresee.

We all want our Organization to have life. We want it to develop its own codes of procedure. We want it to be free to deal with all the situations that may arise in

⁵⁰³ *Ibid.*, pp. 16-17

⁵⁰⁴ Goodrich, Hambro & Simons, *supra* note 8, p. 23

⁵⁰⁵ See VCLT, 1969, Articles 18, 19(c), & 31(1)

⁵⁰⁶ See e.g. League of Nations Covenant, Articles 11-17. Martti Koskenniemi has discussed the relationship between the United Nations General Assembly and the Security Council, suggesting that among the consequences of the collapse of the League of Nations system, which had a number of solutions to problems of justice and order in Europe, "was the birth of an international 'realism' that concluded that legal regimes are by their very nature useless or perhaps even counterproductive in the search for international order". Koskenniemi, *supra* note 445, at 333. This may explain the belief that the UN Charter regulations should be seen in the light of what is actually happening, and not what should be.

international relations. We do not want to lay down rules which may, in the future, be the sign post for the guilty and a trap for the innocent. And, so far as words can go, I venture to assert that the rights and interests of all members are safeguarded in our purposes and principles, while the power of action by the Security Council in the interest of all is made easier. [...] I, for one, hope that we may succeed in creating an organic body which will have within itself the seeds of a vigorous life”.⁵⁰⁷

This background is perhaps useful to bear in mind when viewing the status and function of the Purposes and Principles of Articles 1 and 2. The Purposes clearly state what the Organisation and members are to do, and the *raison d'être* of the Organisation, while Article 2 lays down basic principles according to which the Organisation and the members are to act when furthering the aims contained in Article 1. Accordingly, the discussion on whether Article 1 lays down legal obligations for states, or not, finds a response here. It was the intention of the founders that both Articles have effect beyond that of political statements. On their basis legal action may be taken. If this were not so, the Charter would have been constructed differently.

In the Certain Expenses of the UN case⁵⁰⁸ the ICJ explained that the question of whether the expenditures to be examined were UN expenses within the meaning of Article 17(2) or not had to be “tested by their relationship to the purposes of the United Nations.” The ICJ continued that when the UN takes action which fulfils one of the Charter purposes “the presumption is that such action is not *ultra vires* the Organisation.”⁵⁰⁹ Thus action taken may be based directly on the Purposes, with no other basis needed. The argument is supported by Article 24(2) which requires the Security Council to “act in accordance with the Purposes and Principles of the United Nations.” Karl Doehring argues that the Purposes must have a legally binding nature “since they are expressly described as the nature of legal protection.”⁵¹⁰

On the interrelationship of the preamble, the Purposes and Principles, the Rapporteur on the draft text explained that,

The provisions of the Charter being in this case indivisible as in any other legal instruments, they are, therefore, equally valid and authoritative. The rights, duties, privileges, and obligations of the Organization and of its members match with one another and complement one another to make a single whole. Each of them is construed to be understood and applied in function of the others. [...] May this last explanation dispel any doubts as to the validity and value of any division of the Charter, whether we call it Principles, Purposes, or Preamble. It is thus clear that there are no grounds for supposing that the Preamble has less legal validity than the two succeeding chapters. ⁵¹¹

⁵⁰⁷ Lord Halifax, Delegate of the UK, *Documents, UNCIO*, vol. VI, *supra* note 153, p. 26

⁵⁰⁸ Certain Expenses of the United Nations, *Adv. Op.*, ICJ Rep. (1962)

⁵⁰⁹ This position was, however, criticised already in Judge Winiarski's dissenting opinion.

⁵¹⁰ Doehring, Karl, “Self-Determination”, in: Simma, B. (ed.), *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 1994) p. 57

As to their respective functions, the purpose of an organisation is that which it is to fulfil, while the function of the principles binding on it is the execution of the purposes.⁵¹² Thus it could be argued that purposes enjoy a higher rank than principles.⁵¹³ UN resolutions and other adopted documents referring to the Purposes and Principles often refer to them together, though not always.⁵¹⁴ The Purposes of the Charter also *include* principles, such as the principle of equal rights and self-determination of peoples. The ‘natural’ relationship between the two Articles is that Article 2 should be interpreted and applied in the light of Article 1.

4.1.5.2 The principle of the self-determination of peoples

In the case of UN Charter Article 1(2) regarding respect for the self-determination of peoples, scholars have discussed whether Article 1(2) contains a *right* of peoples which can be claimed by them. Some seem to have concluded that if this right cannot be found in the second Purpose, there is no legal obligation on states.⁵¹⁵ The Purposes would then only be political in character; if there are no right-holders, no one has a corresponding duty. The scope of the Purposes is nevertheless both wider and different from the issue of rights and duties of states. Is maintenance of international peace and security a right owned by an entity or entities, and if not, does no one have the duty to take measures towards this? The duties of the Charter Purposes do not have any corresponding rights of those to which the duties are owed. Nevertheless, they constitute the legal basis upon which to take action in the common interests of members. This could in one sense be compared to *erga omnes* obligations, though the function and effects are very different. In the first case, the members have by agreement given an Organisation, in which they take part, the authority to determine and implement decisions within certain areas, the results of which are in the common interest. The Purposes clarify what those common interests are. Thus the duty to respect the rights of peoples to self-

⁵¹¹ Farid Zeineddine (Syria), in: *Documents, UNCIO*, vol. VI, *supra* note 153, pp. 16-17

⁵¹² UN Charter Article 2 states: *The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.*

⁵¹³ Doehring, *supra* note 510, p. 57

⁵¹⁴ In applying Article 1, UN organs have addressed one another, specialised agencies, and States generally and specifically – even that States be guided by the Purposes in relating to other States. The UNGA has referred to Article 1 as forming one of the constitutional grounds for its decisions; here it has often referred also to Article 2. Article 1 has been used by the UNGA when it has endeavoured to formulate world community interests as a whole. Specific references have also been made to the individual components of Article 1. See Wolfrum, Rüdiger, “Purposes and Principles”, in: Simma, B. (ed.), *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 1994) pp. 54-6

⁵¹⁵ See longer discussion in Shaw, *supra* note 17, pp. 61-64

determination does not form the primary basis upon which peoples may claim the right. There are other treaty and customary law bases for such claims. The duty is that in all that the UN as an organisation does, its eyes are to focus on the ultimate goal – of maintaining international peace and security and to develop friendly relations based on *inter alia* respect for the self-determination of peoples. Under Charter Article 24(2) the Security Council is to act in accordance with the Purposes when discharging its duties. Under Article 25 the Members agree to carry out decisions of the Security Council “in accordance with the present Charter.”

The principle of self-determination in the UN Charter was not included in the original Dumbarton Oaks Proposals, and was only proposed to be included in Article 1(2) by the Four Powers at San Francisco.⁵¹⁶ The discussions in Sub-committee I on the proposed amendment reveal little. The summary report merely states that

Concerning the principle of self-determination, it was strongly emphasized on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.⁵¹⁷

The Rapporteur on the San Francisco draft preamble, Purposes and Principles, wrote:

It was understood: That the principles of equal rights and that of self-determination are two component elements or one norm.

That the respect of that norm is a basis for the development of friendly relations, and is in effect, one of the appropriate measures to strengthen universal peace.

It was understood likewise that the principle in question, as a provision of the Charter, should be considered in function of other provisions.

That an essential element of the principle in question, is a free and genuine expression of the will of the peoples; and thus to avoid cases like those alleged by Germany and Italy. That the principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose.⁵¹⁸

In explaining the reasons for the failure of a motion by Belgium to amend the text, he mentioned *inter alia*,

⁵¹⁶ See amendment jointly proposed on May 5, 1945, in: *Documents, UNCIO*, vol. III, *supra* note 153, p. 622

⁵¹⁷ Summary report (Committee I/1), May 15, 1945, in: *Documents, UNCIO*, vol. VI, *supra* note 153, p. 296

⁵¹⁸ Report of Rapp. Farid Zeineddine (Syria), June 1, 1945, Committee I/1 to Technical Committee I (Preamble, Purposes and Principles), in: *Documents, UNCIO*, vol. VI, *supra* note 153, pp. 703-4. The report of Committee I to Commission I (General Provisions), eight days later, stated: “The Committee understands that the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will”. *Ibid.*, p. 396

That what is intended by paragraph 2 is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights, therefore, extends in the Charter to states, nations, and peoples.⁵¹⁹

Some observations on the principle of self-determination as included in Article 1 of the UN Charter are here suggested. Because of the character of the Purposes as bases upon which direct action can be taken, and in light of the aim to structure the Purposes to be responsive to change, the position that the principle of self-determination in Article 1 is inapplicable, and only political or already exhausted, cannot be supported. It would be more in line with the purposes of the drafters to underline the flexible approach that was set up, in contrast with the restrictive character of the Covenant of the League of Nations. Accordingly, the text in Article 1 does form a basis upon which direct action can legally be taken, and the duties carry the same character. They are not privileges, but legal duties.

In practice, however, the application of self-determination has been infrequent, and often perceived as more of a threat to peace than an aid. The constitutional character of the UN Charter implies a method of interpretation and application that responds to the aims of the Organisation and to international developments. As the Purposes of the Charter are fundamental, they were not aimed to compete or undermine one another, but to complement one another and be applied in light of one another. The principles are therefore to be interpreted so as to 'work' together. Because of the overriding importance of long-term peace, States Parties to the Charter have also authorised the Organisation to act for this purpose, and in line with the whole Charter. Further, because the goal of international peace and security is a fundamental value of the international community, the role of state sovereignty in restricting the reach of the Purposes is much less than in other areas of international law. The protection of state territory in order to preserve the *status quo* is not the primary value of the international community and accordingly it should not be so interpreted.

⁵¹⁹ Rapp. Zeineddine (Syria), in: *Documents, UNCIO*, vol. VI, *supra* note 153, p. 704. Belgium's motion had aimed to include, within §2, the phrase: "to strengthen international order on the basis of respect of [*sic*] the essential rights and the equality of states and of the right of self-determination of peoples." *Ibid.*, p. 300

5. A THEORY of RECONCILIATION

The interpretation of texts in international law is an art and not a science, although it is a characteristic of the art to disguise the process of interpretation as a science.⁵²⁰

History has shown that the will and the capacity of individual peoples to contribute to their world environment is constantly changing. It is only logical that the organizational forms (and what else are such things as borders and governments?) should change with them. The function of a system of international relationships is not to inhibit this process of change by imposing a legal straitjacket upon it but rather to facilitate it: to ease its transitions, to temper the asperities to which it often leads, to isolate and moderate the conflict to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general. But this is a task for diplomacy, in the most old-fashioned sense of the term. For this, law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected.⁵²¹

5.1 The requirement of systemic unity: the challenge to law

It has already been argued that the non-application of self-determination in issues related to boundaries is practically problematic. Regarding the UN Charter, we have seen that in the Purposes the drafters attempted to structure a system that would be responsive to future developments. But these are not the only arguments for an actual application of the principle of self-determination as contained in the Charter. The legal system itself requires the application of all components, the question being only to which degree this should be done, and it is cold towards complete disregard of principles. This chapter therefore attempts to discuss the system itself and the role played by principles within it, as well as the basis for a method on interpretation which accords with the character of the principle of self-determination as it is contained in the UN Charter. Is non-application of the principle of self-determination contained in the UN Charter problematic? How should the principle be approached and applied in light of other purposes?

One of the main purposes and functions of law is to facilitate the working of and coexistence within and between societies.⁵²² As individual legal systems cannot possibly

⁵²⁰ Amerasinghe, C. F., *Principles of the Institutional Law of International Organizations* (Cambridge University Press, Cambridge, 1996), at 32

⁵²¹ Kennan, George, *American Diplomacy, 1900-1950* (University of Chicago Press, Chicago, 1951) p. 95

⁵²² Kaplan, M. & Katzenbach, N., *The Political Foundations of International Law*, (John Wiley & Sons, Inc. N.Y., 1961) p. 60. Max Huber stated that international law "has the object of assuring the co-existence of

resolve all conflicts within their societies once they have taken shape as concrete cases, the main task of law is to prevent conflicts from taking physical form by regulating behaviour and actions so that friction is kept to a minimum.⁵²³ Various interests are taken into account, rights and duties are laid down, rule of law is promoted – all of which constructs a basis for expectations to be formed, and so on. Internal contradictions within the legal system are therefore problematic, as the law then fails in its mission of ordering relations, providing foreseeability and avoiding arbitrariness. For law to be effective it must work as a whole.⁵²⁴ One of the tasks of lawyers or legal scientists is to identify and ‘smooth out’ contradictions within or between systems, so that law can facilitate relations and not itself be the cause of tensions between actors. Norms do come into conflict in many instances,⁵²⁵ both within specific systems of law and between different systems, as law is constructed over space and time. Among the options that lawyers possess, in order to respond to the challenge to the unity of the system, is to be able to argue for precedence between rules and the balancing, or harmonisation, of principles.

5.1.1 Collisions and responses: priority or balancing

The primary response to collisions between rules within one legal system is in the construction of a *priority of norms*, by which a higher norm enjoys priority over a lower-ranking one. This resolution mechanism functions in cases where norms have a different character, such as deriving from diverse sources or resulting at different points in the legislative process – thus, for example, enabling the use of the rule *lex superior derogat legi inferiori*. Importance may also be given to the age of a rule in relation to another rule by the rule of *lex posterior derogat priori*, or to the specificity of the rule by *lex specialis derogat legi generali*.⁵²⁶ However, because hierarchical or chronological systems function on the basis

different interests which are worthy of legal protection”. *Island of Palmas* (Netherlands v. US) 2 *RIAA* (1928) 829 at 870

⁵²³ The corresponding task is, of course, to judge breaches of rules and preclude individual retribution and use of force.

⁵²⁴ An awareness of this necessity came early, as e.g. Cicero supported *perfectam artem iuris civilis* (the perfect art of civil law, in *De Oratore Liber Primus*, chapter 42) which would create order where there was lack of inner coherence or order. Pezzenik, Aleksander, *Vad är rätt? Om demokrati, rättsäkerhet, etik och juridisk argumentation* (Norstedts, Stockholm, 1995) pp. 278-80.

⁵²⁵ Georgiev, *supra* note 26, at 7-8

⁵²⁶ Dworkin explains that the decision as to which of two rules is valid in a given situation is made “by appealing to considerations beyond the rules themselves.” Dworkin, Ronald, *Taking Rights Seriously: New Impressions with a Reply to Critics* (Duckworth, London, 1996) p. 27. There are additional principles such as *lex posterior*

of distinctions in the character or ‘identity’ of rules, they fail to provide a solution where rules of the same character and timing collide. Certain attempts have been made in PIL to make a further distinction on the basis of content, creating a form of priority of norms based on their ‘importance’. The term *ius cogens* has been argued to refer to a form of ‘absolute’ or fundamental norm that allows no breach and which indicates a hierarchy or priority. This is, however, not entirely unproblematic, especially with regard to human rights.⁵²⁷

The doctrine of *abuse of rights* is a further mechanism that may be used to determine clashes between claims based on law of the same order within one legal system.⁵²⁸ This doctrine carries out its distinction based upon the intent of the parties, and its application is closely bound to the parties in each case, ruling out the construction of a general theory. Human rights treaties often include an article prohibiting the abuse of rights. Its inclusion makes it possible to pre-empt colliding claims based on rights of the same validity.⁵²⁹ Evidence of the application of the doctrine internationally is, however, scarce.⁵³⁰

Another formal method of choosing between rules is found in the system of *private international law*, the aim of which is to choose between applicable rules of different domestic systems. Like the hierarchical solution generally, this resolving mechanism is not content-oriented.⁵³¹ The usefulness of the system is limited to decisions on appropriate rules based on a determination of the system of law applicable – not primarily the individual rule because of its content or character. Another limitation is that one rule is selected over the other rule, so no attempt at reconciliation or harmonisation is made. The private international law rules of conflict are also set up on the basis of agreements between states and are therefore silent on conflicts between rules within one system of law.

generalis non derogat legi priori speciali (a later, more general rule is not to be applied instead of an earlier more specific rule).

⁵²⁷ The doctrine of the indivisibility and interdependence of human rights challenges the theory of a hierarchy of human rights norms. There are less theoretical problems involved with a hierarchy where human rights norms would enjoy precedence over other norms; such an approach would require the precedence of all human rights norms, in a sense granting special status to the entire category. However, such a hierarchy requires clear evidence. For a discussion, see Seiderman, Ian, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia, Antwerpen, 2001) chapter 8; Teraya, Koji, “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights” 12 *EJIL* 5 (2001) 917-41; Meron, Theodor, “On a Hierarchy of International Human Rights”, 80 *AJIL* 1 (1986) 1-23. See also Weil’s now famous criticism of the development of “graduated normativity” as risking the demise of the system of international law; Weil, *supra* note 408

⁵²⁸ See e.g. Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1987) pp. 121-2; Brownlie, *supra* note 189, pp. 446-8; Kiss, Alexandre, “Abuse of Rights”, in: Bernhardt, R. (ed.), *EPIL* <1> (North-Holland, Amsterdam, 1992) pp. 4-8

⁵²⁹ ICESCR (1966) Article 5(1); ICCPR (1966) Article 5(1); European Convention on Human Rights (1950) Article 17; ACHR (1969) Article 29 (a)

⁵³⁰ More commonly efforts are labelled as the balancing of interests.

⁵³¹ An exception to this is cases of *ordre public*.

Different methods of dealing with norm collisions:

	Single legal system	Several legal systems
Rules of different character, origin or 'timing'	System of priority	
Rules of the same character	<ol style="list-style-type: none"> 1. Distinguishing between the parties' intent (abuse of rights theory) 2. Political choice of preference 3. Precedence by other method 	Private international law rules
Principles	<ol style="list-style-type: none"> 1. Precedence 2. Balancing, weighing, harmonisation 	

The method of precedence is unproblematic with regard to private international law rules of collision, as such cases receive satisfactory resolution by the application of rules from within one of several legal systems. The use of the abuse of rights theory differs from this in that one of two interests must take a back seat because its intent when calling upon the application of a rule or principle was not accepted as legitimate. Here, weight is given to the object and purpose of a certain regulation, which is seen as contrasting with the interest of the applicant or respondent. The priority of norms system, on the other hand, does not generally examine individual contenders, or the content of rules, but is built on a structure where the result of a collision is possible to foresee on the basis of the character and timing of the rules in question.⁵³² Where it does attempt to create a priority or hierarchy on the basis of content, there will be attendant complications.

The methods described above that resolve rule collisions are less useful in resolving collisions between principles where all parties involved have legitimate interests. It is important, first of all, to study the distinction between principles and rules, as this will explain why collisions involving principles should be treated differently from collisions between rules.⁵³³ While a choice is often made between one rule or another, it is often suggested that principles are to be balanced or 'weighed' against one another.⁵³⁴

⁵³² Internal contradictions, of course, must still be removed by the legislator.

⁵³³ Alexy, Robert, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Clarendon Press, Oxford, 1989)

⁵³⁴ Peczenik, A., *Vad är rätt?: om demokrati, rättssäkerhet, etik och juridisk argumentation* (Fritze, Stockholm, 1995 s. 275)

5.1.1.1 Delimiting rules and principles

The delimitation of rules and principles may be approached from various positions and assumptions. A technical approach would examine how rules and principles are used within the legal system. An easy first description could be that rules are there to implement the legislator's purpose or will clearly, which explains their form, while principles may be likened to formulations of the legislator's will in response to legitimate interests or a summation and extraction of the essence of a group of rules. Rules are there to implement principles or purposes, and/or principles guide the implementation of rules. Ways of implementation might collide, and for that reason it is less problematic to choose between rules. Principles, by contrast, are direct expressions of will and legitimate interests, which, when colliding, reveal a more fundamental problem. In light of the purpose of law to regulate relations and expectations so as to make coexistence possible and more beneficial, law must be treated as a whole – a unity. There cannot be different directions and purposes within a system of law, as this begs for societal chaos. Legitimate demands supported by principles must therefore not be required to stand aside because another principle of the same character has been given priority. The principles in such cases require harmonisation or reconciliation so as to maintain the unity of the system.

In the case of fundamental principles of PIL, a form of harmonisation is even legally required, distinguishing them from rules and discretionary principles.⁵³⁵ The “Friendly Relations Declaration” of 1970 clearly states:

*In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.*⁵³⁶

No choice can thus be made between principles of PIL. Instead they are to be interpreted and applied in a holistic fashion. As mentioned earlier, the doctrine of the interdependence and

⁵³⁵ Raz distinguishes “substantive” principles from “principles of discretion”. The former dictate the goals or values to be pursued or protected while the latter lay down the goals or values a judge *may* take into account when exercising his discretion, thus guiding discretion rather than “negating” it. Raz, Joseph, “Legal Principles and the Limits of Law”, 81 *Yale Law Journal* (1972) 823 at 846-7. Fundamental principles of PIL correspond with the first category of goals to *be pursued* as distinct from discretionary guidance, which further underlines the importance of harmonisation instead of precedence.

⁵³⁶ UNGA Res. 2625 (1970) Article 2. On the Declaration, see footnote 179. See also e.g. the CSCE Helsinki Final Act (1975): *All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.* Similar statements are made in other OSCE documents, e.g. the Charter of Paris for a New Europe (1990)

indivisibility of all human rights makes a selection or priority of rights difficult to maintain in this area, and a form of harmonisation or balancing is required here as well.⁵³⁷

A ‘philosophical’ approach to the distinction between rules and principles forces an immediate, perhaps even slightly involuntary, immersion in the enveloping ocean of legal theory. Fundamental questions force themselves upon the enquirer who wishes to examine the character of principles and rules. Is the distinction between rules and principles merely specificity and generality, or do principles contain additional components such as fairness and justice, purpose or direction? Are principles only the compilation of a collection of applied judicial decisions?

The distinction between rules and principles has been the subject of much theorising and discussion. Robert Alexy has systematised three ‘schools’ on the differences between rules and principles. The first finds it impossible to make a clear distinction at all, as they show “*family resemblances*” and belong to one group; the second suggests the distinction to be merely one of degree; the last holds that the difference is qualitative. Alexy himself favours the third explanation, defining principles as “*optimization requirements*”.⁵³⁸ Ronald Dworkin

⁵³⁷ Martin Scheinin describes the interdependence school as “all provisions in a law or an international treaty must be read and interpreted in their context, as being informed and enriched by every other provision in the same legal instrument and possibly by other instruments as well, at least when a common origin or common system of values can be identified behind the two instruments.” Scheinin, *supra* note 115, at 181. For a clear statement on all human rights as “universal, indivisible and interdependent and interrelated”, see the 1993 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, A/CONF.157/23, paragraph 5. The UN HRC, which supervises the ICCPR (1966), has used an inter-relational or interdependent interpretation. Scheinin, *ibid.*, at 193-99. See e.g. the *Mahuika* case where the HRC explained that “the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.” *Apirana Mahuika et al v. New Zealand* (Comm. No. 547/1993) paragraph 9.2. In the Gillot case the HRC interpreted Article 25 in the light of Article 1. *Marie-Hélène Gillot et al v. France* (Comm. No. 932/2000).

⁵³⁸ Alexy, Robert, *A Theory of Constitutional Rights* (Oxford University Press, 2002) p. 47. In PIL, see the *Gulf of Maine case* where a chamber of the ICJ described the distinction between rules and principles as “no more than the use of a dual expression to convey one and the same idea”, the term “principles” having a “more general and more fundamental character.” However, the Court reached its conclusion by studying the principles “in this context”. *Case concerning delimitation of the maritime boundary in the Gulf of Maine area* (1984), ICJ Rep. 246, paragraph 79-112. Fitzmaurice has formulated the distinction between principles and rules thus: “By a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or provides the reason for it. A rule answers the question ‘what’: a principle in effect answers the question ‘why’.” Fitzmaurice, G., “The General Principles of International Law considered from the standpoint of the Rule of Law”, *RdC* 91 (1957) II, 5-222 at 7. Herczegh describes a principle as “a norm of general validity and content which is manifested [...] by groups of mutually interdependent legal rules or their system [...] and] norms which give expression to the essential traits of the legal system controlling the life of the society in question.” He continues: “The principles of international law—like in general the legal principles—embody the provisions of a general substance or the generalization of actual provisions governing details of statutory rules, of universal international customary law and of quasi-universal agreements, by taking into account the fundamental tasks of the legal system as a whole, in the present instance those of public international law and its most characteristic traits derived from its structural features.” Herczegh, Géza, *General Principles of Law and the International Legal Order* (Akadémiai Kiadó, Budapest, 1969) at 36-7 and 55. It is appropriate here to insert a short note with regard to the very positivist national legal system of Sweden: it has generally been considered foreign to discuss law in terms of principles, but judges have

argued that principles differ from rules in that they contain the dimension of ‘weight’.⁵³⁹ At collisions, rules are selected on the basis of preceding rules of priority, origin and so on, and not by considering their substance. Principles, on the other hand, have the inherent dimension of importance or weight, and a balancing act is instead required. Joseph Raz has adopted a different position, finding the difference between rules and principles to be one of degree.⁵⁴⁰ Regarding collisions, he asserts: “Conflicts between rules are determined solely by their relative importance; conflicts between principles are determined by assessing their relative importance together with the consequences for their goals of various courses of action.”⁵⁴¹ Alexy comes closer to a Dworkian understanding with his description of principles as “optimization requirements” which can be fulfilled in varying degrees, while rules are “always either fulfilled or not”. The distinction is thus qualitative, and not one of degree.⁵⁴² He has linked the very identity of principles to the determination of colliding principles, as they are “characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.”⁵⁴³ Thus a choice is never made between principles. Instead, they are implemented to a greater or lesser extent by the weighing of the principles in a specific context.

occasionally used the expression ‘allmänna rättsgrundsatser’ in decision-making. The Swedish Labour Court (AD) created a sensation in 1932 when it held: “Vad angår upphörande av arbetsavtal, som slutits för bestämd tid, råder ... icke någon tvekan därom, att i Sverige lika väl som i andra länder den allmänna rättsgrundsatsen gäller, att dylikt avtal kan å ömse sidor uppsägas till upphörande efter viss uppsägningstid [...]”. Rimsten, Olle, *Arbetsdomstolen och lagstiftaren: Om värderingar i rättsligt beslutsfattande* (Iustus, Uppsala, 1998) pp. 189-90. See also AD 164/79 on ‘allmänna rättsgrundsatser’. The use of the concept seems more in line with applying equity or equitable principles.

⁵³⁹ Dworkin describes a principle as “a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. [...] Principles have a dimension that rules do not—the dimension of weight or importance.” Dworkin, *supra* note 526, pp. 22, 26-7

⁵⁴⁰ “Rules prescribe relatively specific acts; principles prescribe highly unspecific actions.” Smoking, murder and speeding are given as examples of highly specific acts prescribed or proscribed by rules, while promoting human happiness and increasing productivity are prescribed by principles. Raz, *supra* note 535, at 838. See Raz’ discussion on individuation of laws, *ibid.*, pp. 823-54. Mosler describes rules as more precise, and principles as less precise. He nevertheless distinguishes rules and principles that derive from the will of states from fundamental rules and principles that safeguard the continuation of the international society of states, and thus precede state will, deriving from another source beyond positivist ‘pedigree’. Mosler, *supra* note 410, pp. 67-74, 82

⁵⁴¹ Raz, *supra* note 535, at 833

⁵⁴² Alexy, *supra* note 538, pp. 47-8

⁵⁴³ *Ibid.*, pp. 41, 47-8

This discussion inevitably leads to theorising about the nature of the legal system as being closed or open, or ‘law as a system of rules’ or not.⁵⁴⁴ If the legal system is pedigree-determined, then principles can only be general ‘rules’ based, for example, upon legal decisions, which in turn are based upon rules, the legitimacy of which derives from the Grundnorm. The inductive approach to principles premises that these derive from the accepted sources of international law. Some authors even suggest that rules historically precede principles.⁵⁴⁵ The rule approach has nevertheless been criticised for an inability to “account coherently for the differences among principles and rules”.⁵⁴⁶ If pedigree cannot entirely explain what law is and its binding force – the positivist alternative to Hart’s legitimacy being Austin’s command theory – then principles may have an origin other than a Grundnorm and may contain additional components. The ‘open-textured’⁵⁴⁷ and non-inductive approach to the legal system and its norms allows for the existence of principles that are typologically different from rules, for a method of approaching ‘conflicting’ principles, and also for a consideration of context in relation to which principles will be balanced.

In PIL no Grundnorm or rule of recognition is agreed upon, and there are a multitude of understandings as to the nature, function and basis of international law. The nature of principles seems impossible to agree upon, and it will be the view or perspective of the observer as to the nature of law that most often will determine an understanding of what principles are and what they contain. The chosen prism reveals different ‘results’, for which reason studies of the ‘matter itself’ – *i.e.* technical approaches – are insufficient to explain the character and function of principles. Karen Knop adds further dimensions by placing the principles/rules debate in the context of the nature and change of the international legal

⁵⁴⁴ Kelsen argued for the unity of the legal system because the norms derive from one *Grundnorm*. Kelsen, Hans, “Den rena rättsläran: dess metod och grundbegrepp” 3 *Statsvetenskaplig Tidskrift*, (1933) särtryck, 5-56 at 31. Hence principles, if they were binding, would also have to derive from this norm. However, Hart and other positivists focus on judicial discretion and its interplay with the legislator when confronted with the ‘furry edges’ or ‘open texture’ of law, which leaves principles with an extra-legal character. See Dworkin, *supra* note 526, chapter 2. As PIL principles are binding and not discretionary, either the PIL system is an ‘open’ system lacking an entirely inclusive Grundnorm, or such principles are only general rules.

⁵⁴⁵ Schwarzenberger writes: “Legal principles may [...] be defined as abstractions or generalizations from the products of one or several law-creating processes, *i.e.*, the ‘formal’ sources of international law enumerated in Article 38 (1) (a)-(c) of the Statute of the World Court.” Schwarzenberger, Georg, “The Fundamental Principles of International Law”, *RdC* 87 (1955) I, 195-383 at 201-2. On their historical development, he writes: “When reconciliation between cases or rules of customary law and statutes became necessary, judges and writers abstracted principles from this material and then subsumed individual cases and statutes under a common heading, if necessary, fitted them into gradually expanding systems by way of exceptions to principles or adjusted complementary or conflicting principles by assigning to each of them their respective fields of operation.” *Ibid.*, p. 201.

⁵⁴⁶ Kratochwil suggests that the response of modern legal theories to the view of law as a system of rules is to emphasise process/policy or interpretation. Examples are the ‘New Haven School’ and law as “an argumentative practice”. Kratochwil, *supra* note 16, p. 41

⁵⁴⁷ Schachter, *supra* note 480, p. 20

system, referring *inter alia* to Michel Virally, who has argued that reasoning with rules is ‘conservative’, as the process is inductive, while arguing with principles by deductive interpretation is suggested to be a more responsive tool to a changing international society.⁵⁴⁸ Focusing on rules to the detriment of principles might also be exclusive, because the induction proceeds from state practice dominated by Western sources. Arguing with principles has thus been represented as an approach that is more open both to non-Western and non-lawyer use.⁵⁴⁹ Knop also connects certain perspectives on the nature of principles with views on international society, using Antonio Cassese’s description of the distinction between principles and rules of PIL⁵⁵⁰ to illustrate a view of rules as “a reflection of unity of values and harmony”, while principles “come to represent the possibility of reached agreement on rules, the hope of shared values in the future.”⁵⁵¹

The responses to collisions between principles and between principles and rules differ. Depending on different conclusions as to their ‘origins’ or basis, the materials or arguments used to resolve the collision diverge. If principles are pedigree-determined, rules are on the same level as principles, and vary only in form. When rules change, so does the content of the principles which ‘summarise’ them. Rules can be directly applied, whereas principles have a more vague applicability. It may, or may not, seem more appropriate to allow the rule precedence by making an exception to the principle, or by harmonising the application of the rule with the principle, where possible.⁵⁵² A ‘pure rule’ approach also excludes the need for any balancing.⁵⁵³ As the inductive position on principles does not recognise the existence of principles apart from rules, this may explain the non-recognition of the balancing possibility: either a rule is applied or it is not. A rule cannot be partly applied, for then it is, by definition, not law. Balancing cannot then really be a legal exercise, as the only available option is the selection between rules. The premises underlying the inductive approach might also explain the strenuous non-recognition of the principle of self-determination as law. How can

⁵⁴⁸ Virally, M., “Le Rôle des ‘Principes’ dans le Développement du Droit International” (1968) in: Knop, *supra* note 36, p. 39. Knop argues that this is not necessarily the case with regard to self-determination. *Ibid.*, pp. 40-1. On the inductive approach, see e.g. Schwarzenberger, Georg, *The Inductive Approach to International Law* (Stevens & Sons, London, 1965)

⁵⁴⁹ See different views presented in Knop, *supra* note 36, pp. 41-44

⁵⁵⁰ “[P]rinciples differ from legal rules in that they are the expression and result of conflicting views of States on matters of crucial importance [...] In this respect, principles are a typical expression of the present world community, whereas in the old community – relatively homogenous and less conflictual – specific and precise rules prevailed.” Cassese, *supra* note 36, p. 128. Principles here seem to originate from a minimum of agreement within international society on important issues, while rules are the result of full agreement. The distinction could be summarised as the degree of consent.

⁵⁵¹ Knop, *supra* note 36, pp. 45-7

⁵⁵² In PIL and in the choice between *uti possidetis* as a rule and self-determination as a principle, the ICJ has given priority to the rule. See e.g. the Frontier Dispute case (Burkina Faso v. Mali) ICJ Rep. (1986) §25

something that is only applied in a piecemeal fashion constitute ‘real’ law?⁵⁵⁴ If principles are not pedigree-determined, but are related to the very functioning, aims or values of legal systems, it becomes evident that rules which collide with a principle in a certain instance must give way, since their application would undermine the object and direction of the legal system. Principles then ‘trump’ rules, or using an alternative argument, rules might even in some cases *result* from the weighing of colliding principles.

When principles collide with other principles, the Grundnorm or pedigree system does not seem to provide a means of resolving the conflict. All collisions cannot be resolved by observing procedural or other differences, because the only ‘difference’ might be the substance and effect or result of application, and not any ‘objective’ systematic differentiation. It would then seem that if the rule approach insufficiently responds to the reality of conflicts between simultaneously valid principles, the remaining options are balancing or harmonisation. The simultaneous validity of seemingly opposing principles is based on the existence of several valid goals, interests or values that the principles protect or promote, which implies that any balancing or weighing of the principles has to take their teleological character into account. Accordingly, such a balancing act can also only be performed in a specific context, because the results of the balancing have to accord with the justification for applying the principles in the first place. Context is then an integral component of the balancing of principles.⁵⁵⁵ And how could the value, role or effect of the respective principles within the system be judged by any but ‘extra-legal’ considerations?

There are different approaches to this in PIL. In Oscar Schachter’s distinction between norms, he not only describes rules and principles,⁵⁵⁶ but also defines what he calls ‘ends’:

⁵⁵³ Alexy, *supra* note 538, p. 71

⁵⁵⁴ Some traditional criticism of self-determination as part of international law has focused on its non-rule character, illustrated by a quote from a 1921 Åland Islands report by the Commission of Rapporteurs: “This principle [of self-determination] is not, properly speaking a rule of international law”. The point made was that since it was not a rule, it was not law, “properly speaking”, but non-binding politics or morality, whether good policy or not. The position seems to entail that only rules are binding international law. How can principles, which are more or less applied in different contexts, fit in? Is the presumption that principles must have absolute effect in each case for them to be considered binding? Part of the argument against the legally binding character of self-determination as a principle then stems from its varying application and effect in different contexts. The position on principles which accepts the essential difference between principles and rules explains that at collision they are all applied to a greater or lesser extent, depending on the context. The criticism that simply because they are not applied to their full extent they are not binding, is based upon the inductive or ‘pure rule’ approach, which denies the existence of principles apart from rules.

⁵⁵⁵ The alternatives to balancing principles in context are having the capacities of omniscience or prophecy.

⁵⁵⁶ He describes rules as “norms that dictate a specific result [... that] either apply to a given set of facts or not” while principles “lack this element of definiteness. [...] Their terms have a wide range of application; they are ‘open-textured’ [...] because they leave room for varying interpretation with respect to many situations.” Schachter, Oscar, “International Law in Theory and Practice” 178 *RdC* (1982-V) 9-396 at 43

These aims differ from principles in that they do not in themselves give rise to claims of entitlement. Standing alone they do not provide a solution of a legal character. However, linked to principles and rules, they become relevant to choices among opposing principles or rules.⁵⁵⁷

This does not, however, easily resolve all difficulties in the equation, as there may be a number of valid aims. He continues: “Several competing aims may of course apply to a given situation. [...] Since such aims intersect and clash, they also need to be weighed in terms of importance to the interests involved.”⁵⁵⁸ If the legal system has an ‘open’ character, the primary goals of society could be used to determine the application in a particular case and context where two both valid and legitimate principles collide.⁵⁵⁹ The values suggested to apply in the context of PIL would be those of the international community; the specific contexts in which a balancing is proposed will evidently differ.

i: The principle of self-determination

What then is the principle of self-determination? The principle is easily distinguished from rules under PIL; its character as a principle is part of its very ‘object’. It has earlier been argued that the principle of requiring respect for the self-determination of peoples is not the inductive summation of specific rules, but the formulation of a fundamental value of the international community entailing consideration and non-exploitation or domination. It is an ‘extra-legal’ value that has been embodied in a principle, which may in turn give rise to rules. Its application will respond to the challenges of the times, changing as they change.⁵⁶⁰ It is thus closely context-related. Whereas rules are closely bound to state practice and therefore could be argued to be “essentially conservative”, principles could be suggested to be more responsive to the dynamics of, and changes to, international society.⁵⁶¹ It might be useful to note again that Article 1(2) is treaty law, not customary international law, and as contained in the UN Charter is developed by interpretation *inter alia* by UN organ practice, not by the

⁵⁵⁷ *Ibid.*, at 44

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Practical difficulties can be illustrated by the ancient collision between freedom and equality, both goals of modern liberal societies. In cases where these come into collision, e.g. within individual rights, a decision which one is to enjoy precedence, or how to balance them, must simply be made extra-legally. There is no superior norm which can reconcile them both without limiting their extent or reach to some degree. For the dilemma of liberal societies, see Rawls, John, *Political Liberalism* (Columbia University Press, N.Y., 1993)

⁵⁶⁰ *Supra* chapter 2

⁵⁶¹ See Knop, *supra* note 36, pp. 10-1 on Michel Virally’s understanding of rules.

general practice of states, which develops ‘ordinary’ or general customary international law on self-determination.

The legal status of the principle has been discussed ever since its inclusion in the Charter, and though many at first classified it only as a political principle, such positions have had to change. Crawford claims that self-determination functions both as a political principle, a legal principle and as a right.⁵⁶² Schachter notes that there are few rules on self-determination, and suggests that it functions primarily as a general principle.⁵⁶³ The principle of self-determination may be considered to include certain rules, such as requiring referendums in specific situations.⁵⁶⁴ Cassese suggests that the function of the general principle is threefold: to specify the method by which self-determination may be exercised; to interpret unclear rules; and to be directly applicable in cases where no rules are in place.⁵⁶⁵ In whatever way one views the exact function of the principle of self-determination, what remains clear is that its character as a principle allows it to respond to developments and changes in a way that rules do not.⁵⁶⁶ This also means that the principle might be more open to respond to the needs of other groupings than those that traditionally fall under the right of self-determination. More specifically, the inclusion of self-determination in the UN Charter Purposes places it beyond the bearing of other principles, and requires it to influence issues falling within the scope of the Purposes, giving it direct applicability.

5.1.2 Harmonisation or reconciliation: the best of all worlds?

Choices between principles have been argued above to constitute a problematic response to colliding principles, and the remaining legal options therefore available are harmonisation, reconciliation or ‘weighing’ of principles against one another in specific contexts. How then is reconciliation, balancing or weighing to be effected? The primary way in which harmonisation or reconciliation possibly could be achieved is by interpretation. It is debatable, however, whether balancing, weighing or harmonising really falls within the scope of interpretation. If interpretation is limited to a dogmatic activity seeking only to clarify the

⁵⁶² Crawford, *supra* note 137, pp. 85-102

⁵⁶³ Schachter, *supra* note 480, p. 21

⁵⁶⁴ Cassese, *supra* note 36, p. 129. Just to summarise the different categorisations of self-determination: it is a principle, which also includes specific rules, as well as a right, which also contains rules. Crawford suggests the use of plebiscites to determine boundaries as flowing from the principle. Crawford, *supra* note 137, p. 93

⁵⁶⁵ Cassese, *supra* note 36, pp. 131-3

⁵⁶⁶ Knop, *supra* note 36, p. 32

meaning of norms, then application of the rules or principles in a situation where they come into conflict cannot fall within the definition. Balancing goes beyond this, as additional decisions and valuations are required when the issue is not of the priority of a rule over another rule. For interpretation to be useful as a tool in norm conflicts where, for example, the necessity of limiting the extent of principles seems a distinct possibility, it would have to determine the meaning of the norms *in the context in which they are to be applied*. It is clearly impossible to conduct such an interpretation without regard to the situation at hand. The logical conclusion is that interpretation of the UN Charter Purposes, at least in relation to issues of territory and boundaries, cannot be conducted in a vacuum.⁵⁶⁷

5.2 Unity by interpretation

[T]o interpret a treaty means to give life to dead letters as well as to complete a part of the procedure of realizing an act in the external world. Consequently, [...] there is an ever-ready demand for interpretation.⁵⁶⁸

5.2.1 General comments

Interpretation is a tricky business, and comes with several *caveats* and opposing positions. Some hold that if the meaning of a text is clear, no interpretation is needed. Others say that interpretation is always required, and is the basis for determining when a meaning is ‘obvious’. Some emphasise that interpretation should not be disguised legislation. Others argue that interpretation is a determination involving responsibility because the will of the legislator is not always ascertainable. Another assertion is that interpretation is a scientific method. But yet another position would suggest that interpretation allows an indiscriminate choice of any method – and so on.

⁵⁶⁷ Even though many appear to regard the first and second UN Charter Purposes as colliding in the area of territorial or boundary changes, this is not necessarily so. The two Purposes are to be applied in a reconciliatory fashion, so that self-determination is respected in a mode that is beneficial to long-term international peace and security. Instead of perceiving the first Purpose as limiting the second, it instead affects or informs the mode in which the second Purpose can or should be applied in concrete cases. The first Purpose cannot be legally argued to contain the principle of the stability of boundaries because its link to peace is at best a hypothesis poorly evaluated and evidenced.

⁵⁶⁸ Yü, *The Interpretation of Treaties* (1927) at 45, in: McDougal, M., Lasswell, H. and Miller, J., *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff Publ., Dordrecht, 1994) p. 79

It is here presumed that interpretation involves a more or less regulated decision-making process consisting of a variety of tools appropriate within different contexts.⁵⁶⁹ The determination of the contexts themselves, and the appropriate tool or tools to be used for the occasion is the responsibility of humans; there is no scientific, logical or objective systematisation to fall back on as being entirely determinant – available are only several options.⁵⁷⁰ Choices made between the options can, nevertheless, be more or less rational. Interpretation itself cannot define why a certain method of interpretation should or should not be employed.⁵⁷¹ The need for interpretation illustrates the interrelationship of law with the environment in which it is to be applied. Rules and principles cannot be applied or reconciled in a vacuum,⁵⁷² but must be interpreted in order to solve problems and support the unity of the entire existing legal structure, in order to facilitate community and the attainment of common interests, for the precise reason that conflicts always arise between interests, and contexts differ.

⁵⁶⁹ Thus ‘rules of interpretation’ should therefore be considered tools instead of having the character of binding rules, thus “forms in which legal reasoning has to be cast”. Alexy, *supra* note 533, p. 250. However, PIL is more clearly regulated, as broad rules of interpretation are included in the 1969 VCLT, Articles 31-33

⁵⁷⁰ Methods of interpretation have e.g. been suspected of lacking effective guarantees against arbitrariness. Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2002) p. 357. McDougal *et al* explain the emphasis on determining the shared expectations of the parties. See also their discussion on canons and hierarchies of interpretation: McDougal, M., Lasswell, H. and Miller, J., *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff Publ., Dordrecht, 1994) pp. 101-4, 111-18; see also Alexy, *supra* note 533, pp. 3-7, 234-50

⁵⁷¹ “Logic does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of any expression. Logic only tells you hypothetically that *if* you give a certain term a certain interpretation then a certain conclusion follows. Logic is silent on how to classify particulars—and this is the heart of a judicial decision.” Hart, *supra* note 385, at 25. Kelsen discussed interpretation in the context of *inter alia* clashing norms, stating: ”Föreligger det fall, att två samtidigt gällande normer motsäga varandra, då stå de tre tidigare omnämnda logiska möjligheterna [att motsvara en av rättsnormernas språkliga betydelse eller normstiftarens vilja, en av rättsnormerna, eller att avgörandet görs som om normerna upphävde varandra] av en verkställighet positivrättsligt på en och samma linje. Det är en fåfång ansträngning att ’juridiskt’ vilja motivera den ena med uteslutande av den andra.” He argued: ”Förstår man med ’tolkning’ fastställandet av den norms mening som ska verkställas, så kan resultatet av denna verksamhet blott vara fastställandet av ramen som den norm som ska tolkas framställer, och därmed kunskapen om flera möjligheter som äro givna inom denna ram. Då behöver inte tolkningen av en lag nödvändigt föra till ett enda avgörande som det enda riktiga utan möjligtvis till flera, som alla äro likvärdiga [...] Att en dom är grundad i lagen betyder i själva verket intet annat än att den håller sig inom lagens ram, betyder icke att det är *den* individuella normen utan blott att det är *en* av de individuella normer som inom den generella normens ram äro möjliga. Den traditionella jurisprudencen tror emellertid, att den av tolkningen inte blott får vänta fastställandet av ramen för rättsakten som ska sättas, utan också uppfyllandet av en vidare uppgift [...] Tolkningens övliga [*sic*] teori vill göra troligt att lagen, tillämpad på det konkreta fallet, städe blott kunde giva *ett* riktigt utslag [...] Den framställer denna tolknings förlopp så som om det därvid rörde sig om en intellektuell akt att upplysa eller begripa, som om tolken blott hade att sätta igång sitt förstånd men ej sin vilja, och som om genom en ren förståndsverksamhet under de förhandenvarande möjligheterna ett i den positiva rättens mening riktigt urval kunde göras, som motsvarade den positiva rätten.” Kelsen, *supra* note 544, at 41-3

⁵⁷² An example of this approach to norms is found in the *Loizidou case*, where the ECHR explained: “In the Court’s view, the principles underlying the Convention cannot be interpreted and applied in a vacuum.” *Loizidou v. Turkey*, Judgment of March 23, 1995, §43

5.2.2 Problems and application: the UN Charter

The two contiguous UN Charter Purposes were original objectives to be supported by the UN and its Member States. They were not structured as to be in opposition to, or exclude, each other. The very existence of the United Nations was a response to the preceding wars and the desire to prevent any such further catastrophes.⁵⁷³ The purposes of the organisation were clearly set out in Article 1, the first objective being the maintenance of international peace and security. The term “security” used alongside “peace” underlines the long-term character of the peace to be attained and its “positive peace” character.⁵⁷⁴ The second purpose, that of developing friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples, ends with the task to “take other appropriate measures to strengthen universal peace”. Developing friendly relations is here laid down as being directly linked to the maintenance of international peace. Thus the peace that the United Nations is to work for is not merely the absence of war upheld by force, but a status flowing as a result of “positive” efforts in different areas – both in relations between and within states.⁵⁷⁵

Therefore the interrelational dependence, interpretation and application of the UN Charter Purposes should be uncontested, both from the position of the legal system as a whole, and from the background and structure of the Charter itself.

⁵⁷³ The UN Charter preamble begins: *We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...*

⁵⁷⁴ Wolfrum, *supra* note 514, p. 50

⁵⁷⁵ For a similar approach see e.g. the Uniting for Peace Resolution, UNGA Res. 377 (1950): *[The General Assembly is] fully conscious that, in adopting the proposals set forth above, enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression, but that a genuine and lasting peace depends also upon the observance of all the ‘Principles and Purposes’ established in the Charter of the United Nations, upon the implementation of the resolutions of the Security Council [...] etc. See also the Proclamation of the International Year of Peace, UNGA Res. 3 (1985): Whereas the promotion of international peace and security requires continuing and positive action by States and peoples aimed at the prevention of war, removal of various threats to peace - including the nuclear threat - respect for the principle of non-use of force, the resolution of conflicts and peaceful settlement of disputes, confidence-building measures, disarmament, maintenance of outer space for peaceful uses, development, the promotion and exercise of human rights and fundamental freedoms, decolonization in accordance with the principle of self-determination, elimination of racial discrimination and apartheid, the enhancement of the quality of life, satisfaction of human needs and protection of the environment, [...].*

5.2.2.1 Interpreting the UN Charter

If the interrelationship of these basic purposes and consequent interpretative obligations is clear,⁵⁷⁶ as earlier described, several fundamental international documents additionally lay down the interrelationship of basic principles of PIL.⁵⁷⁷ UN Charter Article 103 should additionally be noted in this context.⁵⁷⁸ The norms of the UN Charter, also on this basis, might well be argued to enjoy priority over other PIL norms outside the UN Charter.⁵⁷⁹ As an international organisation, it is for the organs of the UN to interpret the founding document.⁵⁸⁰ It was agreed from the very beginning that the ICJ would not be the final authority for interpreting the entire UN Charter, but that the Organs would interpret the Charter each according to its functions.⁵⁸¹ Neither individual states nor the ICJ has monopoly over the exercise of Charter interpretation.⁵⁸²

⁵⁷⁶ The Rapporteur of Technical Committee I in charge of drafting the Preamble and Articles 1-2 of the UN Charter (Committee I), Farid Zeineddine (Syria), expressed at the San Francisco Conference: "The Purposes [...] constitute the *raison d'être* of the Organization. They are the aggregation of those common ends on which our minds met. Hence, they are the cause and object of the Charter, to which member states collectively and severally subscribe. [...] The provisions of the Charter being in this case indivisible as in any other legal instruments, they are, therefore, equally valid and authoritative. The rights, duties, privileges, and obligations of the Organization and of its members match with one another and complement one another to make a single whole. Each of them is construed to be understood and applied in function of the others. [...] May this last explanation dispel any doubts as to the validity and value of any division of the Charter, whether we call it Principles, Purposes, or Preamble. It is thus clear that there are no grounds for supposing that the Preamble has less legal validity than the two succeeding chapters." *Documents, UNCIO*, vol. VI, *supra* note 153, p. 17

⁵⁷⁷ UNGA Res. 2625 (1970) "Friendly Relations Declaration", Article 2: *In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.* CSCE Helsinki Final Act (1975): *All the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others.* This is similar to statements in other OSCE documents, e.g. the Charter of Paris for a New Europe (1990)

⁵⁷⁸ UN Charter Article 103: *In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*

⁵⁷⁹ Herczegh, Géza, *General Principles of Law and the International Legal Order* (Akadémiai Kiadó, Budapest, 1969) p. 51

⁵⁸⁰ The members of most of these organs are state representatives, but what is important in this context is that almost all existing states are members of the UN and parties to the UN Charter. Resolutions emanating from the organs in which states are members are produced by consensus or majority vote (though the Security Council interpretation of Article 27[3] requires the absence of a veto for their non-procedural resolutions), which structures a system of Charter interpretation that the great majority of states support as a whole.

⁵⁸¹ Sohn, Louis B., "The UN System as Authoritative Interpreter of its Law", in: Schachter, Oscar & Joyner, Christopher C. (eds.), *United Nations Legal Order, vol. 1* (Cambridge: University Press, 1995) at 200; Goodrich, Hambro & Simons, *supra* note 8, p. 14

⁵⁸² Schachter, Oscar & Joyner, Christopher C. (eds), *United Nations Legal Order, vol. 1* (Cambridge University Press, Cambridge) pp. 1-2. Note that the Organs are, however, permitted to seek an advisory opinion from the ICJ (UN Charter Article 96)

It is certain that several methods of interpretation will be necessary when dealing with treaties, especially the UN Charter.⁵⁸³ The contents of the Charter itself are not “self-operative” but require interpretation to enable them to be applied to specific cases.⁵⁸⁴ The focus of the section that follows will be to examine the methods of interpretation that apply to the UN Charter and that take its special character, and the results that flow from this special character, into account. Before starting this, however, it is perhaps appropriate to make some short general comments on the interpretation of international treaties.

Legal interpretation is often unregulated in national legal systems, and to include rules of interpretation in the 1969 Vienna Convention on the Law of Treaties (VCLT) was something of an innovation at the time.⁵⁸⁵ Though the Convention did not exist when the UN Charter was drafted, many of its contents were and are considered to form part of customary international law,⁵⁸⁶ and are therefore applicable to the UN Charter. The VCLT gives some consideration to differences in the character of treaties, but a relevant question is whether it fully considers the requirements of interpretation that the UN Charter with its special characteristics makes.⁵⁸⁷

The general rule of interpretation can be found in VCLT Article 31:

⁵⁸³ Though they emphasise the shared expectations of the parties (and earlier criticise the textual primacy in VCLT Article 31(1)), to the detriment of the special character of the Charter, the argument of McDougal *et al* against a hierarchy of interpretation and against complete ‘freedom’ in interpretation is interesting: “The appropriate function of principles of interpretation – the more general purpose for which they may usefully and authoritatively be employed – [...] is that of calling the attention of the decision-maker, in an orderly and economic way, to the various features of the process of commitment and its context which must be taken into account in determining the parties’ genuine shared expectations and identifying relevant general community policies. [...] The task of interpretation, created by the necessity of making inferences from a complex of multiple, interrelated variables, requires, rather than hierarchical and dogmatic preconceptions of priority, a flexible and constant reappraisal of the importance of every detail in terms of its changing context. What those writers who do not favor the use of any principles are usually successful in demonstrating is that no one principle taken alone offers sufficient guidance for the interpreter’s highly complex task. What they do not see is that a systematic, disciplined employment of all relevant principles may improve the probability of a decision-maker’s achieving a closer approximation to the genuine shared expectations of the parties to an agreement. [...] The choice between an ordered hierarchy of rules and the rejection of all rules is one which unnecessarily restricts the alternatives.” McDougal *et al*, *supra* note 570, pp. 111, 117

⁵⁸⁴ Goodrich, Hambro & Simons, *supra* note 8, p. 45. Goodrich *et al* write that, “its interpretation and application in practice do not take place in isolation, but rather in the total context of the purposes and principles of the Charter, the responsibilities and powers of organs, and the interests and particular concerns of members.”

⁵⁸⁵ Bernhardt, R., “Interpretation in International Law”, in: Bernhardt, R. (ed.), *EPIL* <2> (North-Holland, Amsterdam, 1995) pp. 1416-26 at 1418; Rosenne, Shabtai, “Vienna Convention on the Law of Treaties” in: Bernhardt (ed.); *EPIL* <4> (North-Holland, Amsterdam, 2000) pp. 1311-12; Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, in: *YBILC*, 1964 (UN, N.Y., 1965) vol. II, pp. 5-65 at 53-55

⁵⁸⁶ See e.g. the ECHR’s pronouncement that “Articles 31 to 33 enunciate in essence generally accepted principles of international law”. *Golder v. UK*, Judgment of February 21, 1975, §29

⁵⁸⁷ *Supra*, chapter 3.1.1. Bernhardt argues that it does, writing that “the recognized rules, especially concerning the relevance of the object and purpose of a given treaty, permit the necessary differentiations. The rules are applicable to all categories of treaties, and they are broad enough to take account of the great variety of treaties in present-day international law.” Bernhardt, *supra* note 585, at 1421

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Treaty interpretation is thus to be performed in good faith, understanding the words in their ordinary sense and in their context, as well as being teleological. The word “and” signifies that these are all methods to be undertaken simultaneously, without any internal ranking or precedence. As earlier discussed (chapter 4.1), the character of the treaty must also be taken into consideration at interpretation. This can be supported by the requirement of interpreting the treaty terms “in their context”, which includes considering the context of the treaty terms in the treaty as a whole, as well as the treaty text itself treating a specific area – such as a text delimiting boundaries, a text regulating the shared use of water or other resources, a treaty laying down the rights and duties of individuals in relation to their government, or a constitutional treaty.

Some further comments on the term ‘context’ might be useful. While the VCLT expressly considers context in Article 31(2) as being connected to the specific treaty,⁵⁸⁸ the use of *telos* in interpretation allows for a consideration of greater or wider context. For our purposes in examining the relevance and application of self-determination to boundaries, the greater context or ‘meta-context’ would, for example, be constituted by insights gained from Political geography and history.⁵⁸⁹

In considering the ‘character’ of the UN Charter as a treaty to be interpreted under the VCLT, its constitutionality might have implications. As has been poetically expressed, written constitutions are “living instruments” and should be interpreted as such.⁵⁹⁰ Judge Alvarez wrote that constitutions “can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard.”⁵⁹¹ A constitutional view of the UN Charter also implies that its contents are not to be interpreted according to the purposes and powers of the document without any limitation whatsoever, but within the limits set by that document. A constitutional document is to create certainty while being able to adapt.⁵⁹² There is a dual justification for the autonomy of the Organisation: its

⁵⁸⁸ Article 31(2). *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

⁵⁸⁹ Gregor Noll kindly suggested this term.

⁵⁹⁰ Pollux, *supra* note 409, at 54

⁵⁹¹ Reservations to the Genocide Convention, Adv. Op., ICJ Rep. (1951) 15 at 53 (Alvarez, J. dissenting)

⁵⁹² Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 137

autonomy is justified because of the powers and purposes invested in it and because it remains within the boundaries set.⁵⁹³

i: A teleological approach

[T]he fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.⁵⁹⁴

[T]he perception of the Charter as a constitution [with its] emphasis on the purposes of the Organization favours the teleological method and the application of the doctrine of implied powers.⁵⁹⁵

As the constitution of an organisation, a feature to be noted is the Charter's movement away from strict bilateralism. As the Charter is a multilateral instrument which was set up to respond to future developments, and as it has also witnessed a dramatic increase in the number of parties, it would be inappropriate to interpret the treaty as being a mere technical bilateral treaty where the original intent of the parties enjoys priority in interpretation and application. Indeed, studying the intent of the original parties, it is clear that they structured the Charter and Organisation so as to be responsive to changes and developments.⁵⁹⁶ The purpose of the organisation was not to preserve the *status quo*, but to fulfil certain aims for an indefinite time during which surrounding circumstances would inevitably change.

The general interpretative method well suited for such a document is the teleological one – a goal-oriented interpretation. Examining the UN Charter Purposes in light of Article 31(1) of the VCLT, it is quite clear that the 'ordinary meaning' of the terms might not be altogether uncontroversial or evident. Neither is the 'context' entirely illuminating. The Article leaves us with *telos* for interpretation – the 'object and purpose' of a treaty. As discussed, such an interpretation requires principles to be interpreted in a 'meta-context'. Contexts obviously differ with place and time. If the declared purposes of the founding document are the purposes which interpretations and applications of the Charter are to be aimed to fulfil, in

⁵⁹³ For a discussion on legitimacy, see Caron, David, "The Legitimacy of the Collective Authority of the Security Council", 87 *AJIL* (1993) 552-88

⁵⁹⁴ *Admission of a State to the United Nations*, Adv. Op., ICJ Rep. (1947-8) 57 at 68 (Alvarez, J., indiv. op.)

⁵⁹⁵ Skubiszewski, Krzysztof, "Remarks on the Interpretation of the United Nations Charter", in: *Völkerrecht als Rechtsordnung - Internationale Gerichtsbarkeit - Menschenrechte: Festschrift für Hermann Mosler* (Springer Verlag, Berlin, 1983) at 891, 893

⁵⁹⁶ *Supra* chapter 4.1.5

order to fulfil the purposes its constitution must be capable of development and also of adapting to changing circumstances.⁵⁹⁷ This method of interpretation is sometimes called the dynamic-evolutionary method – interpreting a document in the light of present circumstances.⁵⁹⁸ In the Namibia case the ICJ held:

[The court’s] interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.⁵⁹⁹

In a goal-oriented and contextual approach to interpretation there must, of course, be a balance between foreseeability and fulfilling ambiguously or unclearly formulated aims. Neither requirement can be fulfilled to its furthest extent. As an international organisation which is a limited subject of international law, the UN has certain purposes to fulfil, which requires that the Charter should be interpreted so as to be able to fulfil those purposes. Such an interpretation would be conducted according to the principle of effectiveness, or the functional rule – choosing the interpretation which best gives effect to the purposes of the treaty.⁶⁰⁰ If an organisation is created it can obviously be assumed that it is not for the purpose of rendering it entirely ineffective.⁶⁰¹ The principle of effectiveness includes the rule of ‘implied powers’: an organisation must be understood to ‘own’ the powers necessary for the fulfilment of its purposes.⁶⁰² In the Reparations case the ICJ stated that:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This [is a] principle of law.⁶⁰³

⁵⁹⁷ Goodrich, L. M. & Simons, A. P., *The United Nations and the Maintenance of International Peace and Security* (Brookings Inst., Wash. D.C., 1955) at 10

⁵⁹⁸ Ress, *supra* note 419, at 31; Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 132

⁵⁹⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Adv. Op. (1970), ICJ Rep. (1971) 16 at 31

⁶⁰⁰ Pollux, *supra* note 409, at 69

⁶⁰¹ Gordon, *supra* note 389, at 798-9. Lauterpacht writes that the principle means “the treaty must remain effective rather than ineffective.” Lauterpacht, Hersch, *The Development of International Law by the International Court* (Stevens & Sons Ltd., London, 1958) pp. 228

⁶⁰² Gordon, *supra* note 389, at 796-7. McDougal *et al* formulate two positions on the principle of effectiveness: either, interpretation conducted in accordance with the general, overriding aims of the parties, in some cases even giving effect to such aims in contradiction to specific treaty provisions; or, interpretation that considers the general aims for the purpose of providing an understanding of the treaty terms, but without any prior determination of final precedence. McDougal *et al*, *supra* note 570, p. 98; see further pp. 156-86

⁶⁰³ Reparation for Injuries Suffered in the Service of the United Nations, Adv. Op., ICJ Rep. (1949) at 182

In the Effect of Awards case the ICJ had to determine whether there was an implied power to establish an administrative tribunal for dispute between the UN and its staff. The ICJ held that:

[...] the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat . . . Capacity to do this arises by necessary intendment out of the Charter.⁶⁰⁴

These principles are not unlimited, because the doctrine of effectiveness cannot be used to give an organisation powers that it does not possess. The use of the doctrine of implied powers must “bear some relationship to the functioning of the organization, the performance of its duties, or the achievement of its purposes.”⁶⁰⁵ The limitations on the principles should not be argued merely on the basis of state sovereignty, but on the basis of the constitutionality of the document, which implies that the limits set in the document must be respected.⁶⁰⁶ As was explained in the Certain Expenses of the UN case:

[The] purposes [of the United Nations] are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation.⁶⁰⁷

ii: On the will of the parties and supplementary materials

As has been mentioned, the ‘context’ in Article 31(2) of the VCLT describes the ‘context’ referred to in Article 31(1) as well as other aids that may be used in interpretation of treaty terms.⁶⁰⁸ Apart from including the text itself, the preamble and annexes, agreements or instruments concluded by all the parties at the same time as the treaty, or later accepted by all

⁶⁰⁴ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Adv. Op., ICJ Rep. (1954) at 57

⁶⁰⁵ Amerasinghe, *supra* note 520, at 47

⁶⁰⁶ Fassbender, *supra* note 420, at 1-2; Simma, *supra* note 420, at 134. See also comments on the Case Concerning Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Adv. Op., ICJ Rep. (1950) at 229, where the ICJ declared that, “The principle of interpretation [...] often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement [...] a meaning which . . . would be contrary to their letter and spirit.” In: Bernhardt, *supra* note 585, at 1420

⁶⁰⁷ Certain Expenses of the UN, ICJ Rep. (1962) at 168

⁶⁰⁸ The remainder of Article 31 reads: 3. *There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.* 4. *A special meaning shall be given to a term if it is established that the parties so intended.*

the parties as relating to the treaty, may be used. This places a rather high threshold – unanimous consent – for such instruments to be used to interpret other treaties.⁶⁰⁹ Article 31(3) allows further materials to be “taken into account”: subsequent agreements between the parties on the interpretation or application of the treaty or practice which established their agreement on interpretation. Like Article 31(2), this requires the consent of the parties to the treaty.

Regarding the UN Charter specifically, the will of the original parties as used for interpretative purposes deserves comment, as the original will of the parties is representative of those original members, whereas UN membership has since grown by around 400 per cent. Article 31(4) allows a special meaning to be attached to a term if it can be shown that the parties “so intended”. The constitutionality of the UN Charter makes this a somewhat problematic option if the reference is made to the original parties to the Charter – that those parties, which comprise less than 25 per cent of the 2004 membership, nearly 60 years earlier could lay down the meaning of a Charter term.⁶¹⁰ The term, however, is not limited to original parties to a treaty.

Supplementary materials may be used as an aid in interpretation when application of VCLT Article 31 has not led to a clear understanding of the terms or confirm the meaning arrived at by applying Article 31. With regard to the use of *travaux préparatoires* Judge Alvarez observed:

[T]he increasing dynamism of international life makes it essential that the texts should continue to be in harmony with the new conditions of social life . . . It is therefore necessary, when interpreting treaties - in particular, the Charter of the United Nations - to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to *travaux préparatoires*. A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it . . . it is possible, by way of interpretation, to effect more or less important changes in treaties, including the Charter of the United Nations.⁶¹¹

⁶⁰⁹ I am grateful to Gregor Noll for pointing out that this places very high demands on unity for agreements made in connection with the treaty or for subsequent agreements and practice to be used in treaty interpretation, which could be seen to have a more restrictive rather than ‘statist’ effect on the role of states’ practice and agreements in interpretation.

⁶¹⁰ Judge Spender stated: “Moreover, since from its inception it was contemplated that other States would be admitted to membership so that the Organization would, in the end, comprise ‘all other peace-loving States which accept the obligations in the Charter’ (Article 4), the intentions of the framers of the Charter appear less important than intention in many other treaties where the parties are fixed and constant and where the nature and subject-matter of the treaty is different [...] The stated purposes of the Charter should be the prime consideration in interpreting its text [...]”. Certain Expenses case (1962) ICJ Rep. at 184-5; see also Pollux, *supra* note 409, at 798

Article 32 of the VCLT confirms that the use of preparatory material plays only a secondary role in interpretation, and is to be consulted merely to confirm an interpretation arrived at in another way, or if other interpretations lead to an ambiguous or obscure meaning, or leads to a manifestly absurd or unreasonable result.⁶¹² In certain cases the ICJ has expressly stated that when the text is clear it is not even permissible to use such material.⁶¹³ This line of reasoning should also be relevant when considering the original will of the parties as being part of “the circumstances of its conclusion”. It would not seem reasonable to allow the will of members of the 1940s to take precedence over the will of a changed and many times enlarged membership.⁶¹⁴ This should be even more readily accepted in the light of the character of the UN Charter as the constitution of an expanding organisation in a changing world.

It has already been mentioned that the VCLT was largely a codification of the customary treaty rules at the time, and mainly focuses on traditional reciprocal treaties. The awareness it shows to different types of treaty, apart from the space for the ‘context’ and *telos* in Article 31(1), is found also in Articles 20(3) and 60(5). Article 20(3) of the VCLT has laid down that:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

It is then not only states that have an influence on treaties, but in the question of reservations to constitutional treaties relevant organs of the organisation which the treaty has established determine whether or not a reservation is acceptable. This reveals that constitutional treaties have a special character not adequately represented by reference to complete reciprocity between states, as the consent of all other states to a reservation does not render it automatically acceptable. For a decision to be arrived at regarding a reservation, the competent organ will have to interpret the treaty to examine the compatibility of the reservation with the object and purpose of the treaty (and the duties that the organisation has to fulfil under the principle of effectiveness).

With specific regard to the UN Charter, it might be useful to point to Article 103 of the UN Charter. It has been agreed that it is for the respective organs to interpret the Charter – not individual states or the ICJ. The authoritative interpretation would ‘be’ the Charter obligations

⁶¹¹ *Admissions case* (diss. op.) ICJ Rep. (1950) 18; see also *South-West Africa cases* (Ethiopia v. South Africa; Liberia v. S. Africa), ICJ Rep. (1966) 6, (Judge Jessup, diss. op. 325-442) at 439

⁶¹² Ress, *supra* note 419, at 37; Amerasinghe, *supra* note 520, at 40

⁶¹³ Amerasinghe refers to case (1950) ICJ Rep. at 8, in: Amerasinghe, *supra* note 520, at 56

⁶¹⁴ Skubiszewski, *supra* note 595, at 895, stated that: “The intention of the present majority cannot be explained on the basis of what was said at San Francisco.”

which are given priority by Article 103 over other obligations under international law. The question then arises whether even potential agreements by all the Member States which would interpret the Charter in a contrary way could, in fact, be used to interpret the Charter.⁶¹⁵

Adding Article 31(1) of the VCLT, the strict requirements of Article 31(2-3), and Article 20(3) to UN Charter Article 103, PIL clearly supports the argument that the UN Charter should be interpreted as a constitutional treaty, using the principle of effectiveness, as well as interpreted teleologically and contextually, which includes ‘meta-context’. There is, then, no legal support for any disregard of the principle of self-determination.

iii: Practice as developing Charter interpretation

It was predicted early on that the constitutional development would be the creation of a customary international law consisting of the framework of the Charter and filled in by the practice of the UN organs.⁶¹⁶

That the practice of the UN organs is to play such a role can be concluded from a number of arguments. Due to the character of the Charter, as a constitutive treaty of an international organisation, the will of the relevant organs is to be taken into account when interpreting the treaty.⁶¹⁷ As the organs are the interpreters of the Charter, their decisions, or practice, will be based upon their interpretations. This practice should then be taken into account as evidence of the interpretations. As the powers of the UN are based upon and limited by the Charter, decisions taken are to be understood as being based upon, or implementing, the Purposes of the UN, which are contained in its first Article.⁶¹⁸ For a teleological interpretation that considers the object and purpose of a treaty, the practice of the organs should then be considered as an interpretative aid. As Judge Hersch Lauterpacht has suggested:

A proper interpretation of a constituent instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.⁶¹⁹

⁶¹⁵ Even though decisions in some organs are made by practically all states, such as in the UN General Assembly, the organisation does have a certain autonomy apart from states, which is what renders it a subject under international law. If there is no autonomy, it would not enjoy the status of a limited international law subject. *Supra* chapter 4.1.1.

⁶¹⁶ Pollux, *supra* note 409, at 54

⁶¹⁷ See e.g. VCLT, Article 20(3)

⁶¹⁸ Wolfrum, *supra* note 132, at 50

⁶¹⁹ Judge Lauterpacht (sep. op), *South-West Africa - Voting Procedure, Adv. Op.* (1955) ICJ Rep. 67 at 106

The distinction between treaty law and customary international law is worthwhile to keep in mind. While customary law rests on state practice and the subjective requirement of *opinio iuris*, treaty law is based upon the texts agreed to. While a teleological interpretation, based on the constitutional character of the UN Charter, allows for a development of the understanding of the content of a text so that the Organisation *inter alia* may fulfil its purposes, this development will not be based upon actual *state* practice and consent to the developments, but to actual needs that the Organisation, and States Members under its obligations, are to meet. It is the practice of the UN organs which may to be used as an interpretative aid when examining the Charter, and not state practice. *Usus* and *opinio iuris* can, however, develop customary international law rules *alongside* but distinct from the content of the UN Charter.

Critique of this suggestion could be that the practice of the Organisation is the practice of states. Are they any different, and if so, how? The autonomy of the Organisation is vital in relation to Charter interpretation, and is especially pertinent to the subject of this thesis because of the non-territoriality of the UN: the territoriality of states fundamentally distinguishes their interests and practice from that of the UN, and could be explained to prejudice their interpretation and practice, or at least be less than progressive. The connection between territoriality, statehood and sovereignty has changed state territory into something much more than land – it is authority to the exclusion of all others, and even the place of safety from the anarchy of the beyond. The primary interest of a state will very likely be the preservation of its territory, rather than international peace and security. It seems reasonable, then, that the interpretation of the Charter, especially in issues that concern territory, would be a ‘neutral’ party. For the purpose of maintaining peace, a non-territorially prejudiced position is vitally necessary in the interpretation of the principle of self-determination so that its territorial implications are not ignored.⁶²⁰

A discussion closely related to that of whose practice is to be taken into account when interpreting the UN Charter is whether or not the practice of UN organs can create rules of customary law.⁶²¹ The practice of the organs is based upon the Charter, and the practice should then seemingly only develop constitutional law.⁶²² This law, however, is binding on all

⁶²⁰ For critique of assumptions and structures attached to the territory- state-sovereignty triad, see Agnew, *supra* note 19; McCorquodale, R. & Pangalangan, R., “Pushing Back the Limitations of Territorial Boundaries” 12 *EJIL* (2001) 867-88

⁶²¹ See e.g. Higgins, Rosalyn, “The United Nations and Lawmaking: the Political Organs” 64 *AJIL* (1970) 43; Sloan, Blaine, “General Assembly Resolutions Revisited”, 58 *BYIL* (1987) 39-150

⁶²² This leads into an extremely interesting discussion as to the developments of law regarding the right of peoples to self-determination and the maintenance of peace and security. What is the importance and effect of the practice of the UN organs regarding these two principles, and what ‘kind’ of law is it that has developed?

states, not as customary law, but as constitutional law. The discussion of whether the practice of UN organs creates customary rules of international law then seems less urgent. The organs would have to have an unusually great capacity for multi-tasking to be able to create separate rules of customary law, as their actions are based upon the Charter. Why should their practice not be seen as filling in the Charter instead?⁶²³ Customary law cannot be understood to have the capacity to alter or change the Charter. Due to its constitutional character, changes can only be effected by the procedure set out in the Charter itself, in Article 108 – by formal amendment of the treaty.

It should be noted that the neat structure above on practice might not always be easily applied because it might not be clear when a decision qualifies as part of the practice of a UN organ. Here it would be necessary to examine the decision itself.⁶²⁴ Grigorij Tunkin has observed, for example, that resolutions of an international organisation should only be understood to have the force that is granted to them by the constitutive document.⁶²⁵

5.2.2.2 Amending by interpretation

The difference between interpretation and actual amendment of a treaty is not always clear; the grey zone can be somewhat extensive. Taking the practice of the UN Security Council on Article 27(3) as an example, Chittharanjan Amerasinghe has suggested:

Undoubtedly, if practice even with general agreement or consensus gives rise to an interpretation that contradicts and, therefore, amends the constitution of an institution, because it continues to be adopted as an appropriate interpretation, this is a question which pertains to amendment and not to interpretation as such. [...] Had the negative vote of a permanent member been disregarded in the tallying of votes, such a practice would have been in contradiction of the express terms of the Article and its adoption would have amounted to an amendment. The practice in fact adopted resulted in giving the meaning ‘not negative’ to the term ‘affirmative’ which is less removed and may be construed as development rather than amendment. Generally, it may be said that

This must be seen in the light of the fact that customary law cannot amend the Charter, and that the very existence of parallel rules of customary and Charter law has been under attack.

⁶²³ Doubts as to this could be justified when e.g. a UNGA Resolution makes a declaration of existing law that seems to go far beyond the UN Charter and, in fact, seems to amend it. See discussion on the Friendly Relations Declaration of 1970 in: Tunkin, G. I., “The Role of Resolutions of International Organisations in Creating Norms of International Law”, in: Butler, W. E., *International Law and the International System* (Martinus Nijhoff Publ., Dordrecht, 1987) at 16

⁶²⁴ Relevant observations here are e.g. whether the decision was taken by consensus; whether a minority was significant etc. The list to be ticked off is, however, not clear, which leaves the conclusions debatable. See Amerasinghe, *supra* note 520, at 52-4 for a discussion.

⁶²⁵ Tunkin, *supra* note 623, at 7

practice of interpretative value does not contradict or amend a text as such and thus can be regarded as being based on prior agreement where it is used to interpret a text.⁶²⁶

From this one could propose that all development or gap-filling of a constitutional text need not be viewed as amendments, so long as they do not directly contradict the text.⁶²⁷ It has earlier been suggested that the constitutional character of the UN Charter implies that changes to it will more often come about by interpretation and application than by formal amendment.⁶²⁸ The principle of effectiveness and the view of the Charter as a living document that can adapt with changing needs should also be taken into account, as a balance against a too rigid and restrictive view of interpretation.

5.2.2.3 Interpreting UN Charter Purposes and Principles

Summing up the discussion, Article 31(1) of the VCLT lays down the requirements of good faith, ordinary meaning,⁶²⁹ context and *telos* when interpreting international treaties. For interpretation to be possible in a goal-oriented mode, it has already been argued that it is impossible to exclude the context of application. Because of the nature of the Charter as a constitutional treaty, it is especially appropriate to apply a teleological approach, as well as the principle of effectiveness. When it comes to the first Article of the Charter, which contains the Purposes of the organisation, an interrelational approach must be used. Accordingly, interpretation is to be conducted in light of all the Purposes, and in order to fulfil the Charter's Purposes effectively. The Principles must be taken into account when considering fulfilling the aims laid down in Article 1.

The teleological method of interpretation is well suited for the UN Charter Purposes, especially because of their nature as principles. Because rules might be suggested to have more 'concrete shape' – being either applied or not⁶³⁰ – a strict textual interpretation, for example, might seem to ensure clarity and foreseeability. However, because it is in the nature of principles to be more flexible than rules in order to respond to changes and developments, they will, because of this, be contextual and more responsive, but might then also seem less

⁶²⁶ Amerasinghe, *supra* note 520, at 54

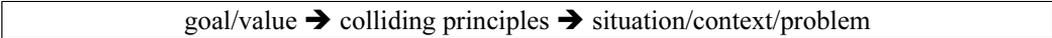
⁶²⁷ *Ibid.*, at 55

⁶²⁸ Goodrich, Hambro & Simons, *supra* note 8, p. 13. This argument is strengthened by the fact that amendments do not require consensus, but a special majority may under Article 108 bind the minority.

⁶²⁹ When it comes to the principle of self-determination contained in Article 1 there is no 'ordinary' meaning that is easily established, but apart from this Article 31(1) is useful.

⁶³⁰ Alexy, *supra* note 538, p. 48

foreseeable.⁶³¹ In contrast to rules, they are limitable – there are often several ‘worthy’ and relevant principles simultaneously appropriate. The extent to which they are limitable can only be determined in concrete cases, and by determining their relative ‘value’ and interrelationship in a particular situation. As previously argued such a process, for obvious purposes, cannot be conducted in a vacuum. Accordingly, an ‘extended’ teleological method of interpretation – a contextual one – is necessary so that the three parts below might be included as interpretory components.⁶³²



In summary, Articles 3 and following of the UN Charter are to be interpreted teleologically, in the light of Article 1. In their implementation they are limited by Article 2 and the principle of effectiveness. The various Purposes are to be interpreted in the light of one another, but one or more values of the international community are necessary in order to be able to apply the ‘inter-interpreted’ Purposes in concrete situations – contextually – in order to determine their extent or practical application. How the ‘values’ – selected to aim at when interpreting principles generally, or the Charter Purposes specifically – are to be discovered or determined remains to be discussed.

The teleological method of interpretation might be suggested to generally favour substantive justice in contrast with procedural justice because it has the aim or result in mind. It should be remembered that the highest aim of the Organisation is to prevent war and conflict and maintain long-term peace,. Though procedural justice is a component of any

⁶³¹ In responding to suggestions that teleological decision-making aiming towards “fundamental public order goals” would introduce arbitrariness and uncertainty into decisions, McDougal writes: “Every experienced lawyer knows that the rationality and certainty claimed for decision by reference to allegedly ‘neutral’ or ‘autonomous’ rules are in fact illusory. The discipline required in systematically relating specific choices to public order goals by explicitly stated intellectual procedures might indeed both offer decision-makers a better guarantee that their choices are appropriately compatible with the goal values to which they are committed and afford the members of the general community greater assurance that their genuine expectations and common interests are realistically and consistently being taken into account.” McDougal, M., “Jurisprudence for a Free Society”, 1 *Georgia Law Review* (1966) 1-19 at 19

⁶³² The components can be likened to a two-part structure supporting a longish object, such as a telescope. In order for the telescope to be aimed at the goal, the first point needs to be positioned in a certain way (the second point here symbolises context). If the first point is not aimed towards that final goal, the direction of the telescope will (obviously) be different, and will not meet that goal. Principle/s → context → goal/aim
 The equation is logical, and unrelated to the wishes, assumptions or intentions of the person positioning the supporting points. Similarly, the second point – context – is more or less ‘objective’, in the sense that it is a reality unaffected by our impressions of it or wishes for it to be different. If the aim, symbolised here by the direction of the telescope, is peace and stability, it is only the first point – the principle or principles to be applied – that can be adapted so as to fulfil the goal. It is along this reasoning that the principle of self-determination should be applied. Within its set limits, which are constituted by conflicting principles or the basic values of

international rule of law or respect for the equality of nations, it is only one component in the system and is insufficient to support it alone. For this reason, the UN Charter Purposes were structured to give the Organisation more powers and possibilities to take political realities into account than the Covenant of the League of Nations had allowed for.⁶³³ This has provided openings both for more flexible interpretations and a wider responsiveness to future challenges, placing less importance on the exact intentions of the original parties.

If one wishes to examine the differences between the proposed use of a ‘modern’ *uti possidetis* as a suggested rule and respect for the self-determination of peoples as a principle, one finds that *uti possidetis* is not focused on result, but should be applied, or so it is argued, whatever the case.⁶³⁴ No distinction is made as to whether or not its application in a case is beneficial to peace and security, even though this is the only basis which legitimises its application.⁶³⁵ The principle of self-determination, on the other hand, differs in application, as it has an aim valuable in itself – that of taking the wishes of the population concerned into account and prohibiting exploitation. This specific discourse on self-determination and the present territorial regime forms a special part of international law, because the underlying issue concerns stability and the maintenance of peace and security, and territory is such an important part of statehood and of peaceful relations between states. This is an additional reason why the interpretation of the above mentioned norms enjoys an especially teleological and contextual character – the aim is so fundamental.

international society, it is to be interpreted and applied in a context, so as to maintain and promote international peace and security.

⁶³³ *Supra* chapter 4.1.5

⁶³⁴ In describing contradictions among rules and “higher order principles” Kratochwil notes three levels of conflict: 1) in choices between clear rules and vague standards; 2) in referring to doctrines arguing for the applicability of rules and standards which, however, are impotent to decide which of the two to apply; 3) at the level underlying the doctrines revealing “a hidden ambivalence over substantive ideals”. The ideals he mentions are self-reliance and individualism embodied by rules, and substantive justice and altruism embodied by standards. Kratochwil, *supra* note 16, at 43. Kratochwil thus formulates the collision between substantive justice and equality. Other famous ideals that clash are consent and justice, or ‘concreteness’ and ‘normativity’; see Koskenniemi, *supra* note 16

⁶³⁵ *Supra* chapter 2.2

5.3 The values and context approach, or Baking the cake

If some superior values or goals are required in order to apply conflicting principles in concrete cases, the issue is where and how these may be found. Myres McDougal and Lehmann insist that

The frequent assertion that there are no generally accepted fundamental policies of the larger global community to aid in the application of international agreements is uninformed.⁶³⁶

The authors go on to describe some of the shifts in values and modes of relations that can be seen within IR, such as the move from extensive state sovereignty to protection of human rights in the interests of peace.⁶³⁷ The values of the international community are those which sustain that community, in the sense that they grant direction and legitimacy to the continuation of the community. One could even claim that they are the ‘glue’ that binds the community and enables it to exist and legitimises its role in the present – a ‘constitution’ is insufficient.⁶³⁸ As the values legitimise both the existence of the system, as well as the entities contained therein (without which the system of states could not function), they precede – theoretically, not historically – and override the individual consent of states.⁶³⁹ For example, it has earlier been argued that when interpreting state duties in the light of fundamental community values, the presumption should not be in favour of state sovereignty but of community interests.⁶⁴⁰ The general consent of states in supporting the values and methods of protecting and promoting them is, nevertheless, certainly necessary, without which they would be quickly overridden or ignored.

In the context of self-determination, different values legitimised the application of the principle after the two world wars – rearranging European states and boundaries, and

⁶³⁶ McDougal *et al*, *supra* note 570, p. xxxvii

⁶³⁷ *Ibid.*, at xxxvii

⁶³⁸ See discussion under chapter 4.1.2.1. A system (e.g. a system of states) requires less than a community, as a community requires common values for its existence and continuation, whereas a system can survive on a limited number of functional rules. In a critique of the Realist preoccupation with force, Kratochwil claimed: “[P]ower and influence are often derived from the role of a protector of certain rules and core values. The notion of a Great Power (in the European state system) and of hegemonic leadership (in ancient Greece) are cases in point.” He continued: “[T]he embeddedness of the powergame in a shared normative structure shows that the alleged antinomy between power politics and following the rules of the international game is largely mistaken.” Kratochwil, *supra* note 438, p. 52

⁶³⁹ From a slightly different angle, Schachter wrote that “a purposive conception [of international law] leaves the door open to override one or more of the rules of mutual accommodation in the interest of a major goal of the community. Thus, the sovereign right of a State to conduct its own domestic affairs might be suspended in the interest of a higher purpose, such as protection of individual human rights or self-determination.” Schachter, *supra* note 480, p. 31

decolonisation. In both cases international stability was seen to be at stake, and in both cases individual states, or their interests, were sacrificed on the altar of stability by the fire of self-determination. Stability overrides individual state consent, but it is admitted that without majority support, stability cannot be sustained.

What is stability? It is not supported or maintained by *status quo*⁶⁴¹ but by balance. Stability is fundamental to any system, but cannot mean *status quo*, because situations might need to change in order for long-term stability to be guarded. That kind of stability could perhaps be called *contextual stability*. It is a stability built not primarily on military force, but on harmonising several aims – one of the fundamental ones being respect for the dignity of humans, both as individuals and as part of groups.⁶⁴² It is a stability that takes respect for human beings seriously and which recognises that consideration for the wishes and needs of humans are vital, both for long-term stability and for a peace that is more than a mere absence of force. Repression is today ‘outlawed’, and is not considered an acceptable method of maintaining stability. Values form the tool with which this balancing or harmonisation exercise of several legitimate aims may be performed.

International law already recognises temporality. Contextual stability adds a further dimension, as it recognises that contexts are different even though they exist at the same point in time. It recognises that the very nature of principles requires context to form the prism through which the aim of the principles may be envisaged, and thus find practical application. The contextuality that any application exercise of colliding principles necessitates, forces lawyers to stretch beyond the discipline of law in order to gain a better understanding of what the probable results of any application might be. The objective of peace is so important that this should be uncontroversial. In more detail, legal principles are to be applied in light of international values, in relation to what we know about boundaries generally and specifically in the ‘hot spot’, or tense boundary situation, itself. The function of values, in connection with the application of several principles, is to limit the scope of the principles, or rather, direct their application so as to accord with fundamental interests. The specific case in which the harmonisation, or balancing, is to be exercised consists of a specific situation. Knowledge of the situation is provided for by both a general and specific approach. This involves studies of

⁶⁴⁰ *Supra* chapter 4.1.3.1

⁶⁴¹ As if that was even theoretically possible; *panta rei*.

⁶⁴² The preamble to the 1948 UDHR clearly connects respect of humans and peace: *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [...] Whereas it is essential, if mankind is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by*

the phenomenon generally (for our purposes, this concerns boundaries, and thus boundary studies in Political geography) as well as studying the history, culture and other factors relating to the specific situation itself. These two backgrounds constitute the prism, or ‘meta-context’, for the interpretation and application of the principles.

This would be the formula in relation to boundaries:

Values → maintenance of international peace and security + principle of self-determination
→ ‘meta-context’: general context + territorial ‘hot spot’ = application of legal principles

A teleological interpretation of the principle of self-determination, as interrelated to the maintenance of peace, in light of the value of contextual stability, and in relation to boundaries, is to see the obligation under the principle of self-determination to consist of at least two parts: of process and result. *Process* implies that the principle requires application of methods in which the wishes and desires of a population are ascertained, while *result* implies that some concrete result, which has taken the wishes of the populations concerned into account, must be arrived at, even though these might take different forms as a result of diverse circumstances. The characteristic of principles as responsive to new developments and challenges – their goals or aims being those that must be fulfilled – requires that these two steps be realized in regard to self-determination. The reason for this is that state practice has revealed many instances of discussions that have been conducted without producing any concrete results which improved the circumstances of those concerned. Consequently, merely requiring process by consultations, for example, would be insufficient. Some concrete actions from which solid evidence results *must* form part of the legal requirement in order that the principle achieves the effect it strives for.⁶⁴³

As the structure of interpretation has been suggested and outlined above, and one concrete example of the suggested interpretation given,⁶⁴⁴ the next chapter will delve into boundaries and Political geography, which provides a general and vital part of our ‘meta-context’. Chapter 7, following that, will attempt to provide further background for the ‘meta-context’ by focusing more closely on the specific contexts themselves.

the rule of law. See further, Schachter, Oscar, “Human Dignity as a Normative Concept”, 77 *AJIL* 4 (1983) 848-54

⁶⁴³ This argument assumes that a principle cannot be said to be respected unless there is evidence that it leads to at least a minimum of effect.

⁶⁴⁴ Nevertheless, without going so far as to outline a more concrete application in a specific situation.

6. DIFFERENT FUNCTIONS AND EFFECTS OF BORDERS: INTERNATIONAL AND INTERNAL ADMINISTRATIVE BOUNDARIES

In discussing international boundaries, it should never be forgotten that boundaries are lines that are located, or to be located, with exactitude on the earth's surface and that they are potent with human significance, especially for those who live nearest to them.⁶⁴⁵

6.1 Studying border differences and changes: a missing component in law

International law norms on territory have primarily focused on issues of title and sovereignty over territory, as well as prohibition on the use of force. The role of self-determination has been understood as being related to where international boundaries should be located or the status of colonial territories, without any implications for how the sovereignty should be exercised after such resolutions of location or status. Because of the commonly made connection between boundary changes and conflict, self-determination has increasingly been thought to be 'ruled out' by other territorial norms, such as territorial integrity or the stability of boundaries. In total, it is seen as being generally irrelevant to issues of territory after decolonisation.

The meagre norms of PIL concerning borders have not taken their varying nature, purpose, function or effect into account as being relevant to peace. When in recent cases internal administrative borders have been transformed into international ones through application of *uti possidetis*, such as in the former Yugoslavia, the character of boundaries and their different functions and effects were not considered to be important. This chapter therefore aims both to study variations in border purpose and functionality, and thus afford a deeper understanding of the implications which arise from changes in border status, as well as to examine the importance of boundaries to peace and stability, especially after changes to the status, location or function of a boundary.

The focus of this chapter will not be on the status of territories, but on the lines dividing them. In order to understand what the effects of changes to a boundary might imply, it is necessary to gain an understanding of the importance and functions of boundaries, and the chapter therefore begins by outlining the nature of boundaries, as well as the different

functions and effects that international and internal boundaries have. The issue of boundaries and changes to them will be approached from the perspective of location and function, and a number of historical responses by governments and organisations and the practices they adopted in order to reduce tensions after boundaries will be presented. The question of whether such responses are understood to be legally required or not will be discussed, as well as specific problems relating to boundary changes in the contexts of the former Yugoslavia and Central Asia.

Since the end of the first world war, Political geography has connected boundary changes with conflict, suggesting *inter alia* that reducing boundary functions correspondingly reduces conflict. When changing internal into international borders the functionality of borders becomes a vitally important issue for study, because the effect on the population concerned changes along with the border's status. The thesis has already suggested that an interrelational interpretation of the first two UN Charter Purposes in the context of boundaries reveals their relevance to boundaries after changes, whether the changes are of location or function. Respect for the self-determination of peoples is not only relevant to changes in the location of a border, such as the holding of referenda to consider the nationality of the resident population. It is also relevant to the functionality and effect of the border on the population's ability to thrive and "freely pursue their economic, social and cultural development."⁶⁴⁶ Thus the bestowing of international status upon former internal borders should involve state consideration of how these new borders are to function in practice and what the effect will be on those living in the frontier zone or borderlands. Indeed, it is argued that such consideration is a requirement under PIL.

6.1.1 The nature of borders

A *border* is a line or thin strip delimiting the territories of sovereign states with equal jurisdictions. The term *boundary* is the narrowest of terms and only used for the demarcation

⁶⁴⁵ Boggs, *supra* note 205, pp. 19-20

⁶⁴⁶ Common Article 1(1) of ICESCR and ICCPR (1966). Many of the conclusions on self-determination and the functionality of borders are relevant to the right of self-determination, which states have a legal duty under HR's instruments and customary international law to respect. However, this dissertation focuses on the duties of states and the 'international community' under UN Charter Article 1 which connects international peace and security and respect for self-determination.

or delimitation line itself.⁶⁴⁷ The *frontier* “is a régime of unilateral territorial organization”,⁶⁴⁸ usually a zone, that halts at will, and is the widest term used for territorial limitation. Frontiers generally preceded the exactitude of the post-world war era, suiting empires, which would move forward or expand into a weaker party’s land, or would create zones of separation from one another.⁶⁴⁹

Regarding the nature of borders the most basic classifications in traditional Political geography were those that distinguished between natural and artificial borders.⁶⁵⁰ But to whom is the border natural or artificial? Most political geographers soon concluded that “all boundaries are artificial” but that “some are less artificial than others”.⁶⁵¹ Several attempts have been made to classify boundaries according to different characteristics, such as their relation to the territory they delimit or its inhabitants. Boggs constructed the following four boundary types within his classification: *physiographic* types,⁶⁵² *geometric* types,⁶⁵³ *anthropogeographic* types⁶⁵⁴ and *complex* or *compound* boundaries.⁶⁵⁵ Richard Hartshorne instead observed the historic relation of the border to the inhabitants of an area, referring *inter alia* to *antecedent*, *subsequent*, *superimposed* or *consequent* boundaries.⁶⁵⁶ Antecedent boundaries precede human development around them, while subsequent boundaries are those

⁶⁴⁷ On the terms boundary, border and frontier, see e.g. Kristof, Ladis K. D., “The Nature of Frontiers and Boundaries”, 49 *AAAG* 3 (1959) 269-282; Anderson, *supra* note 40, p. 9; Prescott, J. R. V., *Political Frontiers and Boundaries* (Unwin Hyman, London, 1987) pp. 12-13. It should be noted that definitions and understanding of the terms vary.

⁶⁴⁸ Paul de Lapradelle, *La Frontière*, in: Boggs, *supra* note 205, p. 7

⁶⁴⁹ Fawcett, C. B., *Frontiers: A Study in Political Geography* (Clarendon Press, Oxford, 1918)

⁶⁵⁰ Lord Curzon, *Romanes Lecture*, *supra* note 10. Regarding rivers Curzon notes that these “connect rather than separate” and that the “same race are apt to reside on both banks.” Thomas H. Holdich observed already in 1891 that rivers did not always make for good boundaries: “should the river be confined within the limits of a comparatively narrow valley, it will very probably happen that both banks are occupied by the same owners of the soil, and difficulties will arise”. He concluded: “Worse, however, than a river, is that artificial class of boundary which follows no natural feature at all, and which crossing the lines of drainage and dividing the main arteries of a country, jumps from ridge to ridge, and requires every yard of it to be demarcated artificially.” Holdich, T. H., “African Boundaries, and the Application of Indian Systems of Geographical Survey to Africa”, 13 *RGS Proceedings* 10 (1891) 596-607 at 599

⁶⁵¹ Boggs, *supra* note 205, p. 25. See Prescott, J. R. V., *Boundaries and Frontiers* (Croom Helm Ltd., London, 1978) p. 106 for writers and arguments discrediting the idea of natural boundaries. J. Herbst writes that “borders are always artificial because states are not natural creations.” Herbst, Jeffrey, “The Creation and Maintenance of National Boundaries in Africa” 43 *International Organization* 4 (1989) 673-692 at 692

⁶⁵² Boggs listed types of boundary that follow a feature of nature, such as: mountains; deserts; lakes, bays and straits; rivers and canals; swamps; maritime boundaries; and contour lines. A distinction, however, should be made between physical boundaries which actually separate even groups, such as deserts, and rivers and mountains, which may provide a habitat for a group.

⁶⁵³ Types of boundary using the ‘ruler approach’, which disregard physical geography and topography, are: straight lines; parallels of latitude; rhumb line or loxodromic curve; circle arc; and lines parallel to or equidistant from a coast or river.

⁶⁵⁴ Types of boundary that relate to those occupying the land: tribal, linguistic, religious, economic, historical, cultural, or previous private property lines.

⁶⁵⁵ These are boundaries that are bilaterally or multilaterally agreed lines adjusted to respond to several factors. Boggs, *supra* note 205, pp. 25-6

that become established after a region has been settled. Totally antecedent boundaries are those drawn before any settlement has taken place. Of course a boundary may be both antecedent and subsequent in different senses. Further, superimposed boundaries are ones showing little consideration for the cultural landscape, while consequent boundaries might, for example, be mountains or deserts when established on barriers between populated areas. Both Hartshorne and Boggs were aware that little could be deduced from these classifications, and that the function of boundaries was more instrumental in enriching the study of boundaries.⁶⁵⁷ The functions of a boundary were later explained to be less related to the nature of the boundary than to the political communities it separated.⁶⁵⁸

6.1.2 Purpose, functionality and the effects of borders

In considering the consequences of moving from internal to international borders, three border dimensions must be considered: the purpose, functionality and effects of a boundary. Examining the *purpose* will reveal the original aim or aims for which the internal or international boundary was constructed.⁶⁵⁹ Studying the *functionality* will explain how the border functions in practice, in particular its restrictive functions, as well as how it works from a locational perspective.⁶⁶⁰ The *effects* of the location and function are viewed from the perspective of different groups and interests, such as the general population and the border population.⁶⁶¹ Study of effects is here focused on the practical consequences of the boundary regarding day-to-day activities, and not primarily, for example, on the influence of boundaries

⁶⁵⁶ Hartshorne, Richard, "Suggestions on the Terminology of Political Boundaries", 26 *AAAG* (1936) 56-57

⁶⁵⁷ Minghi, Julian, "Boundary Studies in Political Geography", 53 *AAAG* 3 (1963) 407-28 at 409

⁶⁵⁸ Moodie, A. E., *The Geography Behind Politics* (1957) p. 83, in: Minghi, *supra* note 657, at 413. In commenting on an American geographer Lattimore wrote in 1955 that "what he saw so clearly, he saw while standing on his head. In large measure, when he thought he saw what the frontier did to society, he was really seeing what society did to the frontier." Lattimore, O., "The Frontier in History", in: Lattimore, Owen, *Studies in Frontier History: Collected Papers, 1928-1958* (Mouton & Co., Paris, 1962) 469-491 at 490. Political geography showed less interest in boundary study and theory after the 1970s, which was perhaps related to Jones' and Prescott's assertions of the uniqueness of boundaries, implying that "theorisation was futile". Megoran, Nick, *The Borders of Eternal Friendship? The Politics and Pain of Nationalism and Identity along the Uzbekistan-Kyrgyzstan Ferghana Valley Boundary, 1999-2000* (Ph.D. thesis, Sidney Sussex College, Cambridge, 2002) p. 23

⁶⁵⁹ Also related and relevant is the study of the role that the boundary plays in national political rhetoric. What is the special importance of the boundary in domestic politics?

⁶⁶⁰ Metaphorical boundaries are not included here. The focus is on the observable effects of spatial boundaries on human activity, such as studied within the discipline of Political geography.

⁶⁶¹ Prescott developed a somewhat similar typology concerning three aspects of boundary evolution: in definition, position and state functions applied at the boundary. By definition he means the process of creating boundaries; position refers to the location of boundaries and what changes to these involve; function refers to the state functions that states may choose to exercise at boundaries. Prescott, *supra* note 651, pp. 57-88.

on the formation of identity and order,⁶⁶² which, though clearly a related issue, will receive less attention in this thesis.

Studying the purpose, location, and function of a boundary helps reveal the *desired* effect of a boundary as an internal or international boundary as well as its *actual* effect.

Purpose → certain group = the desired effect of a boundary location (possibly also the function or parts of it) on the entire population or part of the population

Searching for the desired effect is important for our purposes, as it may reveal why an internal boundary was constructed in a certain way, and explain the effect that the boundary was designed to have. This knowledge might be useful in helping to predict what the consequences of internationalising a specific internal border might be, and whether such a border might be more or less likely to bound a stable political community.⁶⁶³

Location + function → certain group = the actual effect on the entire population or part of the population

Studying the *actual* effect of the location and function of a boundary on a large or small community is important, because the problems predicted or observed might prove useful knowledge when determining steps necessary to take in order to prevent or defuse tension within or between states. These steps might involve altering the boundary, but might also more often than not merely concern changing the function of the boundary so that, for instance, it is more flexible and open to passage.

The existence and location of international and internal boundaries is the result of various purposes and aims. Some aims are common to states, while many will reflect the special characteristics of communities. How borders work in practice – their functionality – is determined by their location and by how restrictive or open the state or neighbouring states wish them to be.⁶⁶⁴ States must weigh different interests, such as trade, freedom of

⁶⁶² See Paasi, Anssi, “Boundaries As Social Processes: Territoriality in the World of Flows” 3 *Geopolitics* 1 (1998) 69-88; Lapid, *supra* note 336. While boundaries and policies related to its functionality may be used e.g. to form identity, the ‘meaning’ of boundaries and related policies may fruitfully be studied as part of the political context and discourse. While ‘open’ EU borders may be understood to reflect cooperation, such policies in Central Asia may be portrayed as revealing a ‘weak’ state and ‘weak’ leader. See Megoran, *supra* note 658, pp. 112-67

⁶⁶³ The time factor is here disregarded, but may cause the effects to change over time as the boundary becomes entrenched.

⁶⁶⁴ Richard Hartshorne noted every state’s challenge to “bind together more or less separate and diverse areas into an effective whole”; centrifugal and centripetal forces will both be working in relation to this goal. Hartshorne, Richard, “The Functional Approach in Political Geography”, 40 *AAAG* 2 (1950) 95-130 at 105.

movement, security, and the problem of smuggling, and attempt to find some kind of balance between their interests.⁶⁶⁵ The borders will then affect the populations of the states on the basis of how they function and where they are located. These effects may or may not correspond with the original objectives for which a boundary was constructed or agreed to, or the functions that states wished it to have. Questions such as the territory included and the implications for identity,⁶⁶⁶ as well as whether the policing of the border facilitates or impedes friendly relations between the neighbour states and their economic well-being, are relevant.

One group within states that should be given special attention is the population residing in the frontier zone or *borderlands* – the zone surrounding the boundary.⁶⁶⁷ This group will often be affected by the location or function of a border to a higher degree or in a different way than the general populations of the neighbouring states. This is especially so if the group is united by economy, culture, language or other common factor, causing the location and function of the boundary to affect the group differently from the general population in both degree and kind. When boundaries are shifted or their functions change this group will also be the most strikingly affected.

6.1.2.1 International borders

The purposes and functions of international borders are many: to separate or unite, to include or exclude, or to control and shape what is within a border.⁶⁶⁸ The international border “is that

Borders may thus usefully be analysed in terms of their unifying effect within the state and in their effect on relations with other states.

⁶⁶⁵ Hedetoft has commented on the response of states to globalisation: “Globalization is a many-headed monster, promising both benefits and threats to the nation-states, and the problem therefore can be just as simply articulated: it is a question of finding a way to open up/include where and when it is desirable, and to close off/exclude where that is needed.” Hedetoft, Ulf, “The Politics of Belonging and Migration in Europe: *Raisons d’Etat* and the Borders of the National”, in: Petersson, Bo & Clark, Eric (eds.), *Identity Dynamics and the Construction of Boundaries* (Nordic Academic Press, Lund, 2003) pp. 201-21 at 207

⁶⁶⁶ Newman wrote that borders are “social, spatial, and political constructs that are tied up with the politics of identity”. Newman, David, “Boundaries, Borders, and Barriers: Changing Geographical Perspectives on Territorial Lines”, in: Albert, M., Jacobson, D. & Lapid, Y. (eds.), *Identities, Borders, Orders: Rethinking International Relations Theory* (University of Minnesota Press, Minneapolis, 2001) pp. 137-151 at 139

⁶⁶⁷ The term ‘borderlands’ refers to “sub-national areas whose economic and social life is directly and significantly affected by proximity to an international boundary”. Definition by N. Hansen quoted in: Asiwaju, A. I., “Borderlands in Africa: A Comparative Research Perspective with Particular Reference to Western Europe” in: Nugent, P. & Asiwaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) pp. 253-65 at 261, footnote 1

⁶⁶⁸ Prescott wrote that “[t]he only function of a boundary is to mark the limits of sovereignty.” He explained that states often find it “convenient” to exercise some of their functions at the border; thus he distinguished such exercises from the boundaries themselves. Prescott, *supra* note 651, p. 75. Hartshorne, on the other hand, noted “the original, primary function of boundaries, namely, to bound”. Hartshorne, Richard, “Geographic and

line which is to be accepted by all concerned as bounding the area in which everything is under the jurisdiction of one state as against areas under different jurisdictions.”⁶⁶⁹ Functionality will differ according to the states’ social and cultural identities as well as temporally.⁶⁷⁰ Functionality is also multi-dimensional. For heads of states friendly or hostile relations are necessary for varying political reasons.⁶⁷¹ Ministers for defence will consider the line’s relation to the geography of the area surrounding the border, and ministers of transport, industry, employment and justice will understand the functionality in light of their own particular responsibilities. The function of a border may have a plurality of effects on different groups or interests. A militarily ‘secure’ border may limit armed incursions and smuggling but have a devastating effect on economic interchange and transport across it.⁶⁷² During the early 20th Century geographers disagreed over the nature of borders most likely to be beneficial to peace. Some focused on defensive capabilities in light of perceived military threats, favouring impassable borders such as mountains; others advocated permeable borders, which would encourage interstate cooperation.⁶⁷³

The Great Wall of China provides an early example of the plurality of functions that a border may have and of the roles it may perform.⁶⁷⁴ Though it has often been suggested that the wall was built against a northern threat, closer study shows that no imminent threat seems to have existed at the time of its construction. Owen Lattimore claimed that the object of building the Great Wall was “to retain the Chinese within China as well as to keep the new-

Political Boundaries in Upper Silesia”, 23 *AAAG* 4 (1933) 195-228 at 199. On the legitimacy of borders and their functions and effect within different traditions of thought, see Miller, David & Hashmi, Sohail H. (eds), *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press, Princeton, 2001)

⁶⁶⁹ Hartshorne, *supra* note 664, at 119

⁶⁷⁰ Boggs, *supra* note 205, p. 4

⁶⁷¹ The boundary may e.g. symbolise the injustice caused to one state by another, legitimising certain actions and changing borderland identities from cross-border/ethnic to national identification, as well as shifting attention from problematic domestic politics. See e.g. Radcliffe, Sarah, “Frontiers and Popular Nationhood: Geographies of Identity in the 1995 Ecuador-Peru Border Dispute”, 17 *Political Geography* 3 (1998) 273-93

⁶⁷² Paasi wrote that relationships between states and boundaries are complicated, as the state “is simultaneously a power container, wealth container and cultural container, and each of these forms of territoriality may put a different emphasis on boundaries”. He noted that varying emphasis may *inter alia* be placed on the importance of military strength, cultural homogeneity or economic expansion. Paasi, Anssi, “Inclusion, Exclusion and Territorial Identities – The Meanings of Boundaries in the Globalizing Geopolitical Landscape”, 23 *Nordisk samhällsgeografisk tidskrift* (1996) 3-17 at 7

⁶⁷³ See the positions of Holdich and Lyde, summarised in Brigham, “Principles in the Determination of Boundaries” 7 *Geographical Review* 4 (1919) 201-219 at 203-5. Lyde had suggested that rivers should be used as borders, as it was a resource used by all sides and promoted amicable relations. Others also advocated the use of rivers as boundaries, but understanding them to be natural and restrictive divides. Holdich wrote in 1916 that “in the present stage of human evolution, when we find man [...] still so little removed from the primitive savage [...] it is necessary to separate the nations, or communities [...] by a barrier which should be as effective as nature or art can make it.” Holdich, Thomas, *Political Frontiers and Boundary Making* (Macmillan and Co. Ltd, London, 1916) p. 283. See also Fawcett, *supra* note 649, pp. 50-61

⁶⁷⁴ Lattimore, Owen, “Origins of the Great Wall of China: A Frontier Concept in Theory and Practice”, 27 *The Geographical Review* 4 (1937) 529-49

style pastoral barbarians out of China”.⁶⁷⁵ Part of the function might then have been to facilitate China’s unification and centralisation. The purpose may also have been to convey to communities that the builder had the capacity to protect them from outer threats and that they therefore confidently could rely on him for protection. He therefore deserved the taxes due to him, and not at the feudal level.⁶⁷⁶ The wall most likely functioned as a defence, a demarcator, and, given its construction, as a means of transport.

The modern international boundary has internal and external dimensions. It delimits the state’s jurisdiction,⁶⁷⁷ its “political space”⁶⁷⁸ and the territory within which it acts as it pleases: determining which goods are imported, what school textbooks are used and songs learned, which national culture is identified with, what news is accessible, which army the inhabitants are to serve in, and the rates of taxation.⁶⁷⁹ The external dimension involves separating states from one another, stopping expansion and delimiting where trespass would occur.⁶⁸⁰ Without a majority of its borders defined, the state would not even be considered to be a state under PIL.⁶⁸¹ The location of a border might have been chosen for military purposes, providing the locality for military structures to protect the territory within or to dissuade attackers. It can even be heavily militarised to threaten an opposite state.⁶⁸² Though international boundaries delimit jurisdictions and separate states, boundaries may have a ‘friendly’ or ‘unfriendly’

⁶⁷⁵ Lattimore, *supra* note 658, at 484. In the 1955 paper Lattimore wrote that in order for the Chinese to continue “their set trend of evolution toward becoming a more and more closely settled rural-urban people” and avoid the move towards becoming a dispersed society “they tried to set a limit to their own expansion. The zone in which they tried to stop became the line of the Great Wall – which in reality is a zone rather than a line”. He spoke of “a frontier of inclusion on the south and a frontier of exclusion on the north.” *Ibid.*, at 477

⁶⁷⁶ Kratochwil, F., Rohrlich, P. & Mahajan, H., *Peace and Disputed Sovereignty: Reflections on Conflict over Territory* (University Press of America, Lanham, 1985) p. 12

⁶⁷⁷ Cukwurah, *supra* note 181, p. 9. Lustick wrote: “The boundaries of states, both internal [...] and external [...] are crucial components of the set of stable expectations which, ultimately, constitute the state as an institution.” Lustick, Ian, “Thresholds of Opportunity and Barriers to Change in the Right-sizing of States”, in: O’Leary, B., Lustick, I. & Callaghy, T. (eds.), *Right-sizing the State: The Politics of Moving Borders* (Oxford University Press., Oxford, 2001) p. 79

⁶⁷⁸ Donnan, Hastings & Wilson, Thomas, M., *Borders: Frontiers of Identity, Nations and State* (Berg, Oxford, 1999) p. 87

⁶⁷⁹ Boggs, *supra* note 205, p. 5

⁶⁸⁰ *Ibid.*, pp. 11-12

⁶⁸¹ The criteria for statehood being (at least) a permanent population, a defined territory as well as effective control over the territory by a government. See e.g. the 1933 Montevideo Convention Article 1 as a formulation of customary international law. However, all boundaries need not be determined, as “one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered to have any territory whatever [...] it is enough that this territory has a sufficient consistency [...]”. Deutsche Continental Gas-Gesellschaft case (1929) decided by the German-Polish Mixed Arbitral Tribunal, quoted in: Cukwurah, *supra* note 181, pp. 30-1. Before the recent unification of Yemen, however, *none* of its international borders was fully determined, which did not hinder the status of the two Yemens as full subjects of international law.

⁶⁸² The state border has today declined in military importance *inter alia* due to technological advances of weaponry, minimising the advantage of distance. It is nevertheless true that some still serve as symbols of strength, such as Turkey’s southern boundary.

functionality. The limiting of border functions within the EU and decentralised development of border regions exemplifies the positive effect on interstate relations and the interests of the border population that an “open” international border can have.⁶⁸³ Similarly, the poverty of land-locked states (LLS) illustrates their vulnerability to restrictive boundary functionality; their need for transportation to coasts provides coastal states with ready opportunities to apply pressure on such neighbours.⁶⁸⁴

The role of boundaries in relation to the state has changed since the 1940s in definition, position and in relation to the state’s role and functions at its boundaries. Development of state functions at boundaries has resulted in changing customs, immigration and security arrangements.⁶⁸⁵ Reasons for general changes regarding the function and effect of international borders in the last century were population growth, transport and communications, as well as resource distribution and needs.⁶⁸⁶ Some examples are the development of air transport, where certain traditional land boundary functions have been moved to international airports, and the division of the oceans, which after the explosion of post-second world war claims of states not land-locked, has shifted boundaries from land out to sea.⁶⁸⁷

Examining the different functions that boundaries have, such as the traditional military (protective) function, and legal, economic, ideological and social-psychological functions, Dittgen claims that advances in military technology and globalisation have redefined or greatly diminished the protective and economic functions of boundaries. The other functions are less altered.⁶⁸⁸ The capacity of states to supervise and control their borders has generally become much greater, but this does not necessarily entail closer supervision and growing

⁶⁸³ Asiwaju, *supra* note 312, pp. 62-8. The Council of Europe is also closely involved in supporting the development of border regions and transborder cooperation. See e.g. the European Outline Convention on Transfrontier Co-Operation between Territorial Communities or Authorities, *ETS* No. 106 with its Additional Protocol, *ETS* No. 159, and Second Protocol, *ETS* No. 169. Convention texts at <http://conventions.coe.int>

⁶⁸⁴ Of course the poverty of LLSs is not primarily aggravated by restrictive boundary functionality, but rather by long distances to coasts. However, the geographical location of LLSs makes their economies more vulnerable to restrictive or closed boundaries than those of their coastal neighbours. Reitsma, Hendrik-Jan, “Boundaries as Barriers – the Predicament of Land-Locked Countries”, in: Kliot, N. & Waterman, S. (eds.), *Pluralism and Political Geography: People, Territory and State* (Croom Helm, London, 1983) pp. 259-283

⁶⁸⁵ Donnan & Wilson, *supra* note 678, p. 46. Their discussion departs from a typology by Prescott, *supra* note 651, p. 57 where he discussed boundary evolution and the aspects of this evolution that geography can fruitfully study. The two main lines of geographical boundary research have been geography’s influence on border location and the influence of the established boundary on its surrounding landscape.

⁶⁸⁶ Boggs, *supra* note 205, p. 9

⁶⁸⁷ Thomas, Bradford, “International Boundaries in the Twenty-first Century: Changing Roles and Depictions”, in: Pratt, Martin & Brown, Janet A. (eds.), *Borderlands Under Stress* (Kluwer Law International, The Hague, 2000) pp. 163-89 at 164 and 168-9

⁶⁸⁸ Dittgen, Herbert, “The End of the Nation-state? Borders in the Age of Globalism”, in: Pratt, Martin & Brown, Janet A. (eds.), *Borderlands Under Stress* (Kluwer Law International, The Hague, 2000) pp. 49-68 at 53-7

exercise of state functions at borders. In North America and within the European Union there is even talk of the “disappearance of borders”⁶⁸⁹ due to their greater permeability.⁶⁹⁰ This seems, however, to be a regional phenomenon and also rather limited in time.⁶⁹¹ Also, in the case of the European Union the “hard” or traditional post-second world war borders have merely been moved to the outer edges of the Union.⁶⁹² The impression some have is of a movement towards of a ‘borderless’ world. Refugees especially have reason to doubt this, and it is belied both by the continued functions of boundaries as well as by continued conflict over them.⁶⁹³

6.1.2.2 Internal borders

Internal boundaries have quite separate purposes. They may serve to unite a group within one territory for the purposes of identity or security, or to reduce tensions between groups. They may also serve the purpose of dispersing groups into several units to eliminate dominance. The boundary might, on the other hand, only provide mere administrative or budgetary rationality within a state, with little restrictive or other defining function. The borders might also be structured for decentralising purposes or to create such an effect. Generally,

⁶⁸⁹ See comments on discourse in Newman, *supra* note 666, at 143-4

⁶⁹⁰ There seems to exist a general perception that boundaries are losing their importance; see e.g. the UN Secretary-General’s Report “An Agenda for Peace”, June 17, 1992, UN Doc. A/47/277, S/24111, paragraph 11: “National boundaries are blurred by advanced communications and global commerce, and by the decisions of States to yield some sovereign prerogatives to larger, common political associations.” This does not, however, seem representative beyond the EU.

⁶⁹¹ The openness must be weighed against developing cooperation and reach of criminal networks distributing weapons, narcotics and smuggling humans and the security concerns that this has created within European states. Bigo, Didier, “The Möbius Ribbon of Internal and External Security(ies)”, in: Albert, M., Jacobson, D. & Lapid, Y. (eds), *Identities, Borders, Orders: Rethinking International Relations Theory* (University of Minnesota Press, Minneapolis, 2001) p. 91-101. The ‘growing threat’ of terrorism should not be excluded, as larger areas of unrestricted passage provide such groups with more contact, access to resources and possibilities of action. On the permeability of US borders one need only compare the differences between the US-Canada and US-Mexico borders to see openness connected to similarity, and restrictions with difference. This corresponds to a post-structuralist analysis, in that “meaning is constituted through difference”; difference is ‘otherness’ and may even be dangerous. At difference, boundaries gain more importance as a defence against danger. Campbell also writes: “The mere existence of an alternative mode of being, the presence of which exemplifies that different identities are possible and thus denaturalizes the claim of a particular identity to be *the* true identity, is sometimes enough to produce the understanding of a threat.” Campbell, David, *Writing Security: United States Foreign Policy and the Politics of Identity*, 2nd ed. (Manchester University Press, Manchester, 1998) pp. 3, 9, 70-1

⁶⁹² Indeed, Dittgen wrote: “A European Union would, in fact, be unimaginable without external borders.” Dittgen, *supra* note 688, at 59. North America is in a different position as most of the territory borders on the sea.

⁶⁹³ Hurrell, Andrew, “International Law and the Making and Unmaking of Boundaries”, in: Buchanan, A. & Moore, M. (eds.) *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press, Cambridge, 2003) pp. 275-97 at 287

international boundaries separate while internal boundaries serve the purpose of unifying polities. Both facilitate governance and promote control, but for opposing purposes.⁶⁹⁴ While a state has only one set of international boundaries, it will often contain many levels of internal divisions and borders such as federal, county, district, municipal – even property boundaries – all with varying purposes and effects on those who are, and that which is, included within. Decentralisation within a state increases the importance and functions of the lower level units. Intra-state boundaries thereby frequently affect citizens in a real and very practical sense. Local government may have duties to provide services such as schooling and garbage collection, and budget allocations and the efficiency of services may differ between intra-state divisions.⁶⁹⁵ Local regulations often differ, including taxation rates, and so on.⁶⁹⁶

An important function of intra-state boundaries in most democracies is to determine the electorate in elections, thus affecting representation and the distribution of power within states.⁶⁹⁷ Few democracies are single constituency states.⁶⁹⁸ The location of internal boundaries might in some cases even mirror deliberate efforts to concentrate or divide groups or support for certain political movements or interests.⁶⁹⁹ Changing internal borders, as well as turning national into international borders, have in several cases transformed majorities into minorities and *vice versa*.⁷⁰⁰ Establishing the Northern Ireland border in 1920 turned a

⁶⁹⁴ Ratner, *supra* note 180, at 602

⁶⁹⁵ For an overview of research on efficiency in providing local services, the quality of local democracy and the size of municipalities, see Martins, M. R., “Size of Municipalities, Efficiency, and Citizen Participation: A Cross-European Perspective”, 13 *Environment and Planning C: Government and Policy* 4 (1995) 441-58

⁶⁹⁶ Prescott, *supra* note 651, p. 166

⁶⁹⁷ Districting in plurality systems (‘winner-takes-all’ or ‘first-past-the-post’ election systems) tends to affect the seats-votes relationship more than in systems of proportional representation. Gudgin, G. & Taylor, P. J., *Seats, Votes and the Spatial Organisation of Elections* (Pion Ltd, London, 1979). The 2000 US presidential elections provided an interesting example of how different factors, among them electoral geography, caused George W. Bush to win despite receiving 540,000 fewer votes of the nation-wide total than Al Gore. See articles by Webster, Archer, Shelley, and Warf & Waddell in: *Political Geography* 21 (2002). On the Swedish system of electoral districting and power distribution, see SOU 1994:30 and prop. 1996/97:70. For a rare critique of the effect of districting in Sweden, in this case Stockholm, see “Borgerlig kritik av valkretssystem”, *Kommunaktuellt* 2002-09-26 (notiser)

⁶⁹⁸ The Netherlands and Israel are rare single constituency states. Johnston, Ron, “Manipulating Maps and Winning Elections: Measuring the Impact of Malapportionment and Gerrymandering”, *Political Geography* 21 (2002) 1-31 at 2

⁶⁹⁹ For bias in district-based elections in the UK, see *ibid.*, pp. 1-31. For redistricting in the US and its effects on minority group voting strength, see Leib, Jonathan I., “Communities of Interest and Minority Districting after *Miller v. Johnson*”, 17 *Political Geography* 6 (1998) 683-99; and Webster, Gerald R., “Playing a Game with Changing Rules: Geography, Politics and Redistricting in the 1990s”, *Political Geography* 19 (2000) 141-161. Baylson (1987) has described the post-1864 Ottoman administrative divisions: “The boundaries of the *vilayets* [department or province] were not drawn specifically to encompass major economic or geographic regions but were delimited primarily for Ottoman administrative convenience. Since it was not in the Ottomans’ best interests to foster ethnic or national identities among the minority communities, national and historic units were often deliberately divided.” Quoted in Lalonde, *supra* note 181, p. 90

⁷⁰⁰ For majority/minority reflections, see Gladney, Dru (ed.), *Making Majorities: Constituting the Nation in Japan, Korea, China, Malaysia, Fiji, Turkey, and the United States* (Stanford University Press, Stanford, 1998); Soffer, Arnon, “The Changing Situation of Majority and Minority and its Spatial Expression – The Case of the

Protestant Irish minority into a Northern Irish majority.⁷⁰¹ Similarly, when internal federal Yugoslav borders were recognised as international ones in the early 1900s, the Serbian majority became minorities in Croatia and Bosnia-Herzegovina. The Bosniak minority became the largest of three groups in Bosnia-Herzegovina, and the Croatian minority was transformed into the majority in independent Croatia.⁷⁰² Russians, who had constituted the ethnic majority in the USSR, became ethnic minorities in most of the former USSR Republics with the break-up in 1991. Though this carried with it less conflict than in Yugoslavia,⁷⁰³ it brought hardship to the Russians, who in large numbers migrated to the Russian Federation.⁷⁰⁴

Internal boundaries may be newly and continually changed, or correspond to those of older regions or entities having political or ethnic identities which may be very strong within states.⁷⁰⁵ Changes to internal boundaries fall within the internal affairs of states, leaving alterations legally uncontroversial. Victor Prescott has discussed two kinds of intra-national boundaries: federal and internal. He noted that federal borders often are the result of negotiations, whereas internal borders are more often based upon unitary decision.⁷⁰⁶ The federal boundaries would thus be less susceptible to change.⁷⁰⁷ It could also be argued that they would be ‘better’ borders, as they would result from a negotiated process. This is, nevertheless, not always the case. The federal borders of Yugoslavia and the USSR were not the result of negotiation, and did not have the effect that ‘ordinary’ federal borders have.⁷⁰⁸

Arab Minority in Israel”, in: Kliot, N. & Waterman, S. (eds.), *Pluralism and Political Geography: People, Territory and State* (Croom Helm, London, 1983) pp. 80-99

⁷⁰¹ Anderson, *supra* note 40, p. 107. Fraser, T. G., *Partition in Ireland, India and Palestine* (Macmillan Press Ltd., London, 1984) pp. 1-67

⁷⁰² Lapid observed: “Operating with a dubious model of identity (which naively affirmed the possibility of constituting new identities within any borders), ignoring profound differences between the vastly different identity functions of internal and external borders, and failing to seriously consider many other predictable complications entailed more generally in the identity-to-border sequence, bordering practices shaped by the *uti possidetis* principle have produced many tragic results.” Lapid, *supra* note 336, pp. 1-20 at 12

⁷⁰³ The secessionist war over Abchazia is related to Russian interests.

⁷⁰⁴ Brubaker, W., “Citizenship Struggles in Soviet Successor States”, *26 International Migration Review* 2 (Special Issue, 1992) 269-91. Ardittis claims that two million Russians migrated from former USSR Republics to the Russian Federation after 1991. Ardittis, S., “Exchange of Experience between the Russian Federation and Southern European Regions in the Field of Migrant Reintegration Policies”, *29 International Migration Review* 4 (1995) 1049-56 at 1049. Bohr mentions language and power indigenisation as two of the factors excluding minorities within the new states. Bohr, Annette, “The Central Asian States as Nationalising Regimes” and “Language Policy and Ethnic Relations in Uzbekistan” in: Smith, Graham & Law, Vivien *et al*, *Nation-building in the Post-Soviet Borderlands: The Politics of National Identities* (Cambridge University Press, Cambridge, 1998) pp. 139-164 at 151-4 and 197-223 at 204-13

⁷⁰⁵ The internal boundary of the former Czechoslovakia, which formed the international boundary of the two independent states after 1991 – the Czech Republic and Slovakia, was the old Moravian-Hungarian border; it was accepted by both entities to constitute their common international boundary.

⁷⁰⁶ See, however, Razin & Lindsey, “Municipal Boundary Change Procedures” in: Barlow & Wastl-Walter (eds.), *New Challenges in Local and Regional Administration* (Ashgate Publ Co., Aldershot, 2003) for ‘open’ processes

⁷⁰⁷ Prescott, *supra* note 651, p. 167

⁷⁰⁸ *Infra* chapters 6.2.3.3 & 7.1.1.3

Thus it is suggested that in those cases the distinction is not useful in order to understand the way in which the borders functioned.⁷⁰⁹

Certain colonial entities also contained internal boundaries. French West Africa and Equatorial Africa are examples of such entities, which were administratively divided by boundaries and organised into federal-like entities. These units were later granted independence ‘*en masse*’ by France in 1960.⁷¹⁰ Their borders were changed many times for various purposes up until the advent of independence. Lalonde gives one example by recounting the varying motivations behind *inter alia* the 1919 establishment, 1932 abolishment, and the 1947 re-establishment of Upper Volta within French West Africa.⁷¹¹

On a concluding note: the functions of *internal* boundaries are many and differ greatly, especially between centralised or decentralised state structures, between federal, regional and unitary states, and between democracies and authoritarian states. As noted with regard to *international* boundaries, their functions and effects have developed during the 1900s due *inter alia* to population pressures and technical developments in relation to armaments, resource extraction, boundary delimitation and supervision. These developments affect relations between states as well as the populations within the borders. Such changes may be gradual or sudden, as in cases of conflict. Dramatic shifts in border function and effect may also result from shifts in status, when internal boundaries are transformed into international ones.

6.2 From internal to international borders: changes, effects and challenges

And of course boundaries have no significance except in relation to human beings.⁷¹²

6.2.1 The impact of borders

What is a ‘good’ boundary? A ‘good’ boundary is here understood to be one that fulfils its purpose with efficiency and as little friction as possible.⁷¹³ The effects of boundaries do differ,

⁷⁰⁹ Prescott admitted this fact, calling the USSR a ‘quasi-federal’ state. Prescott, *supra* note 651, p. 167

⁷¹⁰ Lalonde, *supra* note 181, p. 112

⁷¹¹ *Ibid.*, p. 109

⁷¹² Boggs, *supra* note 205, p. 28

as a boundary might divide one group in two or separate hostile groups from each other; it may facilitate or hinder passage and trade; or it might symbolise opportunity or security from foreign danger. As earlier suggested, studying borders and applicable principles will involve examining the purpose of actual borders and their functions and effects on different interests and groups. Accordingly, one should avoid laying down principles which are too general and applicable to all borders,⁷¹⁴ because the communities encircled or divided by a border will impact its function and effect to a large extent, resulting in diversity. A boundary should be examined in its context. At the same time, a number of impact similarities between boundaries do exist.

6.2.1.1 From frontiers to boundaries, and internal to international borders

Historically it was more common for political frontiers, or zones, to separate entities from one another, rather than modern boundaries. As the frontiers were an undivided zone, and themselves had the function of separating other entities, their very character was linked to their function – a zone which was an area not traversable in just two short steps. Frontiers lacking easily accessible resources, or that were difficult to inhabit, were often found to be suitable, because the separated entities would not be as interested in controlling it as having it perform the role of divider, or buffer zone, for protection. Frontiers would then typically consist of deserts, swamps, mountains, rivers and so on. It was not uncommon for distinct groups to inhabit such frontiers, often forming an economic unit.⁷¹⁵

The advent of the 20th Century allowed access to more detailed geographical knowledge, precision in cartography, delimitation and demarcation techniques, technological advances in weaponry and resource extraction, population growth and dramatic developments facilitating

⁷¹³ The perspective or interest of the one determining the ‘goodness’ of a boundary must be specified. Intra-war boundary literature e.g. analysed the ‘goodness’ of a boundary from a military perspective. According to S. Jones, “There are no intrinsically good or bad boundaries. [...] The goodness or badness of a boundary depends as much upon the general situation as upon the details of delimitation and demarcation. A boundary, like the human skin, may have diseases of its own or may reflect the illness of the body.” Jones, Stephen B., *Boundary-Making: A Handbook for Statesmen, Treaty Editors and Boundary Commissioners* (Carnegie Endowment for International Peace, Washington DC, 1945) p. 3

⁷¹⁴ Boggs, *supra* note 205, p. 21

⁷¹⁵ Prescott, *supra* note 647, pp. 44-5. See also Lattimore, *supra* note 658. Fawcett noted that where frontiers were uninhabited, the zones functioned primarily as separators or for protection, while where inhabited, they functioned as connectors which facilitated interaction. He specifically discusses the advantages and disadvantages with using rivers as boundaries, as they are often inhabited by interdependent groups, and do not form ‘natural’ divides. Fawcett, *supra* note 649, pp. 25-33, 55

transport. Remaining frontiers were largely replaced by international borders.⁷¹⁶ The results of these advances and the development of modern boundaries were to shift the capacities of states to their outer edges, touching one another, often dividing the previously existent frontier zone and separating it into two or more parts. So the movement from frontiers to international boundaries that separated states often had great effect, first by bringing states into closer contact with one another,⁷¹⁷ and then often either by including frontier zones within one state or by strictly separating previous frontier units.

The 20th Century also underwent dramatic political developments that led to the creation of many new boundaries, as well as changes to existing ones. During the first decade of the 20th Century, African colonial boundaries were still being delimited. At the end of the first world war German colonies and Ottoman territory were divided up between other European states as League of Nations' mandates. Several European states were created, leaving a third of Europe's boundaries brand new after the Paris rearrangements.⁷¹⁸ Post-second world war African and Asian decolonisation led to the creation of a large number of new states and UN membership rose steeply.⁷¹⁹ In the 1900s the USSR, the SFRY, and Czechoslovakia were dissolved and their federal boundaries were recognised as the international boundaries of 22 new states.⁷²⁰

Parallels can be found between the shift from frontiers to international boundaries and the move from internal to international boundaries. As with the division of a frontier zone, internationalising internal borders may break up straddling groups. In several cases internal boundaries were constructed with the very purpose of separating dominant groups, whether for voting purposes, reconstructing identities or calming ethnic fears within multinational states. With changes to the status of such administrative borders other effects occur – straddling groups are effectively separated and divided. If the new international borders have

⁷¹⁶ Prescott, *supra* note 651, pp. 54-89; Paasi, *supra* note 672, at 4

⁷¹⁷ Fawcett distinguished between 'zones of separation' and 'zones of intercourse', in: Fawcett, *supra* note 649, p. 32; W. G. East used the terms 'frontiers of separation' and 'frontiers of contact'. Prescott, *supra* note 651, pp. 39-42

⁷¹⁸ Paris added 2,000 new miles to a previous 8,000 miles of international boundary in Europe, of which 3,000 had a new location. Bowman, Isaiah, *The New World: Problems in Political Geography*, 4th ed. (World Book Co., N.Y., 1928) p. 31

⁷¹⁹ There were 51 original UN members in 1945. In 2004 a total of 191 states were members of the UN – a growth of 375 per cent in 60 years.

⁷²⁰ In contrast, in 1990 DDR and FRG were reunified, as were the Yemen Arab and Federal Republics. Eritrea gained independence from Ethiopia in 1993, and East Timor gained independence from Indonesia in 1999.

a ‘hard’ character, the effects are even harsher – limiting travel, economic and cultural interchange and development.⁷²¹



Map 3. Africa before major colonisation. Major section of an 1855 Stülpnagel map of Africa (Stieler’s *Hand Atlas*, No. 40). Author’s map.

In the African context, attempts to restrict border passage at previously permeable borders or practically unbordered areas have often been met by political unrest in cases where this has hindered the trade and movement of divided groups.⁷²²

⁷²¹ An example of such an effect is the division of Germany into a Western and Eastern part and the economic decline and lessened human exchange between the two states. Prescott, *supra* note 647, p. 13.

Both the USSR and the SFRY grappled with the division of ancient frontiers or zones. The internal federal borders of Tito's Yugoslavia both retained and divided important former frontier zones. The southern boundary of the old Austrian-Ottoman frontier zone, the *Vojna Krajina*, was used as a federal boundary, while the Ottoman 'bridge' or tongue connecting Turkey and Bosnia, the *Sandžak* of Novi Pazar, was partitioned (see Map 4 below).



Map 4. Section of "General-Karte der Balkanhalbinsel von F. Handtke" with the post-Berlin boundaries of 1878 (Carl Flemming, Glogau) Author's map.

Sandžak

The southern and eastern borders of the *Vojna Krajina* or 'Military Frontier', a frontier zone today included within Croatia which was formed in 1578 and under direct Austrian control until 1881, had constituted the dividing line between the Austrian and the Ottoman

⁷²² Zartman, I. William, "The Politics of Boundaries in North and West Africa", 3 *Journal of Modern African Studies* 2 (1965) 155-73 at 160; Brown, David, "Borderline Politics in Ghana: The National Liberation Movement of Western Togoland", 18 *Journal of Modern African Studies* 4 (1980) 575-609. Asiwaju observed that the European situation in cases is similar to the Africa experience, noting Catalan, Yoruba and Hausa armed revolts and protest migrations in response to "unpopular policy measures" operating on the dividing border. Asiwaju, *supra* note 667, at 257. A related problem is that of constantly moving groups, such as pastoralist, whose cross-border passage has been perceived as problematic both by colonial and present-day African authorities. In some cases policies to end pastoral life-styles have, by aiming to settle groups, even been

empires. The zone was populated mainly by orthodox Serbs, who held their land on special tenure in return for military service.⁷²³

Though the internal borders of Yugoslavia were dramatically rearranged four times, the old Austrian-Ottoman dividing line was, with limited variations, retained in all cases.⁷²⁴ The zone was never divided, but in 1991 it became the scene of some of the worst atrocities of the Yugoslav wars. The political effect of internationalising the former federal boundary was incendiary. The 1991 Croatian bid for independence left the Serb population a minority in an independent state, which some perceived as a hostile one, and divided them from remaining Yugoslav Serbs. While the original object of the zone was to maintain a bulwark against the Ottomans, which provided a safe haven for Serbs, the boundary would – if internationalised – instead come to include them involuntarily within an entity that was felt by many to be discriminatory against them.

The *Sandžak*, straddling the Serbian-Montenegrin boundary, is instead an example of a zone populated by a relatively homogenous group that was divided between two federal entities. The *Sandžak* had been a strip of land populated dominantly by Moslems, located between orthodox Serbia and Montenegro, which connected Ottoman Bosnia to Ottoman Turkey. At the 1878 Congress of Berlin the independence of Serbia and Montenegro was recognised, simultaneously as the administration of Bosnia by the Dual Monarchy was agreed upon, splitting the *Sandžak* off from Bosnia. Under the Treaty of Berlin, the *Sandžak* would remain both under Ottoman administration and Austrian-Hungarian military control.⁷²⁵ In 1908 the Austrian protectorate of Bosnia was hardened into actual annexation; the *Sandžak* remained occupied until 1909. After the first Balkan war of 1912 the *Sandžak* was lost by Turkey and instead occupied by Serbia and Montenegro, who partitioned it between them in 1913. The *Sandžak* was treated as a unit only on one occasion; in the 1931 administrative rearrangement most of the *Sandžak* was included in the *Zetska Banovina*. After the second world war it was redivided by Tito between the federal units of Serbia and Montenegro, remaining so until this day. It is likely that the federal division of the unit was not perceived to

constructed. Blench, Roger, "Pastoralists and National Borders in Nigeria", in: Nugent, P. & Asiwaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) 111-128 at 116-118

⁷²³ *Infra* chapter 7.1.1.1. The territory was incorporated into Croatia-Slavonia in 1881, which was then under Hungarian rule.

⁷²⁴ *Infra* chapters 7.1.1.2 & 7.1.1.3. In 1921 Yugoslavia was divided into 33 *oblasti*, in 1931 in nine *banovine*, in 1939 the *Banovina Hrvatska* was created under the *Sporazum* agreement, and in 1945 Yugoslavia was reformed into a federation with six republics and two autonomous regions. With the 1931 rearrangement a portion of the northern border of the *Vrbska banovina* was shifted northward.

⁷²⁵ Treaty of Berlin, July 13, 1878, Article XXV, at: <http://www.fordham.edu/halsall/mod/1878berlin.html> (31/07/03)

have great practical effect within the entire state-construct or cause substantial damage. It was neither considered nor predicted that the federal boundaries would later become international boundaries. However, the *Sandžak* will very possibly be split by an international boundary when Serbia and Montenegro decide within the coming years whether to finally dissolve their Union and separate.⁷²⁶ The problems facing these borderlanders are different from those formerly facing the population of the *Krajina*:⁷²⁷ while the partition from ethnic kin is a common issue in both cases, the population of the *Sandžak* has already existed as a minority within a majority for a long period, while the population of the *Krajina* formerly constituted a majority and was suddenly faced with vulnerable minority status within a new state. Though the issue of the effective partition of the *Sandžak* by the internationalisation of the federal boundary may therefore seem less explosive than the *Krajina*, the results might be equally problematic.⁷²⁸

In the Soviet Union, the Ferghana Valley is another example of where federal divisions were thought to have limited practical effect or to cause little damage within the whole state-construct.⁷²⁹ Though their internationalisation was similarly unpredicted, the Ferghana Valley was split by international boundaries in 1991.

6.2.1.2 From location to functionality

The main problems that arise in connection with borders are generally due to their *location*, their *function* and/or *effect* on different groups. It has already been noted that discussions centred on border conflicts and tensions, outside the discipline of Political geography, generally seem to focus on the location of the borders and whether or not these should, or

⁷²⁶ Under the Belgrade Agreement of March 14, 2002, Serbia and Montenegro may, after a period of three years, initiate a procedure to leave the union or change the statehood status.

⁷²⁷ Under the August 1995 Croatian military offensive 'Operation Storm' (*Oluja*) 150,000-200,000 Serbs fled the *Krajina*. Many of those incapable of doing so were killed, effectively 'cleansing' the area and 'extinguishing' the historical Serbian presence. See e.g. *Prosecutor of the Tribunal Against Ante Gotovina*, Case No. IT-01-45-1, Indictment 8 June, 2001 (unsealed 26 July, 2001) paragraph 16-22; Human Rights Watch Report, "Croatia: Impunity for Abuses Committed during 'Operation Storm' and the Denial of the Right of Refugees to Return to the *Krajina*", August 1996, vol. 8, no. 13 at: <http://hrw.org/reports/1996/Croatia.htm> (accessed 29/07/2003); Thornberry, Cedric, "Saving the War Crimes Tribunal", 104 *Foreign Policy* (1996) 72-85; Gutman, Roy, "What Did the CIA Know? August 27, 2001, *Newsweek International*

⁷²⁸ Naegele, Jolyon, "Yugoslavia: Bosniaks in Sandžak Region Seek Recognition", 28-29 November 2002, at: <http://www.reliefweb.int>. On the Serbia-Montenegro split, see ICG Balkans Report No. 142, "A Marriage of Inconvenience: Montenegro 2003", April 16, 2003

⁷²⁹ For a short history on the Ferghana Valley and the federal divisions, *infra* chapter 7.2.1.2

even may, be altered.⁷³⁰ The understanding reveals a one-dimensional view of boundaries that thereby excludes the important connection between functionality and tension. This should not come as a surprise, considering how maps still project reality – on colourful paper all state boundaries are still represented by the same red or black line, providing the viewer of the map with very limited information on the human reality of the borderlands ‘on the ground’. Reality is projected as though it is similar, easily creating a false impression of boundary similarities.⁷³¹ Indeed, some political geographers have called for political maps to depict differences in *inter alia* international border permeability by using shades.⁷³² This would, at least potentially, alert the observer to the existence of differences in, for example, border functionality by distinguishing ‘hard’ and ‘soft’ boundaries.

Earlier advances are often forgotten.⁷³³ In the inter- and post-war periods several geographers focused on the relationship between boundary functions and peace, and the conflict-reducing role that reducing boundary functions might have.⁷³⁴ In 1945 Stephen B. Jones wrote:

The boundaries of the near future almost certainly will limit the domains of governments with many and complex functions and so will deeply influence the lives of the people whose homelands they traverse. Whether this influence is towards peace or war depends mainly upon the general situation. [...] If the functions of international boundaries can be reduced, to some degree, to those of internal boundaries, the problems lose sharpness.⁷³⁵

In 1933 Hartshorne presented his observations on the newly created Polish Corridor, concluding that “there is no geographical solution, i.e., by change of territory.” He instead

⁷³⁰ Minghi has argued that within the discipline of Political geography boundary studies have also suffered from a conflict-related perspective, largely ignoring boundaries in peaceful times. Most studies have therefore focused on boundary location, delimitation, demarcation and territorial disputes. Minghi, J., “From Conflict to Harmony in Border Landscapes”, in: Rumley, D. & Minghi, J. (eds.), *The Geography of Border Landscapes* (Routledge, London, 1991) pp. 15-30 at 17. The re-newed attention given to boundaries beginning in the 1900s could then be understood to be partly fuelled by the break-up of the USSR and Yugoslavia.

⁷³¹ On maps and what they communicate, see e.g. King, Geoff, *Mapping Reality: An Exploration of Cultural Cartographies* (Macmillan, Basingstoke, 1996)

⁷³² Thomas, *supra* note 687, at 172

⁷³³ For a short background of Political geography’s post-second world war ‘guilt by association’ and gradual ‘return’, see Newman, David, “From ‘Moribound Backwater’ to ‘Thriving into the Next Century’: Political Geography at the Turn of the Millenium”, in: Schofield, C. *et al* (eds.), *The Razor’s Edge: International Boundaries and Political Geography* (Kluwer Law International, London, 2002) pp. 3-24

⁷³⁴ See e.g. Boggs, *supra* note 205, *op. cit.*; Hartshorne, Richard, “The Polish Corridor”, 36 *Journal of Geography* (1937) 161-76. Jones referred to the (then) EEC as one example of functional changes for peace. Jones, Stephen, “Boundary Concepts in the Setting of Place and Time”, 49 *AAAG* 3 (1959) 241-55 at 255. In concluding observations on the future of African borders Nugent and Asiwaju argue not for the redrawing of the state boundaries, but “reducing the practical impact of existing boundaries – that is, formally to alter their functions from those of barriers to conduits.” Nugent & Asiwaju, “Conclusion – the Future of African Boundaries”, in: Nugent, P. & Asiwaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) 266-272 at 269-70

⁷³⁵ Jones, *supra* note 713, p. 4

suggested such measures as changing tariff walls and the treatment of minorities.⁷³⁶ In 1944 Roderick Peattie suggested that the less functions applied to an international boundary, the better peace would be served. He strongly encouraged regionalism in frontier areas, especially between states with historic friction.⁷³⁷ A few years earlier Boggs wrote:

It should be appreciated that organization for lasting peace requires close adaptation to geographic factors—to the great differences in climate, soil productivity, and the distribution of mineral resources—as well as to human associations and traditions. As a corollary to such adaptation, the functions of boundaries should be regarded not as being uniform and static but as varying normally from place to place. [...] In areas where there is friction on boundaries already established, the situation may be greatly eased, in perhaps all instances, either by peaceful shifting of the boundary for mutual advantage or by appreciably simplifying the functions which the boundaries are made to serve.⁷³⁸

For the people most affected by a border, its location will have a varying effect on their interests depending on *how the border is to function* – whether or not it is going to be restrictive of their passage – permeable or impermeable. In the case of Ferghana boundaries, it was not at independence in 1991, when the federal borders were transformed into international ones, that the borders became a severe obstacle to the inhabitants. The boundaries were actually closed only in 1999, first for economic, then for security reasons. The main hardships for borderlanders were related to livelihood and kinship after state measures, such as the closing of transport routes and even splitting some villages in half, had been implemented.⁷³⁹ Nick Megoran has therefore suggested that “[t]he legal-constitutional division of the Valley in 1991 only ‘caught up’ with the borderland folk in 1999”.⁷⁴⁰

As noted, the practical effect of the border functions on those residing close to it might constitute the greatest obstacle to long-term peace. In 1933 Hartshorne presented the first systematic study of the effects of border changes upon populations, beginning with the

assumption that where international boundaries run through settled areas, it is those areas rather than the bounding states that are most concerned, the inhabitants of the border regions

⁷³⁶ Hartshorne, *supra* note 734, at 176. Boggs came to the same conclusion, writing that, “boundary problems [...] can therefore never be solved to any considerable degree by shifting boundaries. [...] The solution of many of the perplexing problems may be found in progressive and far-reaching simplification of the boundary function.” Boggs, *supra* note 205, pp. 132-3

⁷³⁷ Peattie, R., *Look to the Frontiers: A Geography of the Peace Table* (1944) commented in: Minghi, *supra* note 657, at 412

⁷³⁸ Boggs, *supra* note 205, p. 203. Political geographic approaches become highly controversial in light of the policies advocated by the Nazi school of *Geopolitik* in the 1930s. However, as a contributing factor to explain tensions it should not be ignored.

⁷³⁹ Megoran, *supra* note 658, pp. 45-52, 168-211, 225

⁷⁴⁰ *Ibid.*, p. 210

rather than those in the internal areas of the states who are most to be considered in studying or locating borders.⁷⁴¹

In a study on the effects of an interwar border change between Italy and Yugoslavia, A. E. Moodie observed:

To those Slovenes who inhabit by far the greater part of the Julian Region, the establishment of the Rapallo Line meant the separation of nearly half a million of their people who not only found themselves under an unsympathetic political regime but were compelled to live under economic and legal systems different from those of their kinsmen. In many cases private estates were cut in two and the peasants' centuries-old grazing rights were suddenly denied to them. Roads and tracks which had become the traditional means of communication between towns and villages, between the arable lands of the valley floors and the mountain pastures, were equally suddenly closed. These are serious matters, striking at the heart of human existence, more particularly in a region where, at the best, life is hard and where subsistence can only be secured by unremitting toil together with the maximum utilization of meagre material resources.⁷⁴²

It seems then, that if a border does not hamper passage, its location has less practical or restrictive effect on the activities of borderlanders.⁷⁴³ Location may in such cases show reduced importance. When boundaries are changed, the fewer state functions exercised at the 'new' boundary, the less severe the effects will be on the border population.⁷⁴⁴ The interested parties in a specific context must then also be identified: to whom does the border constitute a problem and of what does the problem consist? These may vary greatly in different situations. A border dispute should therefore not be approached merely by considering changes to the border's location or denying such an option, but primarily by asking what interests and needs are at stake and examining whether the character or functionality of the border might be constructed so as to respond to those needs and effectively reduce tensions.

6.2.1.3 Hard and soft boundaries

A useful distinction which identifies varying boundary functionality can be made between 'hard' and 'soft' boundaries. A hard boundary has been defined as "a demarcation not easily traversable at will which functions to confer substantial benefits or impose substantial costs

⁷⁴¹ Hartshorne, *supra* note 668, at 199. For studies of the impact of border changes on a population, see Minghi, *supra* note 657, at 416-19, 424-27

⁷⁴² Moodie, A. E., "The Italo-Yugoslav Boundary", 101 *Geographic Journal* 2 (1943) 49-63 at 60-1. See also Moodie, A. E., "Some New Boundary Problems in the Julian March", *Transactions and Papers, Institute of British Geographers* 16 (1950) 83-93

⁷⁴³ Anderson, *supra* note 40, p. 106. It may, however, still be important in issues of identity, schooling and so on.

⁷⁴⁴ Prescott, *supra* note 651, pp. 74-5

on individuals by virtue of which side of the line they happen to find themselves.”⁷⁴⁵ The soft border is instead easily traversable. As has already been proposed, the actual location of a border becomes more important for people in the borderlands if the border has a ‘hard’ character, being difficult to pass through; *e contrario* the location of the border carries less importance with greater permeability. The purpose of the border must be examined when looking at its permeability in order to draw any conclusions as to the border’s compliance with the self-determination of the people concerned. Here a formulation of the core argument of this thesis seems appropriate:

*Where peoples cannot function in accordance with their legitimate wishes and needs there is a clear conflict with their self-determination.*⁷⁴⁶ *This follows from an interrelational and contextual interpretation of the two first UN Charter Purposes. Accordingly, the functionality of international boundaries cannot be considered to fall solely within the internal affairs or complete sovereignty of states. The principle of respect for the self-determination of peoples requires that with boundary changes consideration be shown for the interests of borderlanders. Consideration involves the satisfactory fulfilment of two stages: process and result.*

The argument will be further elaborated in the following sections.

The idea that boundaries are diminishing in importance for the simple reason that a democratic state can function within any boundaries⁷⁴⁷ misconceives the role and importance of boundary functionality. The view of the reduced importance of boundaries is heavily premised on the ability of the state to fulfil all the needs of its inhabitants. But this is something that even the most liberal states cannot claim to do. The entire EU project is an example of efforts to create opportunities for growth that the Member States cannot create alone. Boundaries within the EU are not unimportant, though their open functionality may be misconceived as an absence of boundaries. The borders allow for trade and passage, and the boundary areas might create opportunities for the borderlanders that did not earlier exist. Universally, the globalised economy should sufficiently illustrate the interdependence of

⁷⁴⁵ Lomasky, Loren, “Towards a Liberal Theory of National Boundaries”, in: Miller, David & Hashmi, Sohail H. (eds), *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press, Princeton, 2001) pp. 55-78 at 57

⁷⁴⁶ Nick Megoran helpfully observed the need to add the requirement of legitimacy to the wishes and needs, as all attempts to use borders for various purposes, e.g. for trafficking drugs and child sex slaves, are not legitimate.

⁷⁴⁷ Buchanan, *supra* note 32, at 231-2

states economically, and the dependence of smaller companies and physical persons on extra-national trade should arouse little objection. It should then be quite evident that in practical terms boundaries clearly matter, especially because they can be closed. This affects people radically, which *inter alia* provides the rationale for the international sanctions regime.⁷⁴⁸ If cross-border possibilities matter to such a high degree, the response that the location of boundaries does not matter because a democracy can function within any borders surely misses the mark – it is a non-response to the real issue, and ignores the fact that political systems within states rarely feed people. Whatever the system within a specific state, the neighbour state could close its boundaries, and thus affect people dramatically.

It is not uncommon for states to implement hard border regimes as a nation-building tool, as open borders or frontier zones can be understood to be a threat to homogenous national identity and control or detract from efforts to achieve national integration.⁷⁴⁹ But hard border regimes risk causing severe negative effects on border populations, and the effects of changes to the status or location of a border might even come to jeopardise long-term peace.⁷⁵⁰ Soft border regimes may help to reduce the dramatic negative effects that a change in the status, functionality, or location of a border might cause. In some cases, such advice is already being given. A late 2002 ICG report on the work of the OSCE in Central Asia suggested *inter alia* that in developing a new Central Asian policy the organisation should focus on selected areas of “real significance for conflict prevention”, the first area being “border projects promoting freedom of movement, effective security and cross-border trade”.⁷⁵¹

Though the last decade in post-Schengen Europe, in contrast with recent developments in Central Asia, has witnessed reduced supervision of the ‘inner’ international borders, with the borders to a great extent gaining the character of internal administrative divisions,⁷⁵² it should not be forgotten that supervision of the outer borders of the Schengen area has been and will

⁷⁴⁸ See e.g. Cortright, D. & Lopez, G., *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner Publ., Boulder, 2000)

⁷⁴⁹ Augelli, John P., “Nationalization of Dominican Borderlands”, *70 Geographical Review* 1 (1980) 19-35. Since the use of nationalism as a critique of territorial arrangements nation-building has increasingly begun to be used as legitimising present territorial arrangements, building *inter alia*, but not only, on the liberal assumption. In the case of the post-1999 harsher Uzbekistani border policies, Megoran wrote that “[a]s opposition to the incumbent regime became increasingly violent, the spotlight was turned on to fortifying the borders as bastions of security.” Megoran, *supra* note 658, p. 106

⁷⁵⁰ In his study of the borderlands between the Dominican Republic and Haiti, Augelli concluded that nationalisation projects may actually increase border frictions in borderlands and cause instability. Augelli, *supra* note 749, at 35

⁷⁵¹ ICG Asia Report No. 38, “The OSCE in Central Asia: A New Strategy”, 11 September 2002 (Osh/Brussels) p. iii, at <http://www.crisisweb.org>. See also ICG Central Asia Briefing, “Central Asia: A Last Chance for Change”, April 29, 2003

be further strengthened. It remains to be seen what the long-term response towards the borderlanders in these cases will be.

6.2.2 Border disputes: issues and responses

6.2.2.1 Identifying the problems

There exist numerous types of boundary disputes⁷⁵³ and related problems. Prescott has listed four types of boundary disputes: territorial, positional, functional and resource development-based.⁷⁵⁴ The contested subject matter and the interested parties will vary greatly, and there are diverse originators of such disputes or tensions.⁷⁵⁵ It seems that boundary disputes at first glance often successfully disguise what they actually might involve, and frequently carry with them deeper dimensions and hidden purposes. Boundary conflicts are not infrequently used to strengthen national identity generally or in borderlands, or to deflect attention from domestic problems.⁷⁵⁶ Though boundary disputes have an interstate character, the frustration or interest of frontier groups or borderlanders might additionally lead to boundary tensions and conflict.

⁷⁵² In northern Europe this has long been the case with customs unions and unrestricted passage between Denmark, Norway, Sweden and Finland. Major exceptions within the Schengen *acquis* are jurisdiction and asylum issues.

⁷⁵³ Brownlie has warned generally against over-dramatising boundary situations and using the term ‘dispute’ without defining it, since it is a specific concept involving precise elements under international law. Brownlie, *supra* note 256, pp. 12-14. In the *Frontier Dispute case* the ICJ distinguished between “delimitation disputes” and “disputes as to attribution of territory” and concluded that in most cases it was more an issue of differences in degree than in kind. See *Case concerning the Frontier Dispute* (Burkina Faso/The Republic of Mali), ICJ Rep. (1986) 554-651 at 563 (§17). Wood & Milefsky distinguish between boundary, border and territorial disputes, where *boundary* disputes are defined as conflict over the status or configuration of lines, *border* disputes are conflict over the people or resources within frontiers, and *territorial* disputes are other types of conflict over land, whether or not adjacent to the boundary. Wood & Milefsky, *supra* note 11 at 121, footnote 3. See also Huth, Paul, *Standing Your Ground: Territorial Disputes and International Conflict* (University of Michigan Press, Ann Arbor, 1996) pp. 19-32

⁷⁵⁴ In the first type of situation the disputed territory is attractive for some reason; in the second the dispute often concerns different interpretations of terms used when the border was determined, either at allocation, delimitation or demarcation. The third type concerns state functions exercised at the border, and the last originates in relation to transboundary resources, such as rivers or non-renewable resources. Prescott, *supra* note 651, pp. 90-127

⁷⁵⁵ The ‘instigators’ of a dispute or of border tensions may be the leadership of a state, the general population or a specific interest group. The reasons for entering into a dispute are non-exhaustible; a historical motivation of leadership has been deflection of the internal political or economic situation, while a border population may react against certain exercises of state functions at the boundary. Instead of merely identifying the subject matter of the dispute and interested parties, Prescott writes that any dispute analysis must examine the initial *cause* of the dispute, the *trigger action* setting off the claim, and the underlying *aims* of the concerned states. Prescott, *supra* note 651, p. 91. See Anderson for a short overview of territorial theories on conflict and stability. Anderson, *supra* note 40, pp. 24-36

With regard to issues relating to the locality of a border, the problem might be that of historical claims to land or the population living on it and/or a desire for access to vital resources or other important interests. An example is the case of Iraq, which believed that its access to the Gulf was blocked intentionally by the Powers delimiting the Ottoman Empire borders in an attempt to weaken the Empire, leaving modern Iraq with problems of access and communications.⁷⁵⁷

As developed above, another source of tension and conflict might be the restrictive effects arising from state functions applied to the border. This is certainly relevant to situations when internal borders of an administrative character gain international character, with all the consequences and exercise of state functions that follow in its wake. Several results could follow, and citizenship may change, creating identity issues related *inter alia* to language and schooling. Suddenly having international boundaries within a smaller and/or culturally homogenous area, such as the Ferghana Valley and the *Sandžak*, might constitute a form of “interruptive factor—the nuisance effect”⁷⁵⁸ for persons or other entities. Strict supervision of these borders hinders people from carrying out their affairs.⁷⁵⁹ Problems may be most acute in boundary zones where the populations are mixed, where the boundary has changed over time or been unknown or unclear. Hastings Donnan and Thomas Wilson have termed the groups inhabiting such an area “border cultures”.⁷⁶⁰ Interests for these groups that may be affected or the burdens imposed upon them by changes from internal administrative to international borders include: pasturing animals, visiting friends and relatives, cross-border ownership of land, cross-border labour, visa fees, difficulty in obtaining permission to pass (passport or other permit), having to pay bribes to cross the border or suffering humiliating searches and other treatment, tariffs leading to less commerce and thus difficulties in earning a livelihood, as well as currency difficulties. Negative effects for the state may be the inevitable prostitution, smuggling and illegal passage that often become very lucrative at closed or

⁷⁵⁶ Radcliffe, *supra* note 671; Megoran, *supra* note 658, pp. 63-95. See ‘modified realist’ assumptions considering the need of political leaders to retain and expand their domestic political power in relation to territorial disputes, in: Huth, *supra* note 753, pp. 41-49

⁷⁵⁷ Schofield, Richard, “Boundaries, Territorial Disputes and the GCC States” in: Long, D. & Koch, C. (eds.), *Gulf Security in the Twenty-first Century* (ECSSR, Abu Dhabi, 1997) pp. 133-68 at 137

⁷⁵⁸ The nuisance idea originated with W. S. Boggs (see Boggs, *supra* note 205, p. 16) and has been severely criticised. Here it is used merely to express that the effects of a strictly supervised or ‘closed’ border within a zone is likely to severely hamper cooperation and development within the area.

⁷⁵⁹ Closed border policies lead to *alienated borderlands* with a low degree of transnationalism where routine cross-border exchange is prevented by state policy and/or tensions between the respective states or populations. Other denotations of borderlands are: *coexistent* (having modest cross-border dealings), *interdependent* (moderate to high level of interaction between the regions) and *integrated* (without barriers). Martinez, Oscar, “The Dynamics of Border Interaction – New Approaches to Border Analysis” in: Schofield, C. (ed.), *Global Boundaries* (Routledge, London, 1994) at 9-10

tightly controlled borders with differences between the states.⁷⁶¹ Less restrictive borders may instead prove beneficial for the interests of borderlanders, as their proximity to the boundary then allows the possibility of choosing the best options and advantages available from two countries, instead of one.⁷⁶²

Prescott has shown that when the location of a boundary is shifted the effects are likely to be more problematic and burdensome for the border population when the former boundary enjoyed a long history, when the states exercise many tax and security functions at the border, when the border population is 'moved' into an ethnically dissimilar state, and when the economy of the border group is separated from the one with which it was integrated. Problems usually concern language, labour (which side to work on), cultural expression and state policies of assimilation and the creation of national cultures, as well as restrictive or 'hard' border effects disrupting human activities.⁷⁶³

William Wood and Raymond Milefsky have voiced strong criticism on the absence of studies revealing the relationship between ethnicity and the role of boundary and border disputes as regional destabilisers. They comment:

The key causal factor in recent wars is not either ethnic tension or arbitrary colonial boundaries, but the adverse interaction between historically mistreated ethnic groups and the imposed boundaries that divide them, problems compounded by repressive regimes that deny minority groups basic human rights and constitutional protections.⁷⁶⁴

⁷⁶⁰ Donnan & Wilson, *supra* note 678, pp. 11-14

⁷⁶¹ These may be argued to be either/both detrimental or/and beneficial for the state and the border population when viewed from different perspectives. See a discussion, *ibid.*, pp. 87-106. Another perspective should also be added – that of class; groups who smuggle may or may not have political connections or even contain persons from the political establishment. (Megoran, *supra* note 658, pp. 225-37) Their 'border-crashing' enrichment is facilitated by their relation to power, but detracts from state wealth. The triad could then be the population, the state, and a powerful class. Lundén argues that smuggling often is detrimental to border populations, as it leads to added controls, queues, closed border roads and higher overall crime. Lundén, Thomas, *Över gränsen: Om människan vid territoriets slut* (Studentlitteratur, Lund, 2002) p. 89. In the case of Uzbekistan, the state has come down hard on border traders of all kinds. See e.g. "Uzbekistan: Traders Clash with Police", IWPR Reporting Central Asia (RCA) No. 145, September 10, 2002; "Uzbekistan: Shuttle Traders Curbed", RCA No. 129, July 12, 2002; "Uzbekistan: Traders Protest over Tax", RCA No. 133, July 30, 2002 (<http://www.iwpr.net>). In the Yugoslav case, the sanctions against Yugoslavia, which aimed to close its borders from the outside, transformed the Yugoslav economy into the shades of grey and black with the consent of its government. Arms and produce smuggling took place between all groups throughout the wars (1992-95) as well as in Kosovo (1999), generally providing the only multi-ethnic cooperation in the area. See Cortright & Lopez, *supra* note 748; ICG Balkans Reports, e.g. No. 117, "Serbia's Transition: Reforms under Siege", September 21, 2001, and "Bosnia's Precarious Economy: Still not Open for Business", August 7, 2001. Also, Glenny, Misha, *The Fall of Yugoslavia: The Third Balkan War*, 3rd ed. (Penguin, London, 1996).

⁷⁶² Martinez has suggested that though borderlanders often face conflict-generating circumstances, "[o]n the other hand, to be a borderlander is to have opportunities unavailable to people from heartland areas." Martinez, *supra* note 759, at 14. And in the African context Nugent and Asiwaju have concluded that "most border populations themselves exhibit minimal interest in the redrawing of boundaries. The frontier is often a zone of opportunity precisely because of its ambiguity." Nugent & Asiwaju, *supra* note 734, at 269

⁷⁶³ Prescott, *supra* note 647

A clarification is appropriate here. Relationships relevant when considering ethnicity and boundaries are: the leadership of a state and its population (one or several ethnic or other identity groups or borderlanders, which may consist of one or several ethnic or other identity groups); ethnic groups within a state; ethnic groups across boundaries; and the leaderships of neighbour states. Ethnicity and boundaries cannot be the sole determining factors leading to conflict, as in 1991 Central Asia remained calm, in contrast with Yugoslavia. Even here there is little basis for generalisations: while the *Krajina* was on fire, the *Sandžak* saw less violence.⁷⁶⁵ It must then be vital to study the differences between the contexts.

The focus on ethnicity has been criticised as being superficial in the context of Central Asia, and the term ‘vulnerability’ to conflict might perhaps be more helpful.⁷⁶⁶ Structural problems could lead to the special vulnerability of a population that might in turn become easily manipulated by certain actors in painting the origin of the ills in society, and in projecting grave ‘threats’. The purposes of such rhetoric usually differ, as the object might be to distract from domestic problems, or to legitimise strong control of the state and its boundaries. Not only state leaderships may apply the *lingua* of ethnicity to gain support. Political oppositions may use similar tactics by painting threats and attacking state policies to advance their positions.

Boundaries or ethnicity clearly should not be considered to lead to conflict in themselves; it is instead the usage and reference to these by leaders as having a certain meaning, portraying ethnic differences as threatening, that often is incendiary, or as the quote above mentioned – governmental oppression of groups – that builds resistance. Thus it can be argued that a boundary conflict generally involves certain components: a spark that ignites a dissatisfaction caused either by adverse effects experienced by borderlanders by the functionality of a boundary, adverse effects experienced by the state due to boundary location or functionality, or *perceived threats* as projected in the political space by different actors for varying purposes.⁷⁶⁷ An illustrative example is provided by Saadia Touval, who noted with regard to African border partitions that multi-ethnic states seem to have been regarded as being less threatening to partitioned groups, as “*all* the ethnic groups in the state are

⁷⁶⁴ Wood & Milefsky, *supra* note 11, at 110

⁷⁶⁵ ICG Balkans Report No. 48, “Sandzak: Calm For Now”, November 9, 1998

⁷⁶⁶ See ‘vulnerability’ used in Vaux, J. & Goodhand, J., “Disturbing Connections: Aid and Conflict in Kyrgyzstan”, *Conflict Assessments* (The Conflict, Security and Development Group, London, 2001) at: http://www.dfid.gov.uk/Pubs/files/Book%203_Kyrgyzstan.pdf (accessed 24/04/2003)

⁷⁶⁷ Vaux & Goodhand have distinguished between ‘grievance’, meaning the “discontent of excluded groups generated by poverty, unemployment, political repression”, and ‘greed’, referring to “opportunities for excessive self-enrichment by elite or powerful groups”, suggesting that the “danger [of leading to conflict] lies in the interactions between the two factors”, and not in any of the factors alone. *Ibid.*, p. 10

‘minorities’”.⁷⁶⁸ This theory could be applied to the second Yugoslavia, where the threat of dominance by one group over the others formed the background to the structure set up and the image projected by Tito. With the internationalisation of former federal/internal boundaries in 1991, in Croatia the Serbian minority in *Krajina* risked domination by the Croatian majority, and in Bosnia-Herzegovina the Serbian minority risked domination by the Croatian and Bosnjak majority.

This vulnerability is not taken fully into account in the general liberal theory on boundaries, which assumes that a liberal state can function within any borders.⁷⁶⁹ Perhaps it can, but the reality is that the near perfect state does not yet exist that takes into account all legitimate interests and sensitivities, or can reduce all friction or the memory of past injustices inflicted. The importance of identity, coupled with other contextual factors and added to a specific vulnerability, may cause the relationship within and to the state to malfunction. David Miller writes that “there may be circumstances in which liberals should support a division of territory involving some movement of population to create political units that can then operate according to liberal principles.”⁷⁷⁰ The question to be posed in such cases is which value should have priority – the idea of the multicultural state or peace? Concerning African retention of boundaries, Bowett wrote already in 1966 that the “free, multi-racial society” is not easily created: “it can be achieved if the different elements which comprise it are willing partners in this ideal, but if not, it is not an ideal which can be imposed on them by force.”⁷⁷¹ Furthermore, the liberal position implies that illiberal states do not have the same chance of success within any boundaries, and that boundary changes may then be more understandable, necessary or legitimate with regard to such states.

In Central Asia the effect of strict border controls on passage and transport is clearly problematic for those who live in the area, especially in the Ferghana Valley. Ethnicity has been less of an explosive issue, at least in relation to boundaries. The aim for most of the populations affected by the boundaries is neither separation nor power, but freedom of passage and trade. This can be seen from the fact that internationalisation caused little

⁷⁶⁸ Touval, Saadia, “Partitioned Groups and Inter-State Relations” in: Asiwaju, A.I. (ed.), *Partitioned Africans: Ethnic Relations across Africa's International Boundaries 1884-1984* (C. Hurst & Co., London, 1985) pp. 223-232 at 224

⁷⁶⁹ Buchanan wrote that some liberal thinkers have added minority rights as a supplement to individual rights. Buchanan, *supra* note 32, at 231-2

⁷⁷⁰ Miller, D., “Liberalism and Boundaries: A Response to Allen Buchanan” in: Buchanan, A. & Moore, M. (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press, Cambridge, 2003) pp. 262-72 at 265

⁷⁷¹ Bowett, *supra* note 14, at 130

friction, apart from for the new Russian minority, while the harsh boundary restrictions enacted by Uzbekistan in 1999 caused hardship and growing frustration for the borderlanders.

The context differs radically from that of the *Krajina*, where the location of the internationalised boundary carried important implications for both national identity – being a majority or constituting a minority in a new state – and the perceived safety of the border population. Merely changing the status of the boundary was explosive, even apart from any restrictive functionality of the boundary itself. Concerning the *Sandžak*, located on both sides of the boundary between Serbia and Montenegro, the effect of internationalising the border – dividing the entity between two independent states – will not be to change the status or power position of the population. Grave tensions and frustrations may possibly be prevented if practical day-to-day restrictions on passage and trade can be avoided by setting up a special boundary *regime*. Focusing on the functionality of the boundary and easing restrictions might in this case provide a viable solution to the problem of boundary change.

6.2.2.2 Responses to locational and functional boundary changes and recent legal developments

There are several historic examples of very practical state responses that have been applied to soften the effects both of border changes and the creation of new borders. One method used has been that of making special arrangements for border zones surrounding the altered border. After the first world war several bilateral agreements were concluded where states established economic frontier zones in areas where the location of boundaries had been changed.⁷⁷² The ‘Free Zones’ around Geneva were established to minimise the effects of strict modern international boundary supervision on the inhabitants in an area with a special history and location.⁷⁷³ In 1953 Yugoslavia and Austria agreed to set up a frontier strip on both sides of their common border where those owning straddling property, involved in forestry, or herding livestock across the border, could cross the border without the usual formalities.⁷⁷⁴ In his 1959 study on the effects of post-second world war locational boundary changes on Franco-Italian

⁷⁷² A treaty of 1926 between Hungary and Yugoslavia established 10 km to 15 km wide zones on both sides of the border allowing free trade and traffic. A 1931 agreement between Germany and Poland established a 10 km wide zone in each country where those residing within the zone had access to special permits which granted certain rights of passage. Boggs, *supra* note 205, pp. 101-3

⁷⁷³ *Ibid.*, pp. 123-6. See also the *Free Zones case*, PCIJ (1932)

⁷⁷⁴ The agreement affected 195 Austrian and 41 Yugoslav communes and specified 34 crossing points. Prescott, *supra* note 647, p. 6

borderlanders, John House described earlier efforts to minimise friction in the area, and mentioned that boundary treaties recognising the special ‘rights and difficulties’ of the borderlanders were agreed as far back as 1760. In order to minimise the effects of the boundary changes effected under the 1947 Treaty of Peace with Italy several actions were taken, one of the earliest being the establishment of a bilateral conciliation commission that would investigate ‘friction in the frontier area’, especially problems of land use and of rights of access.⁷⁷⁵

The setting up of mandates under the League of Nations had also brought with it new or altered boundaries. There are examples of agreements concluded between mandatory powers to reduce restrictive border functions in order to allow agriculture to continue despite village fields having been placed on the ‘wrong’ side of the new boundary, or to allow cross-border labour to continue.⁷⁷⁶ Additionally, there exist pre-mandate colonial examples of zonal or group arrangements; agreements that allowed, for example, grazing rights, passage for cross-border groups, or the retaining of land on the ‘wrong’ side of the border, were sometimes concluded between protectorate or colonial powers in Africa.⁷⁷⁷ The boundary between

⁷⁷⁵ The Treaty of Turin (1760). There is also an 1861 Protocol to an 1860 Treaty of Turin involving territorial transfers that made special borderlander arrangements. In the 1947 Treaty the rights of those living along the frontier were again legally protected. House, John, “The Franco-Italian Boundary in the Alpes Maritimes”, 26 *Transactions and Papers (Institute of British Geographers)* (1959) 107-31 at 120, 128. See also Klemencic, V. & Bufon, M., “Geographic Problems of Frontier Regions: The Case of the Italo-Yugoslav Border Landscape”, in: Rumley, D. & Minghi, J. (eds.), *The Geography of Border Landscapes* (Routledge, London, 1991) pp. 86-103

⁷⁷⁶ Biger describes the 1923 French and British demarcation of the Palestinian-Syrian-Lebanese boundary and the following 1926 *Bon Voisinage* agreement to set up an administrative system allowing the cultivation of land, thus ignoring the international border that had left some villages separated from their land. Biger, Gideon, “Village Boundaries as a Factor in Delimiting International Boundaries in the Middle East” in: Schofield, C. et al (eds.), *The Razor’s Edge: International Boundaries and Political Geography* (Kluwer Law International, London, 2002) pp. 463-71 at 467. The 1926 agreement allowed the use of water for irrigation, fishing, navigation and drinking from the lakes by Tiberias and Houla. Gresh, Alain, “Une, deux, trois frontières...” at page: <http://www.monde-diplomatique.fr/2000/01/GRESH/13312> (accessed 17/03/2003). The Lebanese borderland has since been subject to inter-state conflict and occupation, with a UNIFIL supervised Blue Line since May 2000, which still separates several villages from their land, though now with a ‘hard’ border regime. Article IV of a 1908 treaty between Italy and Ethiopia required the governments to “recognise reciprocally the ancient rights and prerogatives of the tribes bordering the frontier without regard to their political dependence, especially as regards the working of the salt mines, which shall, however, be subject to the existing taxes and pasturage dues.” *Ethiopia-Eritrea Boundary Commission Decision* of April 13, 2002, p. 86 at <http://www.pca-cpa.org>

⁷⁷⁷ Touval, Saadia, “Treaties, Borders, and the Partition of Africa”, 7 *Journal of African History* 2 (1966) 279-93 at 289-90; Barkindo, B., “The Mandara Astride the Nigeria-Cameroon Boundary”, in: Asiwaju, A.I. (ed.), *Partitioned Africans: Ethnic Relations across Africa’s International Boundaries 1884-1984* (C. Hurst & Co., London, 1985) pp. 29-49 at 44. In some cases colonial boundaries were decided to not have any effect, due to unclarity, on individual, family, and tribal land rights. Nugent, P., “Arbitrary Lines and the People’s Minds: A Dissenting View on Colonial Boundaries in West Africa”, in: Nugent, P. & Asiwaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) pp. 35-67 at 49-53. Article IV of a 1908 treaty between Italy and Ethiopia required the governments to “recognise reciprocally the ancient rights and prerogatives of the tribes bordering the frontier without regard to their political dependence, especially as regards the working of the salt mines, which shall, however, be subject to the existing taxes and pasturage dues.”

Canada and the United States provides a modern example where the border is completely open to North American Native Americans. Special border regimes are not restricted to ameliorating economic concerns, but can be constructed to permit continued close familial and social contacts.⁷⁷⁸ In this way regimes may focus directly on the border populations, minimising immediate negative effects on their activities arising from locational or functional changes.

More general approaches, which not only focus on borderlanders, have also been attempted. The League of Nations endeavoured to respond to the negative economic effects of border changes and the stricter supervision of state borders that followed after the war in several ways.⁷⁷⁹ The Covenant of the League of Nations Article 23(e) focused on freedom of commerce over borders,⁷⁸⁰ and the Organisation attempted to assist in problems related to borders, setting up a semi-autonomous Communications and Transit Organisation.⁷⁸¹ The concept of protected areas across frontiers is another attempt at cooperation in order to minimise harm arising from the existence of international boundaries. Including ‘peace parks’ or ‘transfrontier/transboundary protected areas’, this regime entails cooperation across divided ecosystems,⁷⁸² which has been argued to benefit peace, as it reduces stress along tense boundaries, and is in the interests of borderlanders.⁷⁸³ In her 1999 study on internationally adjoining protected areas Dorothy Zbicz counted 488 different areas in 136 clusters involving 98 countries.⁷⁸⁴ Another type of interstate co-operation involves transboundary resource

Ethiopia-Eritrea Boundary Commission Decision of April 13, 2002, pp. 86, 88 at <http://www.pca-cpa.org>. For further agreements showing special consideration for the needs of border populations, see Brownlie, *supra* note 256, pp. 171, 246, 401, 1051-61; McEwen, *supra* note 191, pp. 37-41

⁷⁷⁸ Simplified passage was allowed between 1991-2000 for parents, children and siblings across the Estonian-Russian border at Narva-Ivangorod by granting special border-crossing permits. Berg, Eiki, “Deconstructing Border Practices in the Estonian-Russian Borderland”, 5 *Geopolitics* 3 (2000) 78-98 at 83

⁷⁷⁹ Bowman, *supra* note 718, pp. 23-4. Note that the changes made to boundaries primarily after the first world war were a response to the requirements of self-determination, but were not uniformly applied on this basis, and systems of minority protection were set up to compensate for this shortfall. What can also be noted is the provision within the peace treaties, such as Part XII of the Versailles Peace Treaty, where unilateral obligations to grant freedom of transit etc. were laid down.

⁷⁸⁰ Article 23: *Subject to and in accordance with the provision of international conventions existing or hereafter to be agreed upon, the Members of the League: ... (e) will make provision to secure and maintain freedom of communications and of transit and of equitable treatment for the commerce of all the Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind.*

⁷⁸¹ The first LoN’s conference on transit and communications was held in 1921. A Statute for the Organization was adopted only in 1938.

⁷⁸² For an introduction see http://www.unep-wcmc.org/protected_areas/transboundary/index.html (accessed 24/03/2003)

⁷⁸³ Kliot, Nurit, “Transborder Peace Parks: The Political Geography of Cooperation (and conflict) in Borderlands”, in: Schofield, C. *et al* (eds.), *The Razor’s Edge: International Boundaries and Political Geography* (Kluwer Law International, London, 2002) pp. 407-36

⁷⁸⁴ A 1999 list of peace parks globally can be found at http://www.unep-wcmc.org/protected_areas/transboundary/adjoining.pdf

exploitation. When living or non-living resources – some of the more important ones being hydrocarbons, fish stocks, and freshwater – straddle boundaries, states usually realise that they would benefit more from cooperation than from unilateral exploitation or extraction. Joint development zones (JDZ) have been set up in several cases around both agreed and disputed land or maritime boundaries for the extraction of hydrocarbons.⁷⁸⁵ A small number of multilateral conventions have also been adopted for living resources.⁷⁸⁶ Closer regional integration is the next step as a long-term approach to building regional stability. This goes beyond focusing on border functionality, lessening state functions applied at the boundary, and resource extraction cooperation, and involves further positive actions involving cooperation in various areas and levels.⁷⁸⁷

The examples above are models used for easing boundary tensions and building long-term stability. They are to be understood only as methods for interested parties who desire peaceful relations at all levels. However, a search for binding norms under international law which *require* or *prohibit* certain actions or behaviour in relation to boundaries and related resources, reveals much less, as there seem to be very few rules.⁷⁸⁸ Even the utilisation of cross-border freshwater resources is still relatively unclear. Only a few principles and rules that regulate the relation between upstreams and downstreams river states, such as the

⁷⁸⁵ There are agreements on JDZs between Sao Tomé and Nigeria, Bahrain and Saudi Arabia, Venezuela and Trinidad-Tobago. Volterra, Robert, “Transboundary hydrocarbon disputes and their settlement”, lecture 12/11/02, IBS, King’s College. There are older examples of JDZs between Japan and South Korea, as well as between PRC and North Korea. Lagoni, Rainer, “Oil and Gas Deposits across National Frontiers”, 73 *AJIL* 2 (1979) 215-43 at 224-5. See further agreements in Ong, David, “Joint Development of Common Offshore Oil and Gas Deposits: ‘Mere’ State Practice or Customary International Law”, 93 *AJIL* 4 (1999) 771-804 at 774; also Shihata, I. & Onorato, W., “Joint Development of International Petroleum Resources in Undefined and Disputed Areas”, pp. 433-53, and Miyoshi, M., “International Maritime Boundaries and Joint Development: A Quest for a Multilateral Approach”, pp. 453-71, in: Blake, G., Pratt, M. *et al* (eds.), *Boundaries and Energy: Problems and Prospects* (Kluwer Law International, The Hague, 1998)

⁷⁸⁶ International Convention for the Conservation of Atlantic Tunas of 1966; the 1995 UN Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Texts at: <http://sedac.ciesin.org/entri>

⁷⁸⁷ ‘Integration’ and ‘interdependence’ theories argue that territorial competition becomes a non-issue at closer inter-state integration. Anderson, *supra* note 40, p. 31. The treaties preceding the EU were constructed on theories connecting integration and peace. Craig, Paul, “The nature of the Community: Integration, Democracy, and Legitimacy”, in: Craig, P. & de Búrca, G. (eds.), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999) pp. 3-23. See also Duchêne, François, *Jean Monnet: The First Statesman of Interdependence* (W. W. Norton & Co., N.Y., 1994)

⁷⁸⁸ Several authors argue the existence of a legal obligation for states to cooperate in the exploitation of certain shared natural resources. Lagoni, *supra* note 785, at 235; Ong, *supra* note 785, at 796. The UNGA has adopted several (non-binding) resolutions on the requirement of cooperation in exploiting *et al* of cross-border resources. See e.g. the Charter of Economic Rights and Duties of States, GA Res. 3281(XXIV), December 12, 1974, Article 3: *In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.*

principle of 'equitable utilization', seem clear.⁷⁸⁹ There is, nevertheless, substantial support for the claim that there is no 'absolute' state sovereignty over shared water resources.⁷⁹⁰

There exists one uncontroversial legal regime for shared sovereignty or ownership of resources. After the end of the first world war several condominiums were temporarily set up in order to administer areas whose boundaries had been shifted as a result of the Paris Peace Conference.⁷⁹¹ Shared sovereignty through the condominium regime could provide a useful option where an area or resource is disputed.⁷⁹²

However, there has not traditionally existed any presumption of shared sovereignty within international law, as the Lac Lanoux arbitration case of 1957 has illustrated.⁷⁹³ No condominium that would require consensus on decisions regarding the cross-border Pyrénées

⁷⁸⁹ The Tribunal in the Lac Lanoux case admitted that "il existe un principe interdisant à l'Etat d'amont d'altérer les eaux d'un fleuve dans des conditions de nature à la nuire gravement à l'Etat d'aval". Affaire du Lac Lanoux (France/Spain), 12 *RIAA* 281(1957) 281 at 308. McCaffrey has suggested three obligations relating to the use of international watercourses: of equitable and reasonable use; the 'no-harm' rule; and of protection of the watercourse and its environment. McCaffrey, Stephen C., *The Law of International Watercourses: Non-Navigational Uses* (Oxford University Press, Oxford, 2002) pp. 324-96. The ICJ has argued that the adoption of the 1997 International Watercourses Convention is evidence of the strengthening of the principle of shared resources or common legal right in a river by all riparian states. "The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube [...] failed to respect the proportionality which is required by international law." Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997, §85. The situation will become clearer at the entry into force of the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses, A/RES/51/229 (21 May, 1997) drafted by the ILC. As of 08/05/03 the Convention had 16 signatories and 12 parties and requires 35 ratifications etc. before entry into force. Article 7 lays down the duty to "take all appropriate measures to prevent the causing of significant harm to other watercourse States." Article 9 includes an obligation to exchange information. Article 5 requires that usage and participation in development and protection of an international watercourse be performed in "an equitable and reasonable manner."

⁷⁹⁰ Tanzi and Arcari have claimed: "The theory of limited territorial sovereignty of riparian States is nowadays largely accepted in principle [...] as the foundation of the substantive rules of the law of international watercourses." The theory is based both on the idea that the state has rights and duties with regard to its territory, implying their prohibition on causing damage to the territory of other states, as well as the sovereign equality principle, which entails that co-riparians have equal rights/duties in using shared watercourses. Tanzi, A. & Arcari, M., *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing* (Kluwer Law International, The Hague, 2001) pp. 14-5. They refer to UN sources estimating the number of transboundary rivers to over 300. Tanzi & Arcari, p. 5. McCaffrey *inter alia* refers to the PCIJ River Uder case (1929) and the Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997 for the argument that not only is there limited territorial sovereignty over shared watercourses, but perhaps even a 'community of interests'. McCaffrey, *supra* note 789, pp. 71, 149-71

⁷⁹¹ Condominiums were set up after the first world war as "temporary arrangements or measures of last resort." Northern Dobruja, Memel, Danzig, eastern Galicia, Fiume and western Thrace were administered as such. Earlier examples of condominium regimes are Schleswig-Holstein and Lauenburg shared by Austria and Prussia; the Sudan under Great Britain and Egypt; and the New Hebrides and Isle Maurice under France and Great Britain. Schneider, Peter, "Condominium", in: Bernhardt, R. (ed.), *EPIL* <1> (North-Holland, Amsterdam, 1992) pp. 732-5

⁷⁹² Tanzi & Arcari have explained the "aversion" of states to the concept, as any language hinting at resource 'internationalisation' is perceived as communicating an "erosion" of their sovereign rights over the resources. Tanzi & Arcari, *supra* note 790, pp. 22-3

⁷⁹³ However, in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening), ICJ Rep. (1992) 351-618 at 601-2 the ICJ found that the Gulf of Fonseca had the status of condominium, despite the fact that two of the three coastal states did not consent to this.

water resources existed between France and Spain. Such a regime or other restrictions on a state's use of its resources require clear agreement as to their creation.⁷⁹⁴ While the Tribunal agreed that France had to show consideration for the interests of Spain, the latter state had no veto power over France's actions and could not require a prior agreement in order for France to construct its river diversion scheme.⁷⁹⁵ The consideration to be shown seems primarily to have been understood as procedural, and was not an obligation of result, giving consideration

⁷⁹⁴ The Tribunal explained: "Ce texte [article 8 du Traité de Bayonne en date du 26 Mai, 1866, et de l'Acte additionnel] pose lui-même une réserve au principe de la souveraineté territoriale («sauf les modifications convenues entre les deux Gouvernements»); des dispositions du Traité et de l'Acte additionnel de 1866 énoncent les plus importantes des modifications; il peut y en avoir d'autres." ("The Text itself imposes a reservation on the principle of territorial sovereignty ('except for the modifications agreed upon by the two Governments'); some provisions of the Treaty and of the Additional Acts of 1866 contain the most important of these modifications; there can be others." Translation in: MacChesney, Brunson, "Lake Lanoux Case" 53 *AJIL* (1959) 156-71 at 159) The tribunal continued: "La souveraineté territoriale joue à la manière d'une présomption. Elle doit fléchir devant toutes les obligations internationales, quelle qu'en soit la source, mais elle ne fléchit que devant elles." ("Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations." Translation in: MacChesney, *ibid.*, at 159.) The Tribunal referred to the Prises d'eau à la Meuse case (PCIJ) where the PCIJ observed that though references had been made to rules of fluvial PIL, they found that "les questions litigieuses, telles qu'elles lui sont posées par les Parties dans la présente affaire, ne lui permettent pas de sortir du cadre du Traité de 1863." ([T]he litigated questions such as those presented by the Parties in the present case do not allow the Court to go beyond the framework of the Treaty of 1863." Translation in: MacChesney, *ibid.*, at 160.) The tribunal accordingly decided that it "ne pourrait s'écarter des règles du Traité et de l'Acte additionnel de 1866 que si ceux-ci renvoyaient expressément à d'autres règles ou avaient été, de l'intention certaine des Parties, modifiés." ("The Tribunal may deviate from from the rules of the Treaty and of the Additional Act of 1866 only if they referred expressly to other rules or had been modified with the clear intention of the Parties." Translation in: MacChesney, *ibid.*) Affaire du Lac Lanoux (France/Spain), 12 *RIAA* (Reports of International Arbitral Awards) (1957) 281 at 300-1. See also p. 308

⁷⁹⁵ The Tribunal explained that "[l]a souveraineté des Etats contractants sur les eaux des fleuves successifs, qui coulent sur leur territoire, n'est pas absolue" and subject to agreements between the parties. If it would have confirmed that a prior agreement was required, "[c]'est admettre un «droit d'assentiment», un «droit de veto», qui paralyse, à la discrétion d'une Etat, l'exercice de la compétence territoriale d'un autre Etat." Affaire du Lac Lanoux (France/Spain), 12 *RIAA* (1957) 281 at 297, 306 ("This is the same as admitting 'a right of assent,' a 'right of veto,' that paralyzes the exercise of territorial competence of one State at the discretion of another State." Translation in: MacChesney, *supra* note 794, at 163.) The Tribunal nevertheless continued by confirming the more moderate duty coming under good faith: "C'est pourquoi la pratique internationale recourt de préférence à des solutions moins extrêmes, en se bornant à obliger les Etats à rechercher, par des tractations préalables, les termes d'un accord, sans subordonner à la conclusion de cet accord l'exercice de leur compétences. On a ainsi parlé, quoique souvent d'une manière impropre, de «l'obligation de négocier un accord». En réalité, les engagements ainsi pris par les Etats prennent des formes très diverses et ont une portée qui varie selon la manière dont il sont définis et selon les procédures destinées à leur mise en œuvre; mais la réalité des obligations ainsi souscrites ne saurait être contestée et peut être sanctionnée, par exemple, en cas de rupture injustifiée des entretiens, [...] de refus systématiques de prendre en considération les propositions ou les intérêts adverses, plus généralement en cas d'infraction aux règles de la bonne foi". Affaire du Lac Lanoux (France/Spain), 12 *RIAA* (1957) 281 at 306-7 ("That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of this agreement. Thus, mention has been made, although often in an improper manner, of the 'obligation of negotiating an agreement.' In reality, the pledges thus taken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and can be sanctioned, for example, in the case of an unjustified breaking off of the discussions, [...] systematic refusals to take into consideration adverse proposals or interests, more generally in case of violation of the rules of good faith". Translation in: MacChesney, *supra* note 794, at 163-4)

of Spanish interests “une place raisonnable”.⁷⁹⁶ One could liken it to the principle of equitable use. The decision left the border zone or frontier with limited meaning under international law, and without any duties or rights attached to it.⁷⁹⁷ The linear boundary is merely understood to constitute the division between completely sovereign neighbour states, lacking any special rules attached to it. ‘Consideration’ in this understanding owns a rather vague character – when has sufficient consideration been shown?

A change in turning consideration into law seems to be under way, and not only with respect to other states, but also to groups within states. The fundamental principle applied in boundary cases which concern title to territory has long been that of stability, thus often granting more weight to the interests of the militarily stronger state and *effectivités* than to the affected populations.⁷⁹⁸ However, a shift away from immediate security as the primary consideration in issues of territory seems to have occurred. Occupation is no longer understood as providing valid title to territory. Another example is found in the recent Cameroon and Nigeria case, where immediate security and stability had no evident impact on the reasoning by the court. Instead, the title of Cameroon, based on succession to colonial treaties, took precedence over Nigerian occupation and claimed *effectivités*.⁷⁹⁹

In an important article from 1972, Athene Munkman discussed various criteria used by arbitrators when determining boundaries, and included consideration of local populations as

⁷⁹⁶ In its conclusions the Tribunal held that Spain “peut donc simplement faire valoir ses intérêts pour obtenir, dans le cadre du projet retenu par la France, des modalités permettant raisonnablement de les sauvegarder.” (p. 316) At the Tribunal’s examination of whether France had taken Spanish interests sufficiently into account, it declared that, “il faut souligner combien sont intimement liées l’obligations de tenir compte, au cours des tractations, des intérêts adverses et l’obligations de faire à ceux-ci, dans la solutions retenue, une place raisonnable. Un Etat qui a conduit des négociations, avec compréhension et bonne foi, selon l’article 11 de l’Acte additionnel, n’est pas dispensé de faire, dans la solution retenue, une place raisonnable aux intérêts adverses, parce que les conversations ont été interrompues, fût-ce par l’intransigeance de son partenaire.” Affaire du Lac Lanoux (France/Spain), 12 *RIAA* (1957) 281 at 317. (“[I]t must be stressed how closely linked together are the obligations to take into consideration adverse interests in the course of negotiations, and the obligation to give a reasonable place to these interests in the adopted solution. A State which has conducted negotiations with understanding and good faith in accordance with Article 11 of the Additional Act is not dispensed from giving a reasonable place to adverse interests in the solution it adopts because the conversations had been interrupted, though owing to the intransigence of its partner.” Translation in: MacChesney, *supra* note 794, at 170)

⁷⁹⁷ The Tribunal stated: “Quant au recours à la notion de «frontière zone», il ne peut, par l’usage d’un vocabulaire doctrinal, ajouter une obligation à celles que consacre le droit positif.” (“As for recourse to the notion of the ‘boundary zone,’ it cannot, by the use of a doctrinal vocabulary, add an obligation to those sanctioned by positive law.” Translation in: MacChesney, *supra* note 794, at 165.) Affaire du Lac Lanoux (France/Spain), 12 *RIAA* 281(1957) 281 at 307

⁷⁹⁸ See e.g. Austro-Prussian Boundary Arbitration, Decision of October 10, 1796; St. Croix River Boundary, Award of 25 October, 1798; Muscat-Zanzibar Arbitration, April 2, 1861; French and Dutch Guyana Arbitration, 25 May, 1891

⁷⁹⁹ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) ICJ Rep. (2002) 1

one of the criteria applied.⁸⁰⁰ In the light of changes in international law, the law on territorial acquisition may be understood as having reduced significance. She therefore argued that these criteria may be more useful for tribunals than are “more traditional formulations” in resolving modern boundary disputes, and proceeded to make the important observation that the most well known territorial decisions have related to uninhabited and remote areas.⁸⁰¹ Today there are few significant uninhabited areas, which should imply that the decisions relating to such areas in response to an expansionist international community should be less relevant when it comes to populated areas and a society that today claims to prioritise peace and stability above territorial gains.

A number of judgments by the ICJ evidence the use of the criteria of consideration of populations. In the 1951 Fisheries case the ICJ examined evidence of traditional fishing rights that by long usage belonged to Norwegian fishermen, and held that,

Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.⁸⁰²

In the Gulf of Maine case, the ICJ stated that delimitation must not entail “catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned”.⁸⁰³ In the Jan Mayen case the fishing needs of 25 Norwegian fishermen were taken into account by giving weight to their needs when delimiting the fishing zones and continental shelf between the island of Jan Mayen (Norway) and Greenland (Denmark).⁸⁰⁴

But consideration of certain groups and interests does not seem to be limited to the delimitation or determination of boundaries. In a growing number of cases, international courts have decided that this consideration of groups and interests may not only affect delimitation, but may also constitute the basis for rights belonging to these groups to be exercised in specific areas. In the Right of Passage case of 1960, the ICJ held that despite

⁸⁰⁰ The list includes: historical criteria; ethnographic and social criteria; economic factors; geography; strategic factors; convenience and necessity; and equity. Munkman, *supra* note 210, at 22-26

⁸⁰¹ *Ibid.*, at 26-7

⁸⁰² Fisheries case (United Kingdom v. Norway) ICJ Rep. (1951) 116 at 127-28, 142

⁸⁰³ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA) ICJ Rep. (1984) 342, paragraph 237 (1984)

⁸⁰⁴ Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), ICJ Rep. (1993) 38 at 70-2, 79 (paragraph 72-76, 90-92). See 1958 Geneva Convention on the Continental Shelf, Article 6 on the median/equidistance line and “special circumstances”. Text in: Brown, E. D., *The International Law of the Sea* (Dartmouth, Aldershot, 1994) vol. II, p. 111. This can be distinguished from the Grisbadarna case (see chapter 2.3.3.1) where the activities of the fishermen were taken into account when interpreting the existing treaty between Sweden and Norway.

change of sovereignty over the territory in question, non-armed citizens and groups nevertheless enjoyed passage over the territory, in order to reach the Portuguese enclaves.⁸⁰⁵ The trend has continued in more recent decisions. After having determined the relevant channel forming the boundary between Botswana and Namibia in the Kasikili/Sedudu Island case, the ICJ found unanimously that nationals of both states were to enjoy equal treatment *inter alia* in their economic use of the two channels around the disputed island.⁸⁰⁶ In the Eritrea-Yemen Arbitration⁸⁰⁷ the Tribunal considered the needs of the fishermen of both states. The Tribunal determined not only the territorial and maritime delimitation but, additionally, laid down certain entitlements or rights that the fishermen of both states could exercise on both sides of the boundary. This could be paraphrased as partially determining the functionality of the boundaries or rights connected to the territory and seas, and thus moving from the presumption of complete unilateral sovereignty over territory to consideration of those concerned in the interests of long-term peace. The Tribunal explained that

In making this award on sovereignty, the Tribunal has been aware that Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law. Moreover, appreciation of regional legal traditions is necessary to render an Award which, in the words of the Joint Statement signed by the Parties on 21 May 1996, will “allow the re-establishment and the development of a trustful and lasting cooperation between the two countries.”

In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar islands and the islands of Jebel al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.⁸⁰⁸

Nuno Antunes comments that “the access to fishing grounds was seen as amounting to a *res communis omnium* benefiting both Eritrean and Yemeni fishermen.”⁸⁰⁹ With regard to the

⁸⁰⁵ Case Concerning Right of Passage over Indian Territory (Portugal v. India), ICJ Rep. (1960) 6 at 40

⁸⁰⁶ Case concerning Kasikili/Sedudu Island (Botswana/Namibia), ICJ Rep. (1999) paras. 103-4. Though the parties had already agreed to this in a 1992 communiqué, the Court uses several paragraphs to develop the implications of the obligation, and includes the equal national treatment obligation in its finding. It seems likely that had this not already been agreed by the parties to the case, the ICJ would have laid down the obligation on another basis.

⁸⁰⁷ Eritrea-Yemen Arbitration, Award, Phase I & II (October 9, 1998 & December 17, 1999) at <http://www.pca-cpa.org>

⁸⁰⁸ Eritrea-Yemen Arbitration, Award, Phase I, paragraph 525-6

⁸⁰⁹ Antunes, Nuno S. M., “The Eritrea-Yemen Arbitration: First Stage – the Law of Title to Territory Re-Averred”, 48 *JCLQ* (1999) 362-86 at 383

maritime delimitation, the consideration of the fishermen did not affect the delimitation, but carried with it duties for the states.⁸¹⁰ The Tribunal explained:

The Tribunal's Award on Sovereignty was not based on any assessment of volume, absolute or relative, of Yemeni or Eritrean fishing in the region of the islands. What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto. Further, the finding on the traditional fishing regime was made in the context of the Award on Sovereignty precisely because classical western territorial sovereignty would have been understood as allowing the power in the sovereign state to exclude fishermen of a different nationality from its waters. Title over Jabal al-Tayr and the Zubayr group and over the Zuqar-Hanish group was found by the Tribunal to be indeterminate until recently. Moreover, these islands lay at some distance from the mainland coasts of the Parties. Their location meant that they were put to a special use by the fishermen as way stations and as places of shelter, and not just, or perhaps even mainly, as fishing grounds. These special factors constituted a local tradition entitled to the respect and protection of the law.⁸¹¹

A further step can be taken by introducing human rights into the territorial arena, specifically with regard to cross-border resources. Eyal Benvenisti has connected interstate agreements with human rights obligations, and writes in relation to water resources:

The human rights perspective sets two guidelines for the negotiating riparians. First, it clearly obliges them to ensure to all individuals subject to their jurisdiction the minimal share of good freshwater sufficient for decent human subsistence. States may not agree to provide less than this minimal share to their citizens. [...] It can therefore be argued that international law has come to require each state to ensure an adequate water supply for drinking, sanitation and nutrition to its population. [...] These duties are major constraints upon the negotiating parties' margin of possible outcomes.⁸¹²

When results of interstate negotiations and agreements prejudice the enjoyment of basic human rights, these may be argued to fall within the human rights sphere. Negotiations cannot then be considered to remain within the internal affairs of states and beyond international requirements and scrutiny. The primary duty under the human rights obligations of states remains, however, towards the population of the state, and not the citizens of the neighbour state.⁸¹³ The effects of this interrelational interpretation concerning resources relates to the relationship between the state and the persons within its territory, and does not carry with it duties towards any neighbouring population. The duty is limited to not disregarding the human rights of one's own citizens or persons on one's territory when

⁸¹⁰ Eritrea-Yemen Arbitration, Award, Phase II, paragraph 109-11. For a criticism of the Award, see Reisman, Michael, "Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)", 94 *AJIL* 4 (2000), 721-36

⁸¹¹ Eritrea-Yemen Arbitration, Award, Phase II, paragraph 95. See elaboration on the 'right/entitlement', paragraph 103

⁸¹² Benvenisti, *supra* note 407, at 406-7

⁸¹³ Common Article 1(3) of the ICCPR and ICESCR (1966) nevertheless contain extra-territorial dimensions.

negotiating international agreements which affect their fundamental interests – interests that are protected under the human rights regime.

In conclusion, there is a legal basis for the claim that consideration for people in connection with resources is developing into a legal requirement at boundary delimitation, determination or changes. This may result in effects on the delimitation itself, or in rights of groups that relate to the territory. The requirement of consideration implies that boundary regimes no longer fall solely within the internal affairs of states, nor can they be bilaterally agreed and delimited without any restrictions or requirements as to their content. This is clear in relation to marine resources in maritime delimitation cases. With regard to land boundaries, it is supported both by an interrelational or interdependent interpretation of the human rights obligations of states, as well as by the connection between international peace and security and self-determination in a boundary context, where considering the needs of people also at boundary changes (for example, by reducing boundary functionality) seems to be an important factor in reducing tension and conflict.

6.2.3 Changing internal into international borders

6.2.3.1 Gaining independence within international or internal boundaries

A variety of examples of independence gained within internal administrative or agreed international boundaries can be found within the context of decolonisation. It was originally unpredicted that the borders would later have the impact of ‘modern’ borders. One conclusion that may be drawn from the manner in which *inter alia* African colonial boundaries were drawn is that they were delimited without predicting that the boundaries would later define independent states. During the years preceding the Berlin Conference (1884-5) there was no anticipation that the delimited areas would later enter into their own system of states within those very limits. The original purpose and function of the boundaries was entirely different from the function and effect that they later received after decolonisation.⁸¹⁴

⁸¹⁴ Hargreaves described the original aim of “free-trade imperialism” by extending European activity in Africa, and that “elbowing” arising from overlapping claims led to the Berlin Conference, which was to create order from the resulting chaos. The legal concept of protectorates “acquired a new popularity because it seemed to offer a method of asserting rights which other European governments could recognise without extending the protector’s administrative obligations in the countries which were being exploited commercially.” He wrote that the 1889 British-French Arrangement “marked a reluctant recognition that the old system of free trade imperialism in West Africa would have to be replaced by one involving fixed colonial boundaries.” Hargreaves, J. D., “The Making of the Boundaries: Focus on West Africa”, in: Asiwaju, A.I. (ed.), *Partitioned Africans*:

The colonial and mandate contexts involved two types of border – international and internal boundaries. Post-colonial or post-independence disputes or problems relating to borders may concern either kind or type of boundary.

An *international* border in this context is a border that was earlier agreed upon by two equally strong powers, where the border might have had a more or less restrictive effect. Often the purpose was merely to limit their zones of interest.⁸¹⁵ Sometimes local considerations, such as tribal areas, were taken into account when creating the boundary;⁸¹⁶ often rivers or riverbeds were used in delimitation. Later, at independence, disputes sometimes arose between the new leaderships of the states.

A dispute concerning a former *internal* boundary, on the other hand, is rooted in the dissolution of an empire, where internal boundaries have been selected to provide the new international borders. In such cases the new borders will not have been subject to the negotiation, delimitation and demarcation process that a majority of international borders are the result of. If one considers that a primary reason for the construction of modern international borders is to maintain peace between states,⁸¹⁷ it is important to observe that internal boundaries have not been subject to discussion regarding the interests of those later

Ethnic Relations across Africa's International Boundaries 1884-1984 (C. Hurst & Co., London, 1985) pp. 19-27 at 19-21. In Moore's oft-quoted 'Memorandum' on *uti possidetis* he recorded the principle agreed between the US and Spain in 1805 that when a state "takes possession of any extensive seacoast, that possession is understood as extending into the interior of the country [...] and to give it a right, in exclusion of all other nations, to the same." Moore, *supra* note 143, at 333. The principle would explain the presumption that the occupation of the African coast would have the same effect, and the resulting overlapping claims and need for the Berlin Conference.

⁸¹⁵ That the purpose of many colonial borders was merely to delimit zones of interest is supported by the fact that many of the borders were geometric. Such borders were often selected where there was little knowledge of the area, the cost of surveying would be too great, or the area had limited economic or strategic importance. Thus no close supervision of the boundary, and who passed, would be effected either. See similar reasons for geometric borders in tropical deserts and Antarctica. Prescott, *supra* note 651, p. 68. Nugent quotes statistics that 44 per cent of African boundaries consist of astronomical lines (meridian parallels), 30 per cent are mathematical (arcs, curves), and 26 per cent geological. Nugent, *supra* note 777, at 41-2. Boggs estimated that 30 per cent of the African boundaries were geometric. Boggs, *supra* note 205, p. 157. That many African borders were geographic does not exclude the fact that still little was required to be known about the geography, as referring to rivers as boundaries was an easy option excluding expensive demarcation. Griffiths estimated that 45 per cent of African boundaries follow rivers or watersheds. Griffiths, Ieuan, "Permeable Boundaries in Africa", in: Nugent, P. & Asiawaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) pp. 68-83 at 68. For the attraction of "adopting large rivers as the prominent natural features in a country as yet unsurveyed", see Holdich, *supra* note 650, at 598-9

⁸¹⁶ Brownlie, *supra* note 256, pp. 6-7. In some cases protectorate treaties were taken into account when drawing boundaries. See Touval, *supra* note 777, at 288-9. See also Nugent, *supra* note 777, at 42. Biger writes that though many of the borders of Middle Eastern states are geometric, as post-first world war delimitation took place with limited knowledge of the area, local village boundaries were sometimes taken into account at demarcation. Biger, *supra* note 776

⁸¹⁷ Vattel had argued in 1758 that delimitation and demarcation of borders were useful in solving disputes: "to remove every subject of discord, every occasion for quarrel, one should mark with clarity and precision the limits of territories". Erich de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite, et aux affaires des nations et des souverains*, vol. II (London) p. 137, in: Prescott, *supra* note 651, p. 54

bound by them when they become international boundaries. It is not unlikely that the latter type of post-colonial boundary therefore may be even more disputable, or problematic, than the first type for this reason, as internal boundaries often suffer from a lack of clarity that discussion could have prevented.⁸¹⁸

The majority of Latin American units that received independence in the 1800s were delimited by internal administrative Spanish boundaries, with the main exception being the international boundary between Spain and Portugal.⁸¹⁹ The African and Asian units that achieved independence in the 1900s were delimited largely by international boundaries, but also by internal boundaries. When the British and French Empires were dissolved, internal boundaries in *inter alia* French West Africa,⁸²⁰ French Indo-China and British India were used as international borders.⁸²¹ Further complicating the African situation is the fact that some colonial borders between powers that later delimited independent states were former internal boundaries of German colonies partitioned in 1919.⁸²² The Middle Eastern states that became independent in the last century had a different history. Similar to the colonies, their boundaries were established mainly by European powers, but the borders selected were sometimes prior Ottoman divisions.⁸²³ Independence was thus largely gained within former internal boundaries of an empire, as the Latin American context, but with a short period of administration by different states under the League of Nations mandate system.⁸²⁴ The Soviet and Yugoslav federal units that gained independence after 1991 were delimited only by respectively post-first and post-second world war internal boundaries.

⁸¹⁸ Prescott claimed that as internal boundaries are often less well defined than international ones, he was not surprised by the boundary disputes that arose between Benin and Niger, Upper Volta and Mali, Cambodia and Vietnam, India and Pakistan and India and Bangladesh. Prescott, *supra* note 651, p. 70.

⁸¹⁹ Britain, the Netherlands and France variously administered Guyana, Suriname, and French Guyana.

⁸²⁰ See Case concerning the Frontier Dispute (Burkina Faso/The Republic of Mali), ICJ Rep. (1986) 554-651 at 568

⁸²¹ Prescott, *supra* note 651, p. 70

⁸²² Griffiths, Ieuan, "The Scramble for Africa: Inherited Political Boundaries", 152 *Geographical Journal* 2 (1986) 204-216 at 205. German Togoland was divided into French and British Togoland as League of Nations mandates. The German internal boundary was *inter alia* used as a partitioner (see "Description of the Franco-British Frontier", 17 *AJIL* 3, Supplement (1923) 186-90), but in places no actual boundary had been delimited, leaving the border unclear. Nugent, *supra* note 777, at 48-55. In 1957 British Togoland became independent as part of Ghana, while French Togoland became independent Togo in 1960. The border has been severely restrictive on passage and trade for much of its existence, causing unrest due especially to the economic hardship this brought on the Ewes, who were divided by the boundary. Brown, David, "Borderline Politics in Ghana: The National Liberation Movement of Western Togoland", 18 *Journal of Modern African Studies* 4 (1980) 575-609 at 578

⁸²³ Biger, *supra* note 776, at 463-5

⁸²⁴ In 1906 Turkey and Great Britain exchanged notes agreeing to "delimit and record on a map" the 1892 Ottoman administrative division between Egypt and Sinai, both formally part of the Ottoman Empire, though Egypt had been under British occupation since 1882. Lalonde, *supra* note 181, pp. 78-82; cf. Bloomfield, *supra* note 237, pp. 119-43. See Article 22 of the Covenant of the League of Nations for justification of the mandate system.

The boundaries of territories that have become independent do not always show clear typological similarities. They might formerly have been internal or internationally agreed. There may be great differences in functionality and effect between different international borders, and *e contrario* there may be many functional similarities between international and internal boundaries. It has been argued that in the African context there were, in many cases, no marked differences between international and internal administrative divisions. The international boundaries had little practical or restrictive effect on the populations concerned,⁸²⁵ and were not strictly supervised.⁸²⁶ Often there was ignorance as to the actual geography of the area and the location of the boundary.⁸²⁷ This may be partly explained by the fact that the original purpose of the colonial or protectorate divisions was not effective administration of the entire territory, but instead the exclusion of other European claims.⁸²⁸

⁸²⁵ Several political geographers have suggested that the African colonial borders caused the inhabitants little actual disruption. See Boggs, *supra* note 205, p. 156; Prescott, *supra* note 647, pp. 65, 68. Prescott cited a Yoruba chief in Benin who said, "We regard the boundary as separating the French and the English, not the Yoruba." *Ibid.*, p. 68. On the effects of colonial boundaries on the population, see further Prescott, *supra* note 651, pp. 76, 94-5. Asiwaju narrowed his focus down to African groups divided by international boundaries and referred to studies showing that partitioned Africans generally continued their normal activities irrespective of international lines. Asiwaju, A. I., "The Conceptual Framework" in: Asiwaju, A. I. (ed.), *Partitioned Africans: Ethnic Relations across Africa's International Boundaries 1884-1984* (C. Hurst & Co., London, 1985) pp. 1-18 at 3-4. See also Touval, *supra* note 768, pp. 223-32. Homewood *inter alia* concluded that the effects of the French-English boundary dividing Maasailand in the 1880s seems to have had limited impact on the Maasai economy. Homewood, Katherine, "Ecological Outcomes of Boundary Formation in Maasailand", in: Nugent, P. & Asiwaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) pp. 87-110 at 104

⁸²⁶ Examples of border supervision are shown in Asiwaju, A. & Nugent, P., "The Paradox of African Boundaries", in: Nugent, P. & Asiwaju, A. (eds.), *African Boundaries: Barriers, Conduits and Opportunities* (Pinter, London, 1996) pp. 1-17 at 2-4

⁸²⁷ Six years after the Berlin Conference Holdich wrote: "I may perhaps then safely assume that all our boundary lines want more or less of surveying, and that it will be generally conceded that a gradual survey of our newly acquired African possessions is [...] an Imperial measure, demanded in the first instance by the necessity of obtaining a definite outline to our colonial possessions [...]". Holdich, *supra* note 650, at 600. He later summarised: "Africa was originally partitioned amongst European nations when the knowledge of the physical conditions governing the climate and geography of that continent were but nebulous, in the expectation that the acquisition of large slices of undeveloped territory would more or less effectually guarantee an outlet for superabundant European energy. [...] In very few instances in the African partition has the will of the inhabitants been really consulted, nor, indeed, would it be of much use to consult it. Between rival claims to govern these dark-skinned people for their own good, advanced by different European nationalities, it might have been difficult to choose. [...] This removed at least one difficulty in the way of frontier adjustments which might have raised political dissension, and it left for consideration only those geographical questions which arise from the dividing up the continent into rival spheres of interest with indefinite borders, or else into actual protectorates with definite limits, which might be regarded as already ripening for annexation." Holdich, *supra* note 673, pp. 226, 233-4. And Ancel complained: "Comme ces royaumes de l'Afrique noire, dont les cartographes du XVIII^e siècle se plaisent à tracer les limites tangible, les Etats de l'époque moderne se satisfont de zigzag bigarrés: ni les diplomates qui recourent ne savent où s'arrête ce que l'épée a conquis, ce que transcrit le traité de paix. [...] On n'imagine guère cette ignorance: elle est pourtant." Ancel, Jacques, *Géographie des Frontières* (Paris, 1938) p. 184

⁸²⁸ Asiwaju & Nugent, *supra* note 826, at 2; Herbst, *supra* note 651, especially pp. 683-5. Herbst also noted that the modern African leaders were not always in control of more than the capital city, so the functional border changes with independence may not have been great (pp. 687-8); also Herbst, J., "Responding to State Failure in Africa", 21 *International Security* 3 (1996-7) 120-144 at 127-32. Nugent likens the late 19th Century political

The areas surrounding boundaries were characterised by more of a zonal than linear character – frontiers instead of boundaries. As noted earlier, the importance of border location to the populations concerned is often reduced when the border enjoys little restrictive function. It might therefore be suggested that the difference between becoming independent within previous internal administrative or bilaterally agreed borders might not have been great, or affected the populations concerned to a noticeable extent. Most African boundaries today are still permeable,⁸²⁹ entailing that they have never fully functioned as ‘modern’ state borders with ‘hard’ character.⁸³⁰ This has probably reduced the effect of the shift in border status on everyday life, movement and trade, and thereby also reduced the likelihood of conflict.⁸³¹

The importance of noting the status of African colonial boundaries at independence – internal administrative or bilaterally agreed – might therefore be limited to explaining why there is disagreement or confusion as to their location. The reason for this reduced importance is that the change in the status of the borders seems to have altered African border functions only to a minimal extent. However, where the internationalisation of a border changes the function of the border to a significant extent, making it more restrictive and affecting the population to a higher degree, the status change and location could cause more tension and increase the risk of conflict.

As has previously been discussed,⁸³² *uti possidetis* was referred to in the context of Latin American decolonisation. Because of the problems involved, especially due to the absence of discussion and agreement between the parties affected, and the resulting lack of clarity as to the actual positions of these boundaries, the application of the principle required agreement between the parties to its use – without agreement its application would not have been possible. During the later African and Asian decolonisation a majority of the boundaries of the newly independent units were already international boundaries and had thus already been agreed upon earlier – though with varying degrees of clarity – between different administering

space of Europe to a “chequer-board” and the West African map to a “raisin bun” with centres of power dotted between large areas and smaller polities. Nugent, *supra* note 777, at 39

⁸²⁹ Griffiths, *supra* note 815. For another perspective, see Hughes, David, “Refugees and Squatters: Immigration and the Politics of Territory on the Zimbabwe-Mozambique Border”, 25 *Journal of Southern African Studies* 4 (1999) 533-52

⁸³⁰ Some African states, such as South Africa, have attempted ‘hard’ border regimes. Griffiths, *supra* note 815, at 78-80

⁸³¹ Touval argued that there were two reasons why so few African partitioned groups sought to unite with their ‘brethren’: the first being the structures of the states (multi-ethnic and cultural, thus less threatening to minority groups), and the second being the boundary regimes themselves (“only a partition on paper, having little practical significance”). Touval, *supra* note 768, at 223-5

⁸³² *Supra* chapter 3.3

states. Some of the boundaries of the new states, however, were formerly internal boundaries within larger units.

The ICJ has noted that the application of *uti possidetis* can ‘preserve’ something that was meant to have a different purpose:

[I]t has to be remembered that no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries; *uti possidetis* juris is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite different purposes.⁸³³

In the cases of decolonisation in Latin America and Africa it can safely be concluded that the original purposes of the boundaries, and the effects it was considered they would have, were utterly different from the effect the boundaries would in fact exercise after decolonisation and the independence of the colonial units. No such boundaries were constructed with independence in mind. In a majority of cases it seems that the borders had little restrictive effect on the populations concerned before decolonisation. Decolonisation practice and international law say nothing about which level units must have in order to become independent. All types of boundary – both administrative and internationally agreed – have become the international boundaries of independent states. Similarly, in practice both *de facto* and *de jure* boundaries have become international boundaries of independent states. This is not unproblematic. A boundary drawn with the object of inducing a unit to remain within a federation may provoke controversy at separation, because it might have included within the unit territory that includes a population at risk of becoming a minority, or resources that the ‘mother’ state is loathe to part with. Both the Yugoslav and the Soviet internal borders were constructed with purposes decidedly other than preparing the federal units for independence. The conflict over the *Krajina* in the early 1990s exemplifies the results of disregarding the entirely different effects that internationalising internal boundaries may have in different contexts, and the conflict-reducing role that ‘soft’ boundaries have played historically.

6.2.3.2 Central Asia

Into previous economic and social units, such as the Ferghana Valley, Soviet federal borders were inserted to create a plurality of new identities and loyalties, though restrictive economic

⁸³³ Land, Island and Maritime Dispute case (El Salvador v. Honduras) ICJ Rep. (1992) 351 at 388 (paragraph 43)

effects were minimised by the largely administrative character of the new boundaries. The federal borders signified that national self-determination was respected and formed a basis for the construction and functioning of the state. It could thus be assumed that the purpose of setting up the boundaries was ideological and political – to legitimise the new state and, acting as a centrifugal force, draw the various parts towards the centre.

The inter-republican borders drawn in Central Asia were little more than administrative, in the sense that they did not greatly affect persons crossing them.⁸³⁴ Though signs might have marked the republican borders, there were no obstacles, checkpoints or suchlike which hindered or slowed down their crossing. They were similar to colonial borders in Africa in that they generally had a ‘soft’ character; neither was restrictive of passage. Most of the colonial boundaries were international, having the original purpose of closing out the claims of competing overseas powers, and possessing only limited functionality. Some of the boundaries were internal, as in French West Africa, with a federal-like appearance, and with similar limited functionality. The federal borders of the USSR were internal, similar to the French West African boundaries in federal status and functionality. Nevertheless, while the functionality seems similar, the purposes were different.

The internal borders were drawn between 1924 and 1936 in light of the principle of nationality.⁸³⁵ The object of this was to show consideration for national self-determination, a principle that the Bolsheviks had promised that the new state would be built upon. Economic considerations were, nevertheless, also taken into account when constructing the internal boundaries,⁸³⁶ revealing the economic dimensions of the divisions. The federal units did have special characteristics, some concluding that “[i]n effect, the Soviet Union of the late 1930s was a collection of Soviet nations unified through a colonial type framework.”⁸³⁷ Suggestions have even been made to the effect that the USSR structure was modelled on the French and

⁸³⁴ During a visit to the Ferghana Valley in April, 2001, several persons on both sides of the borders between Uzbekistan and Kyrgyzstan remarked that before 1991 they had thought that Osh lay within Uzbekistan.

⁸³⁵ See further chapter 7.2.1.2

⁸³⁶ Park, Alexander, *Bolshevism in Turkestan 1917-1927* (Columbia University Press, N.Y., 1957) pp. 94-5; Roberts, William M. Jr., *Soviet Economic Regionalization in the Pre-Plan Period* (Ph.D. thesis, UMI, 1964) pp. 136, 148

⁸³⁷ Hirsch, *supra* note 85, p. 309. Park, *supra* note 836, found the continuation of the Russian Empire’s colonial policies evident by 1927. In her study on Tajikistan T. Rakowska-Harmstone observed that Tajik society in the late 40s to early 50s closely resembled Asian and African colonial societies with Europeans in control of the power structure, the actual management of society and also holding a privileged position in all areas of society. Rakowska-Harmstone, Teresa, *Russia and Nationalism in Central Asia: The Case of Tadzhikistan* (Johns Hopkins Press, Baltimore, 1970) pp. 139-41, 269-71. Another description is of ‘federal colonialism’; see Smith, Graham, & Law, Vivien *et al*, *Nation-building in the Post-Soviet Borderlands: The Politics of National Identities* (Cambridge University Press, Cambridge, 1998) p. 4

British colonial experiences.⁸³⁸ The federal borders and structure did not have any substantial effect on the decision-making in the country, because the Communist Party, which was not divided along national lines, made all the important decisions.⁸³⁹ The federal boundaries were newly created, but were delimited on the basis of research and various interests, and therefore not entirely arbitrarily. In Central Asia two effects of the federal borders were to divide historical Turkestan – the area covering the emirates and khanates of Kokand (Qo’qon), Bouchara and Khiva (Khorezm), including it within five federal units⁸⁴⁰ – and the Ferghana Valley – which had constituted an economic and historical unit – into three federal units.⁸⁴¹ There are diverse opinions as to the purpose of dividing the territory in that way. While some have suggested the purpose was to ‘divide and conquer’, creating new and centrally controllable identities, it is probable that the federal boundaries were the result of several objectives and considerations.⁸⁴²

Another complex situation arose from the leases effected between various Central Asian Republics, where territory of one republic was administered by another. Post-independence claims to such territories rely either on administration or legal delimitation, leading to conflicting claims that are difficult to settle.⁸⁴³ Also, the existence of enclaves in several former republics has raised issues of territorial shifts and passage.⁸⁴⁴

⁸³⁸ This argument forms the essence of Francine Hirsch’ dissertation, *Empire of Nations: Colonial Technologies and the Making of the Soviet Union, 1917-1939* (Ph.D. thesis, UMI, Ann Arbor, 1998)

⁸³⁹ Another factor was the practice of always placing a Russian decision-maker behind a local national within the Party and government hierarchy.

⁸⁴⁰ Uzbekistan, Turkmenistan, Tajikistan, Kazakhstan and Kyrgyzstan.

⁸⁴¹ Uzbekistan, Kyrgyzstan and Tajikistan. The economic unity of the Ferghana Valley does not, however, imply that it was a stable political entity.

⁸⁴² Studies of boundary-making have revealed some of the considerations taken when delimiting the federal boundaries. As geographers participated in the process, it is probable that some among those who laid down the objectives behind the federal boundaries at this time should have been familiar with delimitation theories of geographers such as Lionel Lyde. Lyde theorised on the positive potential of boundaries, and that divisions should be selected from “geographical features which are associated naturally with the meeting of peoples and persons in the ordinary routine of *peaceful* intercourse.” Rivers were suggested to constitute such a feature. Lyde, L. W., *Some Frontiers of Tomorrow: An Aspiration for Europe* (A. & C. Black Ltd., London, 1915) p. 2. Though his theory concerned international boundaries, it could *inter alia* explain how the Central Asian divisions were understood to legitimately cut across resources, creating a form of interdependence. It is also true that such dependence provided the central government with the powerful role of mediator between the federal republics. Lyde also suggested “[t]hat the racial unit should as far as possible coincide with a geographical unit”. Lyde, Lionel, “Types of Political Frontiers in Europe”, 45 *Geographical Journal* 2 (1915) 126-39 at 128

⁸⁴³ The towns of Bagys and Turkestanets are such examples, part of the Kazach Republic, but administrated by the Uzbek Republic. A boundary delimitation of this section of the common border against the wishes of the inhabitants was agreed to on September 9, 2002. Polat, *supra* note 403, pp. 54-5; “Village Defies Uzbek Government”, IWPR RCA No. 51, May 11, 2001; “Kazak Villagers Go It Alone”, IWPR RCA No. 100, 25 January, 2002; “Kazakstan: Frontier Dispute Deadlock Provokes Tensions”, IWPR RCA No. 120, May 17, 2002; “Uzbekistan: Ethnic Kazaks Set to Leave”, IWPR RCA No. 157, November 1, 2002

⁸⁴⁴ Tajikistan and Uzbekistan have enclaves in Kyrgyzstan (*inter alia* Sokh, Vorukh and Shakhimardan), while Kyrgyzstan has enclaves in Uzbekistan. See generally Polat, *supra* note 403, pp. 56-9; with respect to the strategic Sokh enclave: Koichev, A. “Batken Residents Furious over Secret Kyrgyz-Uzbek Deal”, *Eurasia Insight*, April 25, 2001; Koichev, A. “Kyrgyzstan and Uzbekistan Map Out their Differences”, *Eurasia Insight*,

With the dissolution of the USSR, and the independence of the federal units, the process of ‘nationalisation’ or identity construction intensified and accelerated in Central Asia. The new entities had to be legitimised in the eyes of the inhabitants, and national arguments and policies were largely used.⁸⁴⁵ Graham Smith has observed that “notably in Central Asia, by federalising ethnic homelands into ethnorepublics, the Soviet state actually created nations whose sense of nation-ness had previously barely existed.”⁸⁴⁶ The leaders of the newly independent states have indeed confirmed Frantz Fanon’s predictions of taking over where the ‘colonizer’ left off, replicating its control, national rhetoric and constructing their own loyal power-bases.⁸⁴⁷ The former federal borders now each enclosed ‘nations’ and were thus important markers against the other states. The threat of loss of legitimacy may go a long way to explain the tightened control and tensions concerning borders that the Central Asian states are plagued by. Necati Polat argues that in the context of the former Central Asian republics, what has been understood as ethnic tensions should instead be attributed to the nation-building effort made:

[I]t is not entirely inconceivable for ethnic grievances to transform into border issues. And the likelihood of this may be particularly high in Central Asia, for the prolonged poor treatment of minorities in the new states of the region seems very much to go with the actively pursued goals of creating homogenous nations through frenzied practices of identity formation and nation building.⁸⁴⁸

Clear boundary tensions currently exist between most Central Asian states. Steps to close the border between Uzbekistan and Kyrgyzstan were first taken in 1999, and the border is at present essentially non-permeable, in many cases even unilaterally delimited by Uzbekistan by the laying and aerial dispersion of mines and barbed wire.⁸⁴⁹ The border between Uzbekistan and Kazakhstan has formally been closed since the end of 2002, leading to great discontent among borderlanders.⁸⁵⁰ Cross-border trade suffers particularly from Uzbekistani

May 3, 2001, at: <http://www.eurasianet.org> (accessed 15/5/2001). On enclaves under international law, see Kaikobad, *supra* note 382, at 44-47

⁸⁴⁵ Bohr, *supra* note 704

⁸⁴⁶ Smith & Law *et al*, *supra* note 837, p. 6

⁸⁴⁷ Fanon, Frantz, “National Culture”, in: Ashcroft, B., Griffiths, G. & Tiffin, H. (eds), *The Post-Colonial Studies Reader* (Routledge, London, 1995) pp. 153-7

⁸⁴⁸ Polat, *supra* note 403, pp. 63-4, 73-4

⁸⁴⁹ ICG Asia Report No. 20, “Central Asia: Fault Lines in the New Security Map”, July 4, 2001; ICG Asia Report No. 33, “Central Asia: Border Disputes and Conflict Potential”, April 4, 2002; “Tensions Mount on Kyrgyz-Uzbek Border”, IWPR RCA No. 138, August 16, 2002. For a more in-depth study of the effect of the tense border relations between Uzbekistan and Kyrgyzstan on the Ferghana population, see Megoran, *supra* note 658, pp. 45-55

⁸⁵⁰ “Kazak Anger at Border Death”, IWPR RCA No. 161, November 15, 2002; “Kazak Smugglers Flourishing”, IWPR RCA No. 195, April 1, 2003

restrictions, such as penal taxation.⁸⁵¹ Many state functions are applied at the boundaries, leading to additionally restrictive factors, such as bribes for passage. As the populations essentially are repressed, there is little room to vent frustrations. Demonstrations are occasionally attempted, and fundamentalist parties are gaining increasing popular support. What the long-term results will be remains fearful conjecture.

6.2.3.3 Yugoslavia

Between 1945 and 1956, the pre-1991 Yugoslav federal borders were constructed largely by Tito and his inner Party circle on a historical basis.⁸⁵² The construction of the second Yugoslavia was very different from that of the USSR. While the Soviet inter-republican boundaries were newly delimited, the boundaries of the Yugoslav federal units corresponded with previous historical borders from different times, stretching from 1878 to 1939.⁸⁵³ The boundary delimiting the Macedonian federal unit was, however, entirely novel. The *Sandžak*, the Moslem strip of land acting as the bridge from Bosnia to the Ottoman Empire, was lost by the Ottomans in 1912 and divided between Serbia and Montenegro the following year – a division which has been largely maintained until today.

The political context might help to explain the adoption of various historical borders. Attempting to hold referendums could have brought the recent massacres, expulsions and destruction to the surface, and might therefore have been politically unbearable in a situation where Tito's unifying strategy was to silence the recent past, even by force when necessary, to make a Yugoslavia possible at all.⁸⁵⁴ Peter Radan has also suggested that referring to historical boundaries accorded with the practice of appealing to nationalist sentiments for support.⁸⁵⁵ It is important to note that the effects of these borders were not thought to be significant in practice. Tito spoke many times on the effects of the federal divisions. Milovan Đilas records him saying:

⁸⁵¹ "Uzbekistan: Tax Hikes Killing off Traders", IWPR RCA No. 161, November 15, 2002

⁸⁵² *Infra* chapter 7.1.1.3. Historical boundaries were used with the exception of Macedonia, which had not been a recent political entity, and thus was constructed on an ethnic basis. Shoup, *supra* note 90, p. 118, footnote 46.

⁸⁵³ Slovenia (1929); Croatia (Cvetković-Maček agreement of August 26, 1939, except Hercegovina of 1878); Bosnia and Herzegovina (1878 except the Sandžak); Serbia (pre-1912 with some additions); Montenegro (pre-1912 with some additions). Čavoški, Kosta, "The Formation of Borders and the Serbian Question", in: Ivanović, Stanoje (ed.), *The Creation and Changes of the Internal Borders of Yugoslavia* (Belgrade, 1991) pp. 36-9

⁸⁵⁴ Radan merely notes that "the location of these borders would have been a very sensitive and explosive issue." He wrote that the issue of borders caused "bitter internal conflict" within the CPY's highest organs. Radan,

supra note 326

⁸⁵⁵ *Ibid.*

With us this will be more of an administrative division, instead of fixed borders, as with the bourgeoisie.⁸⁵⁶

In a May 1945 speech to the Communist Party of Serbia, responding to claims that the federal boundaries has split Serbia apart, he explained:

I do not want in Yugoslavia borders that will separate. As I have said 100 times, I want borders to be those that will unite our peoples.⁸⁵⁷

In a later speech the same month he continued:

Those border lines, as I see them, must be something like white veins in a marble staircase. The lines between federated states in a federal Yugoslavia are not lines of separation, but of union.⁸⁵⁸

The process of choosing the boundaries was quick and cursory, further signifying their perceived practical unimportance. Unlike the Soviet preparations, there is little material on the construction of the Yugoslav federal boundaries, because only limited work was done on the issue. The sole exception is the work prepared by the *Đilas Commission* for the delimitation of the Slavonia/Vojvodina boundary between Croatia and Serbia.⁸⁵⁹ The purposes and effects of the new federal boundaries were multi-faceted. Communist parties were centralists at heart, but in light of the post-war national tensions within Yugoslavia anything but a federal structure would not have been politically feasible.⁸⁶⁰ The purpose of the borders were thus symbolic of respect for the Yugoslav nations, but were not to have any decisionary effect.⁸⁶¹ One of the purposes and effects of the internal borders was to elevate smaller Yugoslav nations by showing their equality of rights,⁸⁶² at the same time as limiting the political

⁸⁵⁶ Đilas, Milovan, *Wartime* (Martin Secker & Warburg, London, 1977) p. 356

⁸⁵⁷ Radan, *supra* note 326

⁸⁵⁸ *Ibid.*

⁸⁵⁹ *Infra* chapter 7.1.1.3

⁸⁶⁰ See chapter 7.1.1.3 for the ideological transition of the Yugoslav Communist Party (CPY) from centralist to federal theory on the basis of the specific Yugoslav national tensions. Đilas explains that Tito e.g. accepted Bosnia's enjoyment of federal status because of the Ustashi and Chetnik activities, where "[a]utonomy under either Serbia or Croatia would only have led to more bickering and would have deprived the Muslims of all individuality." Đilas, Milovan, *Fall of the New Class: A History of Communism's Self-Destruction* (Knopf, N.Y., 1998) p. 29

⁸⁶¹ Pavković, Aleksandar, *The Fragmentation of Yugoslavia: Nationalism and War in the Balkans*, 2nd ed. (Macmillan Press Ltd., Basingstoke, 2000) pp. 47-8. Evidence for this is the constant friction between the federal units and central authority; the Central Committee made efforts to minimise the importance of the nation e.g. by the 1953 constitutional changes and Jugoslavenstvo, which was instead suspected of being a Serbian hegemonic project, at the same time as the federal units made step-by-step advances gaining more influence, especially in the economic area. See chapter 7.1.1.3. On the mid-60s devolution of power to the federal units Radan writes that this "was not contemplated as a realistic possibility in 1946." Radan, *supra* note 326

⁸⁶² Enshrined in Article 1 of the 1946 Constitution of the Federal People's Republic of Yugoslavia.

dominance of the largest national group within the new state – the Serbs.⁸⁶³ The federal construct gave each unit the same amount of votes despite population size. This allowed *inter alia* the Slovenians and Croats a stronger voice than a general Western European majority voting system would have offered, thus attempting to dull fears of domination and retribution by clearly distancing the ‘new’ state from the centralist attempts of the first Yugoslavia.⁸⁶⁴ However, because the complete control of the Party kept the state centralist, the federal boundaries were less threatening to Serb interests.⁸⁶⁵ But this balance was to change.

With the gradual gain of more decision-making power for the federal units in the 1960s and 70s, which was codified in the 1974 Constitution, the borders gained more importance, especially economic importance. However, because of the lack of political democracy, the effect was not noticeable in the area of voting results and power distribution flowing therefrom. In the federal organs consensus between the republics was required. The system of economic redistribution within Yugoslavia – from richer to poorer regions – later led the wealthier federal units, Slovenia and Croatia, to view themselves as losers, causing friction between federal entities and with the centre.⁸⁶⁶ The strongest national interests were affected by the move from central to federalised power. Federalisation was more advantageous to the smaller nations which constituted majorities within federal units than to the largest nation which had been divided into several federal units. Within a unified state the compromise was acceptable and indeed required for the union to continue, but with its break-up one side gained all advantages and the other side lost a unity that it had given up only within a certain context and for a certain purpose.⁸⁶⁷

Changing Yugoslav federal into international borders thus had several results, though these seem to have been passed over by those advocating recognition of the new borders. The most important effect was that the largest nationality was broken up, creating new minorities that felt threatened within the new states. One could argue that Tito himself had used historical

⁸⁶³ Serbian ‘hegemony’ was seen as the biggest threat to communism, according to an interview with Milovan Đilas, “Les communistes et la question nationale”, *Le Monde*, Paris, 30 décembre 1971, p. 4. Large Serb groups were thus divided between Serbia, where they formed a majority, and Croatia, Bosnia-Herzegovina (B-H), and Macedonia, where they formed large national minorities. A side effect of the B-H federal entity was the division of Croats into Croatia, where they formed a majority, and B-H, where they formed, alongside the Serbs and Moslems or Bosnjaks, a large national minority.

⁸⁶⁴ The atrocities of second world war had caused deep wounds and confirmed suspicions between Serbs and Croats – the very problem that had rocked the first Yugoslavia.

⁸⁶⁵ Radan, *supra* note 312, p. 152

⁸⁶⁶ This is argued by many as the main reason, apart from the hegemonic attempts of Milošević, why Slovenia and Croatia opted to leave Yugoslavia.

⁸⁶⁷ Indeed, Radan writes: “Serb acceptance of the federalized Yugoslavia after World War II was conditional upon the federation remaining the centralized federation that was established in 1946.” In this he finds a parallel

borders, or borders of former and foreign administrations, in a form of application of *uti possidetis*, though lacking the element of agreement.⁸⁶⁸ Why should these divisions then not also be used at the break-up of the state? The reason becomes clear when examining the purpose of the federal divisions – to make the Yugoslav state, encompassing different inter-suspicious nations, possible at all. The divisions were adopted for politically unifying purposes, by dividing up and thus pacifying the perceived greatest threat to the new state that Serbian hegemony was perceived to pose. The unity of this group was effectively sundered by the construction of international borders, leaving that population an especially vulnerable target for dangerous political propaganda from those who thought they could benefit from national tension.⁸⁶⁹ The original object of the federal borders – the existence of a federal Yugoslav state – had become obsolete, and thereby, the reason for maintaining them. Their preservation could instead be understood to have metamorphosed into a threat to peace. With internationalisation the function of the boundaries would also change, both with regard to identity and decision-making, as well as to transport, trade and other interchange.

The complete dominance of the Russians and the Communist Party over all other nations within the USSR, which left the federal structure generally void of any real delegation of power, represented an important difference between the functioning of the USSR and the Yugoslav federal systems.⁸⁷⁰ Such national dominance and maintained centralisation was not possible in Yugoslavia, because of the existing national tensions, especially grave between Serbs and Croats. Thus a continuation of Yugoslavia required compromise between the federal units, which were kept together under and by Tito's personal authority. While the federal units in the USSR underwent a construction of national identities, alongside a common Soviet identity, all attempts at a common Yugoslav identity were considered suspicious, hegemonic, and generally suffered failure. Under Tito, any similar national attempts or expressions were prohibited, leaving the federal entities consisting of earlier nations and nationalities lacking any common identity.⁸⁷¹

with the structure of the first Yugoslavia. He also writes that Serb dissatisfaction arose in both cases "when Yugoslavia moved towards substantive federalism." Radan, *supra* note 326

⁸⁶⁸ If we exclude the requirement of agreement in order to apply *uti possidetis*, as the questions of which borders at which historical moments are to be used may cause at least as much conflict as the purported principle is expected to solve.

⁸⁶⁹ Several groups stood to gain from conflict: political leaders wishing to divert attention from the acute need of political reform; Mafia-like interests benefiting from what conflict brings in the black market, such as arms sales, and a stronger position leading to growing influence in the economic area, and so on.

⁸⁷⁰ Examples are that the Communist Party instead of the USSR federal units made the important decisions and each national decision-maker was backed by a Russian. See chapter 7.2.1.2, section *vi*. On the Yugoslav system, see Pavković, *supra* note 861, chapter 5

⁸⁷¹ See e.g. the 1971 suppression of the 'Croatian spring'.

The result of the move from federal to international boundaries in 1991-2 was to leave large Serbian minorities within Croatia and Bosnia-Herzegovina and thereby leave the playing field wide open to nationalist rhetoric. Whatever the results will be of the move from the federal to an international boundary between Serbia and Montenegro in the coming years, they should arouse interest, because the Moslem *Sandžak* population will effectively be divided. As already noted, however, the issues facing the population of *Sandžak* differs from the *Krajina* by not involving a dramatic shift in status from majority to minority. The internationalisation of the boundary may, however, if the functionality is restrictive, cause hardships in the everyday life of the borderlanders, as well as engender vulnerability to aggressive political rhetoric and demands. If partition of the Union is determined, and in order to pre-empt tension and hardship for the population of the *Sandžak*, Serbia and Montenegro have the alternative either of focusing on shifting the location of the boundary, or easing its functionality. Options to change the location of the boundary would aim to include the zone as a unit within one of the independent states, or grant the unit independence as one entity. If boundary functionality is decided upon, a regime that allows for the unit to continue functioning practically, with only limited restrictions arising from the existence of the international border, needs to be constructed.

6.2.4 Some tentative conclusions and suggestions

He who builds a bridge
shall receive God's reward.
He who destroys a bridge
destroys his own soul.⁸⁷²

Boundaries matter greatly because they greatly affect those they enclose, exclude and hinder. In the last decade of changes from internal administrative to international boundaries the character of boundaries and their functionality have largely been unaddressed by PIL. It has here been argued that closed borders contribute to internal and regional instability, and that the functionality of boundaries needs to be understood as vital for international peace and security. Shifting boundary location or retaining boundaries is not the only relevant discourse

⁸⁷² Djuric, Rajko, "God's Bridge" from the Gypsy legend 'God's Bridge', in: *Writing Frontiers: "The Pont l'Europe"*, at page: <http://www.coe.int> (accessed 30/10/2003)

in struggling to maintain international peace and security. Instead, easing boundary functionality may in certain cases provide a better and more viable solution. Since many boundary disputes concern precisely status and function, international law needs to address these issues.

In his examination of the Åland Islands case before the League of Nations, Sureda concluded: "If [Finland] has to be delimited on purely territorial grounds its jurisdiction over certain groups should be subject to some restraint and allowance should be made for autonomy."⁸⁷³ In that case, wide autonomy was given to the islanders on issues that were important to them, especially relating to their identity. The same approach may be advocated today in respect of tensions and conflict relating to boundaries. Because changes to boundary status involve important effects, especially for those living near the boundary, the principle of self-determination, interpreted contextually and in the light of the principle of maintaining international peace and security, places restraints and duties on states *inter alia* in relation to how their borders function, requiring consideration to be shown to the social and economic needs of borderlanders.

In order to conclude in a specific case whether reducing boundary functionality or setting up a special boundary regime has a reasonable chance of success and of pre-empting or reducing tensions, the context in each such case must be studied. Because changing the location of a boundary can involve severe difficulties for borderlanders, apart from the inherent threat that states perceive that this option contains, the 'benefits and costs' of such a change must be closely examined. The costs can indeed be higher than the benefits. And further, the option selected might not solve the problem. If the frustration of borderlanders arises from a 'closed' or 'hard' boundary, moving the boundary is unhelpful, as it does not respond to the cross-boundary needs of both borderland groups. If unrest results from tensions between territorially separated groups, reducing boundary functions and opening the boundary would not be an appropriate response either. In such a case, shifting the location of a boundary to provide a barrier would better address the problem.

In order to suggest appropriate border policies or solutions to tense interstate relations because of boundary issues in concrete cases, some preliminary questions will need to be answered in order to understand what the problems in the specific context are or what the conflict really concerns. Some of these questions are:

- What purpose does the border have in the specific context?

- What is its functionality and effect?
- What are the underlying reasons for the border conflict or tensions?
- What are problems or difficulties experienced by the borderlanders or other people concerned because of the boundary?⁸⁷⁴
- What are modes or models which could take those interests and needs into account? Are functional or location changes a possible solution to reduce conflict?

If the problem has been identified as one concerning boundary functionality, there are a number of examples from past practice which could be applied to ease boundary frictions. Options could aim to set up economic zones, or grant special passes for the borderlanders to ease transport or continued familial and cultural relations across the boundary. Peace parks, condominiums or JDZs are other regimes which are used especially in relation to cross-boundary resources. For long-term stability further regional integration, beyond these examples, is going to be vital.

PIL must increasingly move from boundary functionality as a responsibility at state level into acceptance that it is an issue of international concern, as it may affect international peace and security. In practice, this means that the UN and member states have a responsibility in relevant cases to promote and require the showing of consideration towards groups affected, for example, in cases of state dissolution where the status or location of boundaries are changed. This may be summed up in the formula of *consideration as law* regarding boundary issues of location and functionality.

The obligation to show consideration under the Charter principle of self-determination consists of two parts. The first part of the obligation concerns *process* and the second concerns *result*. ‘Process’ involves taking the above steps to study the consequences of a boundary change for those affected, to determine the major problems, and hear what the wishes of the inhabitants are for a possible solution. Process thus requires the participation of those affected.⁸⁷⁵ Gaining the consent of those affected by changes may be underestimated as a factor necessary for peace. ‘Result’ consists of selecting one or several out of a range of

⁸⁷³ Sureta, *supra* note 6, p. 235

⁸⁷⁴ Studying the role that the boundary plays in national political rhetoric is also related to this and relevant to understanding the ‘role’ that the boundary plays and identifying what the ‘problem’ related to the boundary actually is: substantive or for internal domestic political purposes? What is the special importance of the boundary in domestic politics?

⁸⁷⁵ There is an old Soviet joke, in which Brezhnev walks up to a man with a watermelon and asks if he can buy it. “Which one?” the man asks. Surprised, Brezhnev says, “How can I choose if you only have one?” The man

possible options to respond to the needs of the inhabitants, a choice that will favour long-term international peace and security, and then taking steps to implement this fully. If concrete steps are not required as a part of the obligation flowing from the principle of self-determination, the risk is that there is much talk and little change for the better and for long-term peace.

In light of prior changes of boundary status and unrest caused, the case of the *Sandžak* deserves close attention. In its ‘maintenance-of-peace mode’ the principle of self-determination requires that the concerns and interests of the population affected are considered and responses put into action before Serbia and Montenegro separate. The borderlanders need to be included in the process of changing the status of the border, and its functionality must be responsive to their needs. Under the UN Charter Purposes the international community has a duty to call attention to, support, facilitate and challenge states to respect their international obligations in this regard.

Territorial conflicts are complex, involving a variety of factors, and using a ‘self-determination-approach’ will not solve all related problems. The focus here has primarily been on groups within states that are affected by boundary changes. Historically there is evidence that steps can be taken, and in several cases have been, to respond to the interests of borderlanders. The chapter has attempted to outline some possible responses and argued that there is a requirement under the principle of self-determination to respond. There will nevertheless be situations that are not easily solved. Making an effort to show consideration may in several cases only be part of a larger solution.

The aim of the next chapter is not merely to legitimise spending time on history, but, even more importantly, to provide further background to the ‘meta-context’ (discussed in chapter 5.3) which is vital when attempting to apply the principle of self-determination with the aim of maintaining international peace and security.

responds, “The same way I chose you.” Myers, Stephen L., “Russian Voter Disillusionment Seen in St. Petersburg Runoff”, *NY Times*, September 30, 2003

7. TWO DISPARATE CASES EXAMINED

The past is always prologue to the present.⁸⁷⁶

7.1 Yugoslavia

7.1.1 The creation of the state

As it is both impossible and unrealistic to attempt to give a thorough understanding of the history of the various areas making up Yugoslavia at one time or another, especially on as limited a number of pages as here, the effort made is only to sketch some outlines of the events and thinking which led to the creation of Yugoslavia and its structure, and set the scene for its dissolution.⁸⁷⁷

7.1.1.1 Pre-Yugoslavia

The areas making up Yugoslavia before 1991 do not have a long history of independence in modern times. Their history is instead characterised by extended periods of foreign domination and intervention. This was the meeting place between the Austro-Hungarian and Ottoman Empires and the Orthodox, Catholic and Moslem faiths.

*O, Tsar Lazar, prince of righteous lineage, which of the two kingdoms will you embrace?
Would you rather choose a heavenly kingdom, or have instead an earthly kingdom here?
If, here and now, you choose the earthly kingdom, saddle horses, tighten the saddles' girths,
let all the knights put on their mighty swords, and launch you then assault against the Turks.
Then their army, all the Turks, shall perish.*

*But if, instead, you choose the heavenly kingdom, then you must build a church at Kosovo.
Do not build it upon a marble base, but on pure silk and costly scarlet cloth,
And give you host orders to Holy Mass. For every man, all soldiers, will perish,*

⁸⁷⁶ Shakespeare, William, *The Tempest*, act 2, sc 2

⁸⁷⁷ See Clissold, *supra* note 55; Glenny, Misha, *The Balkans, 1804-1999: Nationalism, War and the Great Powers* (Granta, London, 1999)

*and you, their prince, will perish with your host.*⁸⁷⁸

The independence of Serbia and Montenegro was recognised only in 1878, with the last Ottoman troops having left Belgrade in 1867 when the Kalemegdan fortress was ceded to Serbia. Serbia's first revolt against the Turks began in 1804 after over 400 years of Ottoman rule.⁸⁷⁹ The Romantic movement of Europe had brought to greater light the Serbian linguistic, cultural and historical heritage, and national feeling was stronger than ever. The second revolt of 1815 led to Serbian autonomy under Turkish sovereignty. Serbian territory was enlarged southward in 1833, 1878, and after the Balkan Wars of 1912-13. The greater parts of Montenegro, on the other hand, had not been under Turkish rule, and the suggestion is often made that the resistance put up was much greater than the value to the invaders of holding the mountainous territory.

Slovenia had been ruled by Austria from the 1200s with some interludes, *inter alia* Napoleon's creation of the 'Illyrian Provinces' before the 1815 Vienna Congress restored the area to Austria. During those four years Croats, Serbs and Slovenes were joined in one unit, giving a taste not only for the idea of South Slavic unity, but also for the liberties of the French Republic as its legal code was applied to the Provinces.⁸⁸⁰ Croatia had been under Hungarian rule since the 11th Century. In the 1500s the Hungarians were defeated by Ottoman troops, with much of Croatia falling into Turkish hands. In 1578 the 'Military Frontier' or *Vojna Krajina* was formed under direct Austrian control. The inhabitants who came to repopulate this zone, mainly orthodox Serbs who sought shelter after the 'Great Migration' of 1690, held their land on special tenure in return for military service as "farmer-soldiers".⁸⁸¹ In 1699 most of Croatia and Hungary was ceded by the Ottoman Empire to the Habsburgs,⁸⁸² who extended the military frontier to encompass even more territory and shortly afterwards incorporated the territory within Croatia-Slavonia.⁸⁸³ The southern boundary of the zone developed into the dividing line between the Austro-Hungarian and Ottoman Empires, and

⁸⁷⁸ Extract from "The Fall of the Serbian Empire", an oral poem recorded by Vuk Karadžić (1787-1864), in: Holton, M. & Mihailovich, V. (eds.), *Songs of the Serbian People* (University of Pittsburg Press, Pittsburg, 1997) pp. 147-8

⁸⁷⁹ The historical battle referred to as leading to Ottoman rule being the *Battle of Kosovo polje* in 1389. The revolt in 1804 began, not aimed at the sultan, but against the independent janissaries' reign of terror, and only later developed into a struggle for independence. Glenny, *supra* note 877, pp. 1-18

⁸⁸⁰ Darby, H. C., "Croatia", in: Clissold, Stephen (ed.), *A Short History of Yugoslavia* (Cambridge University Press, Cambridge, 1966) p. 33. The areas included within the Illyrian Provinces were Carinthia, Istria, Carniola, Croatia, Dalmatia and the Military Frontier of Croatia, see *ibid.*, p. 53; Glenny, *supra* note 877, pp. 41-2

⁸⁸¹ Pavković, *supra* note 861, p. 10

⁸⁸² Treaty of Carlowitz, 1699

would also continue as a boundary within the future Yugoslav state. The Croats were similarly affected by the Romantic movement, and there were Croatian calls for the union of South Slavs under the banner of 'Illyrianism'.⁸⁸⁴ These calls grew louder with the forced magyarisation of Croatia, and when the Hungarians rose up against Austria in 1848 both Serbs and Croats allied themselves with the Habsburg monarchy. They were rewarded with Austrian centralisation as well as the *Ausgleich* of 1867, which created the Dual Monarchy and placed Croatia firmly under Hungarian rule yet again.⁸⁸⁵ Croatia and Slovenia joined the Kingdom of Serbs, Croats and Slovenes directly upon the break-up of the Austrian-Hungarian Empire.

Bosnia-Herzegovina had been under Ottoman rule from 1463 until 1878, when the foreign minister⁸⁸⁶ of the Dual Monarchy convinced the Great Powers at the Berlin Congress that it should shoulder the responsibility of administering the area after the peasant uprising of 1875,⁸⁸⁷ which had led to the involvement of Serbia, Montenegro and Russia in war against the Ottoman Empire.⁸⁸⁸ The defeat of the Turks led to the San Stefano Treaty⁸⁸⁹ which was not approved by the other European Powers. The treaty, which had given Russia and Bulgaria great territorial advantages in the Balkans, was thus revised at the Berlin Congress of 1878 and the Sultan's sovereignty over Bosnia was nominally retained, though under Austrian

⁸⁸³ Direct Austrian rule of the frontier was abolished only between 1873-81 and the territory incorporated into Croatia in 1881, after Austria's 1878 occupation of Bosnia and Herzegovina. This suddenly increased the Serbian population of Croatia to nearly 25 per cent, according to a 1910 census. Darby, *supra* note 880, p. 38

⁸⁸⁴ Glenn, *supra* note 877, pp. 42-5; Banac, Ivo, *The National Question in Yugoslavia: Origins, History, Politics* (Cornell University Press, London, 1984) pp. 75-89

⁸⁸⁵ The Habsburg Monarchy was divided in two, with Croatia-Slavonia under Hungarian administration and Dalmatia and Istria under Austrian. Banac, *supra* note 884, pp. 91-2

⁸⁸⁶ Julius Andrassy's success at the Berlin Congress caused such opposition in Hungary that he was forced to resign, as Hungary felt the Slavic element was becoming too dominant within the empire.

⁸⁸⁷ For an Englishman's account of the peasants' situation in Bosnia and Herzegovina under Ottoman rule see Evans, Arthur, *Through Bosnia and the Herzegovina on Foot During the Insurrection, August and September 1875* (Longmans, Green & Co., London, 1876) pp. 255-63, 329-38

⁸⁸⁸ Russia had concluded a secret treaty with Austria-Hungary at Reichstadt in 1876 stating that the latter would receive Bosnia and Herzegovina if, in the event of war between Russia and Turkey, it remained neutral. Vucinich, Wayne, "Introduction: Ivo Andrić and His Times", p. 4-5 in: Vucinich, W. (ed.), *Ivo Andrić Revisited: The Bridge Still Stands* (Research Ser. No. 92, U. C. at Berkeley, 1995) at:

<http://escholarship.cdlib.org/ias/vucinich/> (accessed 8/3/2002). An idea that had enjoyed some support before the Congress was that the Prince of Serbia should administer Bosnia and Herzegovina. Burdett, Anita (ed.), *The Historical Boundaries Between Bosnia, Croatia, Serbia: Documents and Maps 1815-1945* (Archive Editions, London, 1995) p. 145. See also a request for this in a letter by the Catholic Bishop of Bosnia Josip Strossmayer to W. Gladstone, October 1, 1876 and February 13, 1878, in: Seton-Watson, R., *The Southern Slav Question and the Habsburg Monarchy* (London, 1911) p. 417 at: <http://www2.h-net.msu.edu/~habsweb/sourcetexts/stross1.htm> (accessed 5/3/2002).

⁸⁸⁹ Preliminary Treaty of Peace between Russia and Turkey, signed at San Stefano, February 19 – March 3, 1878, in: Hertslet, Edward, *The Map of Europe by Treaty: Showing the Various Political and Territorial Changes which Have Taken Place Since the General Peace of 1814*. Vol. IV (Gregg International Publ. Ltd., Farnborough, 1969) pp. 2672 ff.

administration.⁸⁹⁰ In 1908, around two months after the Young Turks came to power in the Ottoman Empire through a bloodless revolution, Austria-Hungary annexed Bosnia-Herzegovina.⁸⁹¹ This set off the chain of events which led to the first world war. Macedonia had an even more complex background, having been under Serbian, Bulgarian and Byzantine rule at different times, part of the Ottoman Empire, and then split between Greece, Bulgaria and Serbia during the Balkan Wars of 1912-13.

7.1.1.2 The first Yugoslavia

On July 20, 1917, the Serbian premier and the president of the Yugoslav committee in exile signed the Declaration of Corfu, which called for the unification of Serbs, Croats and Slovenes in one state under the Serbian king. The state was to be a constitutional, democratic and parliamentary monarchy with two alphabets and three national names, flags and religions.⁸⁹² On December 1, 1918, Prince Regent Alexander formally proclaimed “the united Kingdom of Serbs, Croats and Slovenes”, consisting of the former Austro-Hungarian provinces including Bosnia-Herzegovina, Serbia and Montenegro. However, the structure of the state was not finally agreed upon and there were strongly divergent opinions as to whether the state should be a constitutional monarchy or a republic, and function according to a centralist or federal system.⁸⁹³ The unification was immediately criticised as undemocratic, and the national issue quickly became the new state’s dominant internal problem.⁸⁹⁴

At the Paris Peace Conference there were great expectations that the Great Powers would deal kindly with the new Kingdom’s claims. President Wilson’s 14 Points of 1918 had dealt with South Slavic interests:

XI. Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkans states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the

⁸⁹⁰ The Treaty of Berlin, signed July 13, 1878. *Ibid.*, pp. 2759 ff.

⁸⁹¹ The argument given for annexation was the desire of the Bosnian population for a constitution, a granting which only a sovereign power could give. Letter from Franz Joseph to Wilhelm II, September 29, 1908, at: <http://www.lib.byu.edu/~rdh/wwi/1914m/bosherz.html> (accessed 5/3/2002)

⁸⁹² Darby & Seton-Watson, “The Formation of the Yugoslav State” in: Clissold, Stephen (ed.), *A Short History of Yugoslavia* (Cambridge University Press, 1966) at 162. The different flags and coats of arms were promised equal status and the group names of Serb, Croat and Slovene were to be equal before the law. By its reference to “our” and “the nation” the Declaration evidenced the understanding that the three groups were merely tribal components of a common Yugoslav nation. Connor, *supra* note 60, pp. 129-30

⁸⁹³ Lederer, Ivo, *Yugoslavia at the Paris Peace Conference: A Study in Frontiermaking* (Yale University Press, London, 1963) pp. 36, 52

⁸⁹⁴ Banac, *supra* note 884, pp. 134-40, 214-25

political and economic independence and territorial integrity of the several Balkan states should be entered into.⁸⁹⁵

Problems cropped up immediately. One of the main ones was Italy's claims on the Yugoslav frontier based on the Treaty of Rome of 1915.⁸⁹⁶ All claims were finally settled with the Treaty of Rapallo in 1920, leaving a large Croat and Slovene minority within Italy. Many Magyars and Germans were included in the new Slav state due to the incorporation of Vojvodina as well as Albanians and Moslems living in Kosovo-Metohija and Novi Pazar.⁸⁹⁷

A constitution was set up in 1921,⁸⁹⁸ though many found its centralist character to be unacceptable, especially those Croats and Slovenes who desired a federal system. The economy was developing rapidly, but the political tensions caused by the struggle for centralism versus federalism were not resolved.⁸⁹⁹ The Kingdom of Serbs, Croats and Slovenes had been divided into 33 administrative districts (*oblasti*) by internal boundaries.⁹⁰⁰ The *oblasti* were not to function as federal units, and it seems that Serb leaders had rejected the federal system precisely because dispersed Serbian minorities would come under the domination of non-Serb majority entities.⁹⁰¹ In this way, the state was still unitary but with local self-government.⁹⁰² One of the purposes explained was to limit the effect of nationalist forces, but an exception was made in relation to Bosnia and Hercegovina where the traditional internal divisions were retained.⁹⁰³ Radan writes that the Austro-Hungarian divisions were argued to encourage disunity and separatism, and therefore the state was instead to be divided into many smaller units "based upon 'natural, social and economic circumstances'[...] and without regard to former historical and cultural boundaries, thereby precluding 'tribalism'."⁹⁰⁴

⁸⁹⁵ Speech to Congress, January 8, 1918, in: Nicolson, *supra* note 37, p. 40. Complete text at: <http://www.lib.byu.edu/~rdh/wwi/1918/14points.html> (accessed 22/01/2001)

⁸⁹⁶ This Treaty had been secretly concluded with France and Britain in order to convince Italy to declare war on their enemies. Nicolson, *supra* note 37, pp. 160-1; Lederer, *supra* note 893, pp. 54-78; Novak, Bogdan, *Trieste, 1941-1954: The Ethnic, Political, and Ideological Struggle* (University of Chicago Press, Chicago, 1970)

⁸⁹⁷ Darby & Seton-Watson, *supra* note 892, at 167-9; Lederer, *supra* note 893, pp. 276-308

⁸⁹⁸ The constitution became known as the Vivotdan constitution as the Prince Regent made his oath to uphold it on St. Vitus Day, June 28, 1921

⁸⁹⁹ It seems that immediately after 1918 many Croats began to regard Belgrade in the same way they had regarded Budapest - as the "source of all their ill fortune"; a special sensitivity due to their long subordination to a "distant centre". Pešić, Vesna, "The War for Ethnic States", in: Popov, Nebojša (ed.), *The Road to War in Serbia: Trauma and Catharsis* (CEU Press, Budapest, 2000) p. 13

⁹⁰⁰ Radan wrote that the division was made under the 1921 Constitution and implemented by a 1922 ministerial decree. Radan, *supra* note 326. According to Pavlović the division was made already in 1919. Pavlović, M., "Yugoslavia and the Serbian Lands", in: Ivanović, Stanoje (ed.), *The Creation and Changes of the Internal Borders of Yugoslavia* (Belgrade, 1991) p. 23

⁹⁰¹ Radan, *supra* note 326

⁹⁰² Radan, *supra* note 312, pp. 138-9

⁹⁰³ Bosnia-Hercegovina's territorial integrity was even laid down in the 1921 constitution, Article 135, subsection 3. Banac, *supra* note 884, p. 375

⁹⁰⁴ Radan, *supra* note 326

After failed attempts at mediation between the different and inflexible party leaders, the king dissolved parliament and abolished the constitution in 1929.⁹⁰⁵ On October 3, 1929, the official name of the state was changed to Yugoslavia.⁹⁰⁶ A new constitution was promulgated on September 3, 1931.⁹⁰⁷ The king's dictatorship, well received at first, attempted to resolve the political deadlock and national differences by unifying the population and reorganising the administration. The 33 *oblasti* were abolished and the country was divided into nine provinces (*banovine*), splitting Bosnia and Hercegovina between four of the provinces.⁹⁰⁸ The boundaries were now based on economic and geographic considerations, not historic or ethnic, and the *banovine* were given names of rivers. Though the Moslems were minorities in all *banovine*, and the Croats through the change became majorities in two provinces, the division was severely criticised by Croats because six of the provinces gained Serbian majorities.⁹⁰⁹ The king's policies, which included prohibiting all national parties and organisations that were based upon national interests, were perceived to be more and more repressive in their efforts at unification, and he succeeded in alienating all major political and national groups, satisfying no one.⁹¹⁰

In the light of events unfolding in Europe, the prince regent attempted an agreement with Croat leaders in 1936 which recognised that a federal solution had to be constructed. It was, however, only after Hitler's seizure of Prague and the removal of the Stojadinović government in 1939 that an agreement could be reached – the *Sporazum* of August 26, 1939. The new region of Croatia (*Banovina Hrvatska*) was created, though the borders were preliminary and were to be finalised only at a later date.⁹¹¹ The time up until the invasion of April 6, 1941, was spent arguing over “whether the *Sporazum* was a starting point, as the Croats believed, or an ending point, as the Serbs believed, for reorganizing Yugoslavia.”

⁹⁰⁵ King Alexander even suggested to the Croat and Slovene leaders that Croatia and Slovenia be ‘amputated’ from the new state, but this was responded to as ‘high treason’. Their suggestion of federalism was rejected by the leaders of the Serbian parties, leading the king to dissolve parliament and abolish the constitution, thus leaving all authority to the crown. Seton-Watson & Laffan, “Yugoslavia Between the Wars”, in: Clissold, Stephen (ed.), *A Short History of Yugoslavia* (Cambridge University Press, Cambridge, 1966) pp. 170-6

⁹⁰⁶ Seton-Watson & Laffan, “Yugoslavia Between the Wars” in: Clissold, Stephen (ed.), *A Short History of Yugoslavia* (Cambridge University Press, Cambridge, 1966) p. 178

⁹⁰⁷ *Ibid.*, p. 181

⁹⁰⁸ The Moslems became minorities in all four *banovine*. Banac, *supra* note 884, p. 376. The nine were Dravska, Savska, Vrbaska, Primorska, Drinska, Zetska, Dunavska, Moravska, and Vardarska banovine.

⁹⁰⁹ Radan, *supra* note 326

⁹¹⁰ Radan, *supra* note 312, pp. 139-41. However, his assassination by terrorists on October 9, 1934, during an official visit to France, caused outrage in all of Yugoslavia. Seton-Watson & Laffan, *supra* note 906, pp. 181-8

⁹¹¹ The first Article of the decree stated: “*The Sava and Coastal banovinas as well as the districts of Dubrovnik, Šid, Ilok, Brčko, Gradačac, Derventa, Travnik and Fojnica shall merge into one banovina under the name of Banovina of Croatia. The Croatian Banovina's headquarters shall be in Zagreb.*” This cut deep into Hercegovina and included Mostar. Pavlović, *supra* note 900, p. 27

Though the implementation of the Sporazum stalled, demands to grant similar privileges to other ethnic groups within the state increasingly began to be made.⁹¹²

On March 26, 1941, the Yugoslav prime minister and foreign minister returned from Vienna, where they had gone only to negotiate but had ended up signing Yugoslavia's adherence to the Tripartite Pact. The news spread quickly, and a *coup d'état* was effected the following night after which King Peter was immediately declared to be of legal age. Axis invaded Yugoslavia only 10 days later. Yugoslavia soon fell apart and an armistice was signed with Germany on April 17, 1941.⁹¹³ Slovenia was divided between Germany and Italy. Italy also occupied large parts of Dalmatia as well as Montenegro and Albania, to which Kosovo was added. Hungary and Romania divided Vojvodina between them. Macedonia was occupied by Bulgaria. The Independent State of Croatia was proclaimed, swallowing up all of Bosnia and Hercegovina.⁹¹⁴

The Yugoslav Communist Party (CPY) began its resistance with Germany's attack on the Soviet Union on June 22, 1941, after a quick Comintern change of policy. The Yugoslav communist identification with nationalist interests gave the communists support in different national regions when the resistance struggle began.⁹¹⁵ The only rival power were the Chetniks, who represented solely Serbian interests.⁹¹⁶ In the beginning of 1944 Winston Churchill transferred his support from the Chetnik forces to the Partisans, and on August 26 that year King Peter recognised Tito as the sole military leader of the resistance forces. At the end of the year the king transferred his royal powers to a regency which formed a 'United Government' under the premiership of Tito.⁹¹⁷

⁹¹² Van Hook, Laurie West, "Ethnic Tension and the Leadership Vacuum within the Yugoslav Government, 1939-1945", p. 3, at: http://www.ksg.harvard.edu/kokkalis/pastevents_wkshop1.html (accessed 8/3/2002); Pavlović, *supra* note 900, pp. 27-9

⁹¹³ Van Hook, *supra* note 912, pp. 4-5

⁹¹⁴ Clissold, S., "Occupation and Resistance" in: Clissold, Stephen (ed.), *A Short History of Yugoslavia* (Cambridge University Press, Cambridge, 1966) p. 210

⁹¹⁵ "The political line of the Partisan Detachments lays down that there must be a National Liberation Anti-Fascist Front of all the peoples of Yugoslavia regardless of party or religion. In forming Partisan Detachments it is essential not to be narrow-minded but to give wide scope to initiative and enterprise of every kind." Order by Tito, *ibid.*, p. 216

⁹¹⁶ While the fascist Ustaša cooperated openly with Germany and Italy, it is unresolved as to whether and to what extent the Chetniks collaborated with the Axis powers to destroy the Partisans.

⁹¹⁷ Clissold, *supra* note 914, p. 230

7.1.1.3 The second Yugoslavia: From one people and constitutional solutions to many nations and revolution

The Balkan context was quite different from industrialised western Europe, as the population was largely agricultural. Yet socialism found support among the intelligentsia, and the ideas of Renner and Bauer on national-cultural autonomy fell upon fertile soil among the South Slav portions of the Austro-Hungarian Empire. In 1896 the Second Congress of the Social Democratic Party of Croatia and Slavonia made a demand for full autonomy within the Empire. In 1908, at the Austrian annexation of Bosnia, the Croatian socialists called for each nation's constitutional right to "full governing, political and educational freedom."⁹¹⁸ The pre-war solution agreed on by most Balkan socialists for solving the national question was to create a Balkan federation based upon the idea that the Yugoslavs were one nationality, and the Marxist theory that larger territorial components facilitated economic development.⁹¹⁹ In 1918, however, Croatian, Slovenian and Serbian socialists instead supported the creation of a Yugoslav state.⁹²⁰

In 1919 the CPY was formed, which initially took a centralist approach to the national issue and desired a unitary state.⁹²¹ However, the party soon advocated constitutional concessions to the Croats in order to calm national frictions, as such rivalries were thought to distract revolutionary forces from the class struggle.⁹²² This was, however, contrary to the Comintern Balkan strategy of fanning nationalist grievances in order to overthrow the new Yugoslav state, revealing the *volte-face* that the theory had undergone under Lenin regarding the relationship between the class struggle and the national issue. Stalin explained at a meeting of the Executive Committee of the Comintern in 1925 that the main struggle was no longer among the bourgeoisie, but between the imperialists and the oppressed colonial peoples – the national question was now a question of the peasants.⁹²³ The CPY moved back and forth between the two positions from 1922 to 1926, when finally the Comintern faction gained the upper hand.⁹²⁴ In 1928 the Comintern adopted the position that Yugoslavia should be immediately dismembered. There was cooperation with nationalist movements, and calls were made, for example, at the Third and Fourth Congresses of the CPY in 1926 and 1928,

⁹¹⁸ Shoup, *supra* note 90, p. 15

⁹¹⁹ Connor, *supra* note 60, pp. 128-30; Shoup, *supra* note 90, p. 56

⁹²⁰ Shoup, *supra* note 90, pp. 15-19

⁹²¹ The Communist Party was banned in Yugoslavia by the Law for the Defence of Public Security and Order in the State, passed in 1921. Banac, *supra* note 884, p. 332

⁹²² The main theoretician of this strategy was Sima Markovic. Shoup, *supra* note 90, pp. 21-30

⁹²³ *Ibid.*, pp. 27-8

for different nations and minorities to secede and the ‘occupier’ be driven out. This policy slowed down with the growing fascist threat in Europe and Hitler’s rise to power, and in 1935 the preservation of a federalised and restructured Yugoslavia was advocated in its place.⁹²⁵ In 1937 the strategic use of the principle of self-determination in Yugoslav communist discourse was discontinued.⁹²⁶ As the party still promoted itself as the defender of national rights it could not go back to claiming that the Yugoslavs were of one nationality. The party, though seemingly not feeling ready to activate a revolution, still held that with revolutionary changes to society the national issue would resolve itself naturally.⁹²⁷ With the change in policy between 1934 and 1935 – from calls for the dismemberment of Yugoslavia to its preservation – the CPY decided to form regional parties. Thus the Communist Party (CP) of Croatia and the CP of Slovenia were established in 1937.⁹²⁸

During the second world war the party developed an independent policy on the national issue which was to support the claim that it was only the communists who were genuinely interested in solving the national question. A declaration from 1940 mentioned self-rule for the Macedonians and Montenegrins; autonomy “and similar [measures]” were suggested for Bosnia; “a real solution of the national question” claimed for the Serbs, Croats and Slovenes; and for the minorities freedom and equality were to be guaranteed. With regard to Macedonia the declaration also called for the “expulsion of all those colonizing elements with whose aid the Serbian bourgeoisie oppress the Macedonians, Albanians and other peoples.”⁹²⁹ With the dissolution of Yugoslavia the Yugoslav Communist Party moved even more clearly towards a policy of unity among the Yugoslav peoples and the maintenance of its present territory, which included attempted alliances with nationalist forces.⁹³⁰

⁹²⁴ Connor, *supra* note 60, pp. 131-41; Shoup, *supra* note 90, pp. 21-4

⁹²⁵ Čavoški, *supra* note 853, pp. 42-4, 48-9

With the August 1939 Non-Aggression Pact between the Soviet Union and Germany the situation was again reversed, and Yugoslavia was not to be defended. Tito began advocating autonomy instead of secession. Connor, *supra* note 60, pp. 145-6

⁹²⁶ It was reinstated late in 1942. *Ibid.*, pp. 156-7

⁹²⁷ Shoup, *supra* note 90, pp. 41, 58

⁹²⁸ Provincial organisations were set up in Bosnia and Hercegovina, Dalmatia, Montenegro, Serbia and Vojvodina. Čavoški, *supra* note 853, pp. 52-3. Čavoški cites V. Bakarić as explaining that these were formed as parties of “oppressed nations”.

⁹²⁹ Fifth Conference of the Yugoslav Communist Party, November 1940; resolution published in *Komunist*, No. 1 (October 1946) p. 117, in: Shoup, *supra* note 90, pp. 50, 53. The secretary appointed for the regional committee for Macedonia some months earlier was well-known for his nationalist views, and it seems the party was ready to allow greater national demands from Macedonia in order to strengthen its popularity there. The policy backlashed the next year when, with the break-up of Yugoslavia in April, 1941, the secretary called for an independent Macedonia. When called to a Yugoslav Communist Party consultation, he dissolved his own committee and attached the Macedonian party to the Bulgarian Communist Party, leaving the Yugoslav party without control over the Macedonian communists. *Ibid.*, pp. 52-4

⁹³⁰ *Ibid.*, pp. 61-2

On November 26, 1942, Tito summoned an assembly known as the Anti-Fascist Council of National Liberation of Yugoslavia (AVNOJ), which was claimed to represent the Yugoslav resistance.⁹³¹ Regional councils were formed the following year. AVNOJ was declared by the communists to be the sole legal government of Yugoslavia, and at the second session in Jajce, on November 29, 1943, the AVNOJ stated that Yugoslavia was to be organised as a federal state.⁹³² The declaration made at the 1943 AVNOJ session also confirmed “the right of every nation to self-determination, including the right of secession or uniting with other nations”.⁹³³ In December 1942 Tito had an article published where he outlined his views on the national question, re-introducing the principle of self-determination and secession into Yugoslavian political discourse.⁹³⁴ This could be seen as a move away from the commonly suggested possibility of autonomy for nations or regions within a federal structure, and back to the sole Leninist alternatives for nations – of seceding or remaining within the state without special privileges. Equal rights had to be a sufficient structural solution to the problem of national exploitation, as autonomy threatened the central authority of the party.

At the Second AVNOJ Council in 1943 it was declared that Yugoslavia’s peoples had proven, on the basis of the right of all nations to self-determination, “their firm will to remain united in Yugoslavia”, and that this was “in accordance with the true will of all the nations of Yugoslavia, tested during three years of common national struggle for liberation which has cemented the indissoluble fraternity of all the people of Yugoslavia”.⁹³⁵ The later position was that “[i]n adopting and implementing the decisions of the Second Session of A.C.P.L.Y., the peoples of Yugoslavia were actually exercising the right of self-determination”. Article 1 of the 1946 Constitution of the Federal People’s Republic of Yugoslavia stated: “The Federal Republic of Yugoslavia is a federal people’s state republican in form, a community of peoples

⁹³¹ Clissold, *supra* note 914, pp. 220-1

⁹³² Shoup, *supra* note 90, p. 72. It was not here, however, that the actual federal entities were agreed upon. Đjilas notes that it was after the 1943 session that Tito accepted that Bosnia and Hercegovina would have republican status. Previously the assumption had been that it would enjoy autonomy, most likely under Serbia. Đjilas writes that because of the Ustashi and Chetnik activities “[a]utonomy under either Serbia or Croatia would only have led to more bickering and would have deprived the Muslims of all individuality.” Đjilas, *supra* note 860, p. 29

⁹³³ Shoup, *supra* note 90, p. 115, footnote 40

⁹³⁴ *Borba za oslobodjenje Jugoslavije*, pp. 121-30, in: Shoup, *supra* note 90, p. 73. Walker noted the ambiguous language of Tito’s article, allowing much room for interpretation. Connor, *supra* note 60, pp. 157-9

⁹³⁵ Connor, *supra* note 60, pp. 159-61. No plebiscite or other mechanism was chosen to verify the will of the people. Connor makes an alternative interpretation of the situation: “[T]he nations of Yugoslavia have proved by their propensity to engage in interethnic, genocidal conflict with their neighbours, their firm will to achieve independent statehood.” *Ibid.*, p. 160

equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state.”⁹³⁶

Federal institutions were introduced in 1945 and 1946 after elections to a constituent assembly and the adoption of the new constitution.⁹³⁷ Six republics and two autonomous regions were formed.⁹³⁸ Five nationalities were recognised.⁹³⁹

The minorities had special status, because the right of self-determination was not considered to apply to them as it did to the nationalities. The purpose of the autonomous regions was different from the purpose of the republics, whose borders were primarily to include the dominant nationality. The autonomous regions were not to be a similar ‘homeland’ to the Hungarians or Kosovo-Albanians, but instead recognised areas of mixed nationalities with specific problems which required special status. There was not much which set these autonomous regions apart from other inferior administrative units in the republics other than their statutes, representation in the Chamber of Nationalities and a Vojvodina Supreme Court equal to those in the republics.

The republics, on the other hand, were given much greater rights as they were considered to be “states”.⁹⁴⁰ The right to self-determination, however, was considered to belong to the nations and thus not directly applicable to the republics. The formulation of the right in the constitution could also be understood as though it had already been exercised and thus was no longer applicable.⁹⁴¹ The Communist Party was still centralist, and though the federal structure was to reflect the multinational character of Yugoslavia, it was not the party’s purpose that the republics actually use their powers contrary to the wishes of the federal government.⁹⁴² Instead of granting specific national rights the Communist Party emphasised

⁹³⁶ *Ibid.*, pp. 161-2. Similar wording was used in the 1974 constitution: *The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right of secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, [...] have, together with nationalities with which they live, united in a federal republic of free and equal nations and nationalities [...].* Basic Principle I, in: *The Constitution of the Socialist Federal Republic of Yugoslavia* (Cross-Cultural Communications, Merrick, N.Y., 1976). While the 1946 constitution stated that sovereignty was vested in the six republics the later constitutions held that that sovereignty resided in the people. See e.g. Article 3 of the 1974 Constitution: *The Socialist Republics are states based on the sovereignty of the people [...].* Constitutional amendments in 1953 excluded the term “self-determination”, which was re-introduced in the 1963 constitution. Connor, *supra* note 60, pp. 223-4

⁹³⁷ The constitution of January 31, 1946, was based on the 1936 Soviet constitution

⁹³⁸ Bosnia-Hercegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia; Serbia included the two autonomous regions Vojvodina and Kosovo-Metohija.

⁹³⁹ Croats, Macedonians, Montenegrins, Serbs, and Slovenes.

⁹⁴⁰ Shoup, *supra* note 90, pp. 113-15

⁹⁴¹ Article 1 of the constitution stated: *The Federal People's Republic of Yugoslavia is a federal people's state, republican in form, a community of peoples equal in rights who, on the basis of the right to self-determination including the right of secession, have expressed their will to live together in a federative state.* *Ibid.*, p. 115, footnote 40

⁹⁴² E.g. foreign affairs and the military were in the hands of the federal government. *Ibid.*, p. 116

their having ended national exploitation and protecting national equality, thus attempting to gain nationalist approval while confirming Yugoslavia's multinational character.⁹⁴³

The republican boundaries were drawn from 1945 onwards.⁹⁴⁴ Tito himself, with the assistance of the small leadership of the party, largely determined the borders within which the federal units would be established.⁹⁴⁵ Many of the territorial disputes were also decided within the inner circle of the party and the borders appeared without prior constituent assembly approval, even though by law this assembly had to approve all the republic boundaries before these could be incorporated into the various federal and republic constitutions.⁹⁴⁶ The Slavonia/Vojvodina boundary between Croatia and Serbia provided an exception, as an inter-republican commission was set up to research and suggest the boundary line. It did this primarily on the basis of national criteria, though economic considerations were also taken.⁹⁴⁷ Records show that with regard to the federal borders it had been decided that:

Slovenia was to be within the borders of the former Drava Banovina; Croatia within the borders of the former Sava Banovina with 13 districts of the former Coastal Banovina and the Dubrovnik district from the former Zeta Banovina; Bosnia and Herzegovina within the borders established by the Treaty of Berlin; Serbia within the pre-Balkan War borders with the districts taken from Bulgaria by virtue of the Treaty of Versailles [sic⁹⁴⁸]; Macedonia, Yugoslav territory south of Kačanik and Ristovac; Montenegro within the borders established prior to the Balkan War along with the Berane and Kotor districts and Plavo and Gusinje.⁹⁴⁹

Thus the territory of the federal units corresponded with previous borders but at different times, stretching from 1878 to 1939.⁹⁵⁰ The borders were therefore determined not on an

⁹⁴³ A strategy for showing national sensitivity included the use of national cadres and allowing cultural autonomy in areas such as the development of cultural institutions, and publishing own school textbooks within the republics *et al. Ibid.*, pp. 120-2

⁹⁴⁴ Border adjustments were made up to 1956, when the village of Bušević (Bihać district) was transferred from Bosnia-Herzegovina to Croatia. *Ibid.*, p. 118, footnote 46. Klemenčić & Schofield note that the Yugoslav government set a letter to the republics in 1947 requesting suggestions for changes to the inter-republican boundaries. Klemenčić, Mladen & Schofield, Clive, "War and Peace on the Danube: The Evolution of the Croatia-Serbia Boundary", 3 *IBRU Boundary and Territory Briefing* 3 (2001) p. 16

⁹⁴⁵ Tito said, "With us this will be more of an administrative division, instead of fixed borders, as with the bourgeoisie." Đjilas, *supra* note 856, p. 356

⁹⁴⁶ Čavoški, *supra* note 853, p. 34; Shoup, *supra* note 90, p. 118; Radan, *supra* note 326

⁹⁴⁷ As Milovan Đjilas led the commission it was simply called the *Đjilas Commission*. He is quoted as saying: "We went from village to village trying to determine which nation had a majority. The Politburo ordered us to stick to the ethnic principle beforehand." (Original in italics) The majority of commission proposals were accepted and included in the law determining the boundary. Klemenčić & Schofield, *supra* note 944, pp. 12-16

⁹⁴⁸ Treaty of Neuilly, November 27, 1919 with Bulgaria.

⁹⁴⁹ From reconstructed shorthand notes taken at the AVNOJ Presidency session, February 24, 1945. Čavoški, *supra* note 853, pp. 35-6

⁹⁵⁰ Slovenia (1929); Croatia (Cvetković-Maček agreement of August 26, 1939, except Herzegovina of 1878); Bosnia and Herzegovina (1878 except the Sandžak); Serbia (pre-1912 with some additions); Montenegro (pre-1912 with some additions). Čavoški, *supra* note 853, pp. 36-9

ethnic but on a historical basis, with the exception of Macedonia. Within Bosnia and Hercegovina the territorial unity of the Moslems was retained, while the Croatians and Serbs were divided between Croatia, Serbia and Bosnia and Hercegovina. The Macedonians were included in Macedonia, though Serbs and Albanians were included within the republic's borders, dividing them from Serbia and Kosovo. The Slovenian border was the only border fulfilling both ethnic and historic criteria.

The break with Stalin and Comintern in 1948 led to a rethinking of the structure of Yugoslavia. Decentralisation through 'self-management' was to lead to a shift in decision-making not to the republics, but to the lowest level – the workers. Thus decentralisation was to facilitate the unity of the Yugoslav people and not lead to re-emphasis of national identities. The changes to the 1946 constitution which were made in 1953 thus involved a removal of the reference to self-determination as well as minimising the rights of the republics and the reference to their 'sovereignty'.⁹⁵¹ The move away from totalitarianism, however, paved the way for the expression of national sentiments, especially in culture and education, which led the communists to open a discussion on relations between the nationalities. Tito attempted to promote the Yugoslav identity in place of the various republic nationalities, but the republics resisted all attempts to minimise the importance of the nationalities, which finally led Tito to abandon the strategy.⁹⁵² Nationalism would only come to grow in importance in politics, economy and culture.⁹⁵³

In 1958 Edvard Kardelj's *The Development of the Slovenian Question* (1939) was reissued with an introduction dealing with the national question from a Marxist point of view.⁹⁵⁴ He added the factor of "social division of labour in the epoch of capitalism" to Stalin's description of factors necessary for the formation of a nation.

⁹⁵¹ Shoup, *supra* note 90, pp. 184-6; Pešić, *supra* note 899, pp. 19-23

⁹⁵² Efforts were instead made to develop cultural exchange and cooperation between the nationalities as an attempt to develop a Yugoslav culture side by side with national cultures, instead of attempting to replace them. These efforts were also suspected to be generated by ulterior motives, one of them being Serbian cultural domination. Shoup, *supra* note 90, pp. 189-97

⁹⁵³ See Pavković, *supra* note 861, chapter 5

⁹⁵⁴ Informally Kardelj enjoyed the second position in the Yugoslav League of Communists, only behind Tito.



Map 5. The Former Yugoslavia, UN Map No. 3689 Rev. 10.
 With kind permission of the UN Cartographic Section.

Paul Shoup writes:

The reference to the “social division of labor in the epoch of capitalism” was not an effort to emasculate the concept of the nation by resorting to some form of economic determinism; instead it represented an attempt to view the development of the nation as a necessary response to the needs of organizing production under the conditions created by capitalism. Kardelj’s apparently very orthodox definition of the nation was in fact a revision of Marxism-Leninism, for it not only pointed to the importance of economics in the development of nations (Stalin himself had made this point) but emphasized the importance of the nation in the development of economic relations.⁹⁵⁵

Kardelj stressed that the positive role of the nation continued regardless of a state’s political form. This constituted a break with Stalin’s view of the solution to the national ‘problem’ through revolution. If the nation had a positive effect also in socialist stages of development “there had to exist a continuity in national development which defied revolutionary upheavals and the subsequent changes in class relations.”⁹⁵⁶ So while the nations were considered to be a

⁹⁵⁵ Shoup, *supra* note 90, p. 203

⁹⁵⁶ *Ibid.*, p. 204

progressive social force and seemingly equated with the republics, the state of Yugoslavia was a form of supra-national relationship between these nations which was superior to the nation-state system. The relationship towards the state of Yugoslavia was labelled “Yugoslav socialist consciousness” or “Yugoslavianism” (*Jugoslavenstvo*). Shoup’s analysis is that contrary to the understanding that Kardelj defended the rights of the republics, Kardelj instead argued the case that Yugoslavia was the only true nation, as the republics did not perform any progressive economic function – only Yugoslavia did.⁹⁵⁷

But the argument could also be used to legitimise a greater role for the republics in economic affairs, which is exactly what occurred. That which transpired differed again from the plans of the Central Committee: in attempting to decentralise with a strategy of finally eliminating the friction between nations, regional interests quickly took advantage of the possibility of gaining primacy over the interests of the state as a whole, leading to clear economic competition between the republics.⁹⁵⁸ Shoup has suggested that “economic rivalry among national regions was perhaps *the* single most important factor contributing to the rise of nationalism in the Tito era.”⁹⁵⁹ The party itself had linked the solution to national tensions with economic inequalities between the republics.⁹⁶⁰ Self-management was the response to the economic difficulties of the SFRY.⁹⁶¹ In the 1960s the important and differing role of the various republics in economic development became accepted and the strategy of “Yugoslavianism” was dropped with the creation of the new constitution of 1963.⁹⁶² In identifying one’s nationality a person could now choose any nationality, including that of Yugoslav, but he was also free to refuse to identify his nationality at all.⁹⁶³ The preamble to the constitution also contained a statement of general principles which referred to the rights of the peoples of the republics to self-determination and secession.⁹⁶⁴ The development continued. At the Eighth SKJ (League of Communists of Yugoslavia) Congress in 1964, Lenin’s theory that nations would disappear with the class society was rejected.⁹⁶⁵ This was the springboard for additional changes to the structure of the relationship between the

⁹⁵⁷ *Ibid.*, pp. 205-7

⁹⁵⁸ Wilson, Duncan, *Tito’s Yugoslavia* (Cambridge University Press, Cambridge, 1979) pp. 140-8, 195-7; Shoup, *supra* note 90, pp. 209, 224-5

⁹⁵⁹ *Ibid.*, p. 227

⁹⁶⁰ *Ibid.*

⁹⁶¹ Wilson, *supra* note 958, chapters 9-13, 17

⁹⁶² The strategy of ‘Yugoslavianism’ was perceived by some to be an attempt at Serbian domination, and thus for the sake of maintaining its multinational character, that nation-building process was abandoned. Shoup, *supra* note 90, p. 263

⁹⁶³ *Ibid.*, p. 211

⁹⁶⁴ *Ibid.*, p. 212

⁹⁶⁵ Pešić, *supra* note 899, p. 20

republics and the federation, as the different nations were now considered to be the bearers of sovereignty. In a series of constitutional amendments from 1968 to 1971, led by Croatian party leaders, there was a transfer of power from the federation to the republics.⁹⁶⁶

The 1974 constitution continued the trend, granting Tito more personal power by making him Yugoslavia's president for life, as well as further devolving power to the federal units. All powers except for those specifically delegated to the federation now belonged to the republics and provinces.⁹⁶⁷ Despite changes and reforms the economic and political pressures on the SFRY continued, and in 1970 Tito suggested his own replacement by a Collegiate Presidency which would consist of a representative from each republic as well as representation from the autonomous provinces. In the light of growing nationalism this would supposedly pre-empt an "inter-Republican scramble for the Presidency."⁹⁶⁸ In the 1974 constitution Vojvodina and Kosovo were granted autonomy within Serbia. Decisions within federal organs required consensus, which functioned reasonably well as long as Tito lived, but which effectively created the possibility of republican veto.⁹⁶⁹

In 1980 Tito died. The following year there were riots in Kosovo, igniting the nationalist response in Belgrade. What occurred in Yugoslavia after the death of Tito is complex – that is an understatement. This chapter will not, and cannot in any way, attempt to give an appropriate account or explanation of all the events that occurred and their implications.⁹⁷⁰ What can be suggested is that while some endeavoured to keep the Yugoslav federation afloat, others found that their interests were better served by seeking to dominate the entire entity or by separating from that entity. Some of the grave and much-discussed problems that Yugoslavia faced were tensions in Kosovo and an inflation that undermined the economy.

⁹⁶⁶ *Ibid.* p. 23

⁹⁶⁷ Wilson, *supra* note 958, p. 200

⁹⁶⁸ *Ibid.* p. 199. The following year actions were taken to suppress the nationalist movement or 'crisis' in Croatia. *Ibid.*, pp. 197-207

⁹⁶⁹ Pavković wrote that the members of the first Presidency were united by "the bonds of their shared revolutionary struggle as well as their loyalty to Tito" while the institutional bonds "were quite weak"; the 1974 constitution made Yugoslavia "a semiconfederation of semisovereign republics". Pavković, *supra* note 861, pp. 69-70. And Pešić noted: "Finally, the 1974 constitution established a symmetry that precluded linking Yugoslavia's identity with any particular republic. As such, Yugoslavia essentially had no citizens; rather, it was inhabited by citizens of its respective republics. In reality, though, the country's political life belonged to Tito and the Yugoslav National Army. The country's political elites would begin their competition for real political power only after Tito's death in 1980." Pešić, Vesna, "Serbian Nationalism and the Origins of the Yugoslav Crisis", p. 2, at: <http://www.usip.org/oc/sr/pesic/pesic2.html> (accessed 18/12/2002).

⁹⁷⁰ Tito seems to have been much aware of the problems facing Yugoslavia. Radan quotes Tito's response to a question from a political collaborator about what was wrong with Yugoslavia and the Party: "There is no Yugoslavia. [...] There is no party any more." Radan, *supra* note 312, p. 149

These two issues – ethnic relations and the economy – have often been referred to as the exclusive or interrelated backgrounds to the break-up of Yugoslavia.⁹⁷¹

7.1.2 The conflict

On July 13, 1991, some 18 days after the Slovenian and Croatian declarations of independence were made, the Dutch government suggested to the EC member states that the possibility of making changes to the internal borders of Yugoslavia on the basis of agreement between the different parties, should be examined. The then Presidency wrote:

It considers it especially important that selective application of principles be avoided. The principle of self-determination e.g. cannot exclusively apply to the existing republics while being deemed inapplicable to national minorities within those republics.

After having recognised that it did not seem possible for Yugoslavia to continue to exist within its present constitutional structure, the representative for the Netherlands stated that

It is equally difficult to imagine that Yugoslavia could peacefully dissolve into six independent republics within their present borders.

Because of the position of the Serbian minority in an independent Croatia and the guarantees that would be necessary, the Dutch government concluded that “[t]he foregoing seems to point in the direction of a voluntary redrawing of internal borders as a possible solution.” In response to the problems that this would entail, the government stated that “it cannot be denied that, if the aim is to reduce the number of national minorities in every republic, better borders than the present ones could be devised.”⁹⁷²

David Owen, who became co-chairman of the International Conference on the Former Yugoslavia in 1992, has recorded that “[i]ncomprehensibly” the proposal was rejected by the 11 other EC countries: “[T]o rule out any discussion or opportunity for compromise in order to head off war was an extraordinary decision.” The explanation he gives was their fear that a Pandora’s box would be opened, along with the belief that it was “out of date” to draw the borders of a state along ethnic lines. Owen wrote that this greatly limited the EC’s efforts at

⁹⁷¹ A tipping-point often referred to is the 1986 *Memorandum* of the Serbian Academy of Sciences and Arts. See any commentary on post-Tito Yugoslavia.

⁹⁷² Owen, David, *Balkan Odyssey* (Harcourt Brace & Co., London, 1995) pp. 32-3

crisis management and confined the peacemaking “within a straitjacket that greatly inhibited compromises between the parties.”⁹⁷³



House in Mostar, October 2001. With kind permission of Henrik Sturve.

It is evident that many errors of judgment were made in relation to the conflict in Yugoslavia. Of course it is impossible to predict accurately the effects that other approaches would have had. The purpose of this study is not, in safe retrospect, to blame those governments involved to different extents in attempting to resolve the conflict. This has already been done. The aim must be to examine the decisions made and the basis upon which they were determined in order to re-examine the norms or values used. If the goal of maintaining peace could not be upheld by the use of the norms chosen, it is not only legitimate, but also a moral and intellectual responsibility, to re-evaluate the values and principles used and referred to in the light of experiences gained. Conflicts between groups involving border disputes did not end in 1995.

⁹⁷³ *Ibid.*, p. 34

7.1.2.1 Positions, presumptions and decisions

The importance of consent in the settling of territorial or boundary claims, and of its importance for the application of *uti possidetis*, has already been discussed.⁹⁷⁴ The reasons for excluding the option of discussion were not legal ones, but were the result of political values and of an underestimation of context – partly of the importance of considering the functionality and effect of boundaries.

i: Political values

According to David Owen, the position that underlay the decision to exclude the option of discussing boundary changes was that it was outdated to consider ethnicity at boundary delimitation. Though the retention of federal boundaries must have been thought of as a peaceful option, this does not account for excluding the possibility of discussion entirely. Discussion was then very probably excluded because the EC ministers thought that the possible solution reached would not accord with their ideas of a modern and liberal society – the multicultural society which primarily relates to individuals, functions with the one-man-one-vote system, and, because of recent European history, often attempts to distance itself from treating persons first and foremost as members of groups.

Though this is understandable, the question should have been asked whether this was beneficial or harmful to a peaceful solution of the situation at issue. A context-sensitive approach would not have automatically assumed that western European political values could be immediately applied in other political contexts with similar results, or that the liberal assumption of state territory also applied to non-liberal societies. Ethnicity had been an important part of the political culture in Yugoslavia, and decisions had to be worked out by a form of consensus. This was different from the one-man-one-vote system where the result of that would risk dominance of the ethnic majority over the minority. Also, recent past experience meant that any new states would not begin with a political *tabula rasa*, but would have to cope with deep mistrust of its intentions by large minorities.⁹⁷⁵

⁹⁷⁴ See chapter 3.3.4

⁹⁷⁵ One of the biggest mistrusts was due to the gross and systematic violations committed against *inter alia* Serbs by the fascist Croatian state during the second world war, exemplified by the Jasenovac camp.

The imposition of e.g. EC political values on the options to resolve the conflict peacefully becomes problematic when the options are reduced to the point where there is less scope for a peaceful solution. Chapter VIII of the UN Charter leaves room for regional organisations in carrying out the UN mandate. However, regional attempts are subject to the UN Charter. The first Article of the UN Charter lays down that the primary purpose of the UN is to uphold and work towards the maintenance of international peace and security. This, and the following purposes in the Article, are to be reconciled and applied in light of each other. Two areas that the Article emphasises is *respect for international law* and for the self-determination of peoples. If any goals, these are the ones that should have had an effect on the position of the EC ministers. The ministers had no legal basis for ruling out options that could have led to a peaceful solution, and which were in line with the UN Charter Purposes, on the basis that these collided with their own political values. In light of the human costs of the conflict, the hundreds of thousands dead, wounded, or otherwise physically and emotionally scarred, it must be asked whether the imposition of the value of the multicultural society, which still does not function in the post-Yugoslav states as was the aim, was either legal or legitimate. Eric Stein has expressed that

The international community, in one form or another, should have faced the reality of the situation: the need to use an international agent, whether the European Community or the Security Council, to force the parties to get together and look at frontiers.⁹⁷⁶

ii: Boundary functionality and effect

An assumption made with regard to boundaries was that their character, function and legitimacy were irrelevant factors in the Yugoslav dispute. Thus the different functions of the borders within the SFRY, and their changing effects with altered status, were not seriously examined. The federal boundaries were aimed at uniting the SFRY and by its federal structure and divisions make it possible for the post-second world war state to function as a state by strengthening the position of ethnic minorities and reducing their fear of being oppressed and dominated by an ethnic majority. As international boundaries, those boundaries, whose original objective was to *reduce* fear, would instead have the effect of enclosing new minorities involuntarily in states where many felt they were in a vulnerable position, thus *causing* fear and strengthening the odds for political propaganda – poured out incessantly by

irresponsible and self-interested leaders – to be successful. Requirements such as setting up minority protection, that were made in return for recognition, were never followed up, and the fears that many had only heard ‘wild-cards’ prophesy materialised quickly and harshly.⁹⁷⁷ Other arrangements that might have taken the special vulnerability of new minority groups into account were not raised. No requirements were made of the new states with regard to the day-to-day functionality of the new international boundaries.

iii: The Badinter Commission

Towards the end of 1991 the Badinter Arbitration Commission began issuing Opinions in response to questions posed within the framework of the European Conference on Yugoslavia, which was set up in August 1991 in response to the conflict in Yugoslavia. The Conference mandate was to:

[...] ensure the peaceful accommodation of the conflicting aspirations of the Yugoslav peoples on the basis of the following principles: no unilateral change of borders by force, protection of the rights of all in Yugoslavia and full account to be taken of all legitimate concerns and aspirations.⁹⁷⁸

The parameters within which the Badinter Commission was to respond to the questions posed before it were very narrow, as the EC ministers’ decision had ruled out the only option, apart from non-acceptance by use of force or unconditional acceptance, to resolve the tensions. The retention of the boundaries would now have to be argued as obligatory under international law. There was little to refer to apart from a new interpretation of *uti possidetis* supported by selective use of ICJ *dicta*. The task of the commission’s constitutional lawyers was not an easy one, especially when the national conflict changed into an international one.

In response to the question of whether the Serbian population in Croatia and Bosnia-Herzegovina had the right to self-determination the commission held in Opinion No. 2 that “the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”⁹⁷⁹ Responding to the question posed of whether the internal boundaries between Croatia and

⁹⁷⁶ Stein, Eric, panel discussion in: “Communities in Transition: Autonomy, Self-Government and Independence” *Proceedings ASIL* (1993) 248-66 at 256

⁹⁷⁷ See footnote 727 on Operation Storm.

⁹⁷⁸ EPC Statement September 3, EC Bulletin 9-91, 63

⁹⁷⁹ On the principle, see e.g. Ratner, *supra* note 180; and Shaw, *supra* note 28

Serbia and between Bosnia-Herzegovina and Serbia should be regarded as frontiers in terms of PIL the commission held in Opinion No. 3 that

the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis* [...] is today recognized as a general principle [...].⁹⁸⁰

7.1.3 The law suggested

Uti possidetis cannot be classified as a rule of PIL for several reasons, some of which have already been discussed. Firstly, it is premised on consent to be workable, and there is therefore an inherent lack of the *opinio iuris* that is necessary to support its status as a rule of general customary international law. Secondly, it is context-related to an extent where it will only be a useful option for resolving conflicting boundary claims for a particular type of boundary that has a certain function and effect.

Koskenniemi has written that “[t]he apparent validity of the conflicting principles of *uti possidetis* and national self-determination has long been an international lawyer’s favourite paradox.”⁹⁸¹ Perhaps one reason why the paradox has remained unresolved for so long is because there has been little in the way of a multidisciplinary approach in the area of international territorial law.

In law, little distinction has been made between different kinds of boundary apart from the fact that force may not be used against international boundaries, while the issue of internal administrative boundaries have fallen within the internal affairs of states. The functionality of boundaries has, similarly, been seen as an issue falling within the internal domain, and little connection has been made between the functionality of boundaries and internal and international stability or the maintenance of international peace and security.

In the Badinter application of the principle of *uti possidetis* there was no recognition of the problems related to the changing functionality of the federal boundaries resulting from their changed status. For long-term peace and stability, a contextual approach is required. This

⁹⁸⁰ The Opinions can be found in their entirety in: Conference on Yugoslavia (Arbitration Commission), 92 *ILR* (1993) pp. 162-211, and were to have binding force. It is interesting that the commission even refers to the ICJ in support of this last claim, while disregarding the fact that the ICJ admitted that *uti possidetis* in the case of African decolonisation conflicts with the right of peoples to self-determination. Frontier Dispute case, ICJ Rep. 1986, 554 at 566-7. For some more comments on the commission, see Pomerance, *supra* note 283

relates both to the preservation of earlier internal boundaries at cases of ‘mass’ independence, as well as to boundary functionality. A question that must be posed is what the territorial problems or claims really consist of, and what solutions are possible to respond to the problems. Sometimes territorial or boundary shifts may be necessary in order to reach an agreement. In other cases setting up a system whereby the boundary will function in a way that gives sufficient consideration to the groups that will become divided by a ‘new’ boundary, or a boundary whose status has changed, might be sufficient.

7.2 Central Asia: Uzbekistan and Kyrgyzstan

To create new boundaries is always to create new trouble.⁹⁸²

7.2.1 The creation of the states

This chapter does not for a moment attempt the daunting task of providing an overview of the development of the entire Soviet Union. The main focus will be on areas of Central Asia making up the former Soviet Union, more specifically Uzbekistan and Kyrgyzstan, at the time of their formation. An attempt will be made to outline some of the main developments which led to the structure of the now independent states. The purpose is to facilitate an understanding of the challenges confronting Uzbekistan and Kyrgyzstan, specifically in the present border discussions between them.

7.2.1.1 Some short comments on Central Asia

The area formerly called Transoxiana, Turan, Turkestan or Tartary, today included, among other areas, in Kyrgyzstan, Tajikistan, Uzbekistan and Turkmenistan, has a fascinating

⁹⁸¹ Eisemann, P. & Koskenniemi, M. (eds.), *State Succession: Codification Tested against the Facts* (The Hague, 2000) p. 102

⁹⁸² Colonel E. M. House, chief adviser to President Woodrow Wilson, in: Nicolson, *supra* note 37, p. 126

history.⁹⁸³ The area has provided a meeting place for many cultures and peoples: ancient Greek, Roman, Chinese, Persian, Turkic, Mongol, Arabic and Indian. Alexander the Great defeated the Sogdian and Bactrian kingdoms in 329 BC and took the princess Roxanne from Bactria, the home of Zoroaster, as his wife. Central Asia was conquered by the Arabs in the 7th Century, bringing Islam to people accustomed to many old and newer forms of worship, such as Buddhism, Zoroastrianism, Manichaeism and Nestorian Christianity, and replacing them. Eventually, there were rebellions against the Arabs and local dynasties arose, ushering in a time of great prosperity and culture. In the 13th Century this civilisation was crushed by the Mongols of Genghis, or Chingiz Khan, who ravaged the oases. Khorezm was destroyed in 1219, followed by Bouchara the following year.⁹⁸⁴ A century later, after having gained domination over Transoxiana in 1369, Timur Lenk, otherwise known as Tamerlane, made Samarkand the centre of his empire and brought renewed prosperity, turning the cities lining the Silk Road into legend. He conquered Moscow in 1395. In 1510 the region was won by the first Persian Safavid ruler, who took Khorasan and all land south of the Amu Darya. Khorezm was reunited with Transoxiana under the Uzbek Shaibanids, who ruled from Bouchara, before the end of the same century. However, Khorezm became independent under another line of Shaibanids and at times even dominated Bouchara.⁹⁸⁵ By the mid-1700s there were five principalities: Badakhshan, Gissar, Bouchara, Khiva and Kokand.

When the Russian conquest began in 1864 the main powers in the sedentary area were the three emirates and khanates of Bouchara, Khiva and Kokand, always in competition and at war with one another and with the two former great centres of the slave trade. To the south and north were the steppes inhabited by the nomadic and pastoral Kazachs and Turkmen. In 1876 Kokand was annexed by Russia, while the khanate of Khiva and emirate of Bouchara were reduced and made into Russian protectorates in 1868 and 1873.⁹⁸⁶

Survival in this arid land was made possible by the Amu and Syr Darya rivers and their tributaries, and the construction of complex irrigation networks, creating in the desert islands

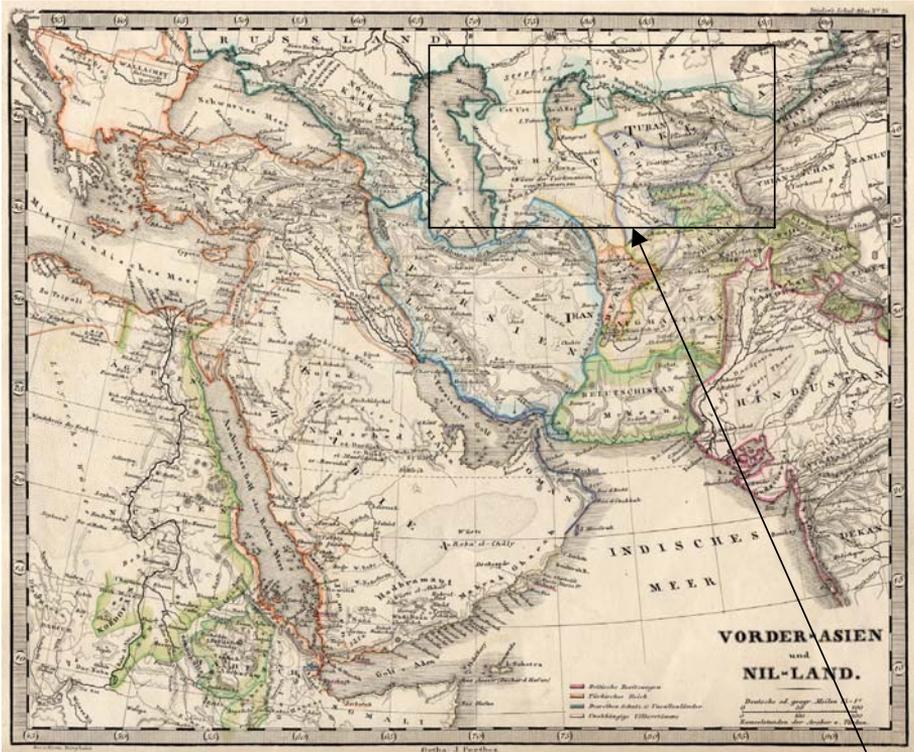
⁹⁸³ The 14th Century traveller Ibn Battuta seems the first to have used the term Turkestan, meaning the land inhabited by Turks. Gibb, H., *The Travels of Ibn Battuta A.D. 1325-1354*, vol. III (Munshiram Manoharlal Publ. Pvt Ltd., New Dehli, 1993) chapter IX. On the various names, see Yalçinkaya, Alâeddin, "The Frontiers of Turkestan", 16 *Central Asian Survey* 3 (1997) 431-8

⁹⁸⁴ Killing 30,000 people in Bouchara and burning the city to the ground Genghis Khan declared, "I am the scourge of God, if you had not sinned God would not have sent me hither to punish you." Rashid, Ahmed, *The Resurgence of Central Asia: Islam or Nationalism?* (Oxford University Press, Karachi, 1994) p. 14

⁹⁸⁵ It is suggested that the reason for the decline in the prosperity of Khorezm was due to the change, possibly in 1573, of the Amu Darya's direction, which led Urgench to be abandoned as its capital in favour of Khiva. Caroe, Olaf, *Soviet Empire: The Turks of Central Asia and Stalinism* (MacMillan & Co. Ltd., London, 1953) p. 66

⁹⁸⁶ Allworth, Edward (ed), *Central Asia: 130 Years of Russian Dominance, A Historical Overview*, 3rd ed. (Duke University Press, Durham, 1994)

of wealth and life. Some say that the history of Central Asia can be summed up as a history of the struggle for water. This struggle is presently all too evident for the inhabitants as years of drought and decades of harsh exploitation of the water resources have taken their toll. The potential for cotton production seemed limitless when higher yielding cotton strains were introduced in 1884, turning the region into an essential raw material supplier for Russia, but bringing with it the disastrous environmental and health consequences which are still increasing due partly to the exploitation of the Aral Sea water resources.



Map 6. Middle East and Central Asia, probably 1867 (likely between 1867 and 1878). Turkestan enlarged. *Stieler's Schul-Atlas No. 25* (Iustus Perthes, Gotha) Author's map.

At the turn of the last century the parts of Central Asia under Russian rule were divided into four major entities: the governates of Turkestan and of the Steppes, and the protectorates of Khiva and Bouchara. The Tsarist policy of systematic territorial division which was begun in 1867 was continued by the Bolsheviks, and from 1917 to 1936 borders and names were continually changed until the identities of the people and their territories in no way resembled the ones introduced only 20 years earlier.

7.2.1.2 The creation and development of the Soviet Union: the rhetoric of self-determination

The February Revolution of 1917 led the Tsar to abdicate, leaving a provisional government as trustee of Russian state sovereignty.⁹⁸⁷ Immediately local organs of internal self-rule, such as the Petrograd Soviet,⁹⁸⁸ were established by Russians as well as by many minorities. As the authority of the provisional government weakened, despite having included socialist ministers,⁹⁸⁹ these organs took on a greater role in society. In October, the same year, the Bolsheviks successfully implemented their *coup d'état*.⁹⁹⁰

i: Responses to the political shift: irredentist, instinctive and ideological

Within a year of the Bolshevik coup several national councils proclaimed self-rule and in 13 cases new states were proclaimed.⁹⁹¹ Finland and Poland had demanded independence immediately following the February Revolution. On the basis of national self-determination the independence of Poland was recognised by the Bolsheviks immediately following their coup. Finland was recognised in December of 1917. Estonia, Lithuania and Latvia were

⁹⁸⁷ This was not the first revolution. The 1905 revolution led to the creation of soviets, *inter alia* the Petrograd soviet, and a liberal constitution, effects which were gone by 1908. Carr, *supra* note 56, pp. 58-62, 81-111

⁹⁸⁸ This was followed by a Moscow soviet and others, dominated by Mensheviks, which led to a 'dual power' situation in the state – the provisional government and self-constituted soviets – within which both competed and cooperated. *Ibid.*, pp. 86-7, 147-52

⁹⁸⁹ *Ibid.*, pp. 98-9

⁹⁹⁰ *Ibid.*, pp. 108-9

⁹⁹¹ Connor, *supra* note 60, p. 46. Axel Kristian lists eleven between December 6, 1917-December 5, 1918: Finland, Ukraine, Lithuania, Estonia, Bielorrussia, Azerbaijan, Armenia, Georgia, Poland, Latvia and Kuban. Kristian writes that many minorities in Russia made claims for national autonomy as early as 1916 and that representatives of Poland, Finland, Bokhara, Khiva and Armenia claimed complete independence. Kristian, Axel Alexander, *The Right to Self-Determination and the Soviet Union* (Boreas Publ. Co. Ltd., London, 1952) pp. 11, 21

recognised as independent in 1920. The Siberian Republic, the Southeastern Union,⁹⁹² and the independence of Azerbaijan were proclaimed in 1918. The Ukraine followed with demands for wide-ranging autonomy.⁹⁹³

A Soviet Russia which was deprived of its borderlands would clearly find it difficult to obtain the material resources it needed. The Bolshevik response, framed by Stalin, was to claim that the nationalist calls were an insult to the right of self-determination. It was declared that the stage of bourgeois democracy had passed into the socialist stage, and so the right to self-determination had also passed from nations to workers. This explanation of self-determination could thus be applicable to the Ukraine and Belarus, which had a relatively strong working class.⁹⁹⁴ Stalin argued that national self-determination could not be allowed to be used as a cloak for counter-revolution:

All this points to the necessity of interpreting the principle of self-determination, not of the bourgeoisie, but of the toiling masses of the given nation. The principle of self-determination must be subordinated to the principles of socialism.⁹⁹⁵

In October 1920 Stalin wrote that

The demand for the secession of the border regions from Russia [...] must be rejected not only because it is contrary to the very definition of the establishment of an alliance between the centre and the border regions, but primarily because it is fundamentally opposed to the interests of the mass of the peoples both of the centre and of the border regions. Apart from the fact that the separation of the border regions would undermine the might of Central Russia [...] the seceded border regions themselves would inevitably fall into bondage to international imperialism.⁹⁹⁶

Some of the actions taken at this time to suppress anti-Soviet movements were the dissolution of the Belarussian Rada, the invasion of the Ukraine, and the crushing of several Moslem governments.⁹⁹⁷ At Lenin's prodding this interpretation of self-determination was abandoned at the Eighth Party Congress in 1919.⁹⁹⁸ The right of self-determination limited to workers

⁹⁹² This contained the Cossack regions of northern Caucasus and the Urals.

⁹⁹³ Pipes, *supra* note 63, pp. 52-108; Carr, *supra* note 56, pp. 295-312; Roy, Olivier, *The New Central Asia: The Creation of Nations* (N.Y. University Press, N.Y., 2000) pp. 43-4; Carrère d'Encausse, *supra* note 70, pp. 79-84

⁹⁹⁴ Carr, *supra* note 56, pp. 269-74

⁹⁹⁵ Cited from article published December 12, 1917, in: Connor, *supra* note 60, p. 48

⁹⁹⁶ Stalin, J., "The Policy of the Soviet Government on the National Question in Russia" (1920), in: Stalin, Joseph, *Marxism and the National and Colonial Question* (International Publishers, N.Y., 1936) pp. 78-87 at 79

⁹⁹⁷ Pipes, *supra* note 63, pp. 108-9; Carr, *supra* note 56, pp. 296-8; Roy, *supra* note 993, pp. 58-60; Bohr, Annette, "Turkmenistan and the Turkmen", in: Smith, Graham (ed.), *The Nationalities Question in the Post-Soviet States* (Longman, London, 1996) p. 350. Caroe mentions three Moslem States: Kokand in Ferghana (proclaimed 28 November 1917), Alash Orda in northern Kazach territory (November 17, 1917) and the Bashkurd Republic (November 21, 1917). Caroe, *supra* note 985, pp. 103-13.

⁹⁹⁸ Lenin said, "In my opinion, this kind of a Communist is a Great-Russian chauvinist. Many of us harbour such sentiments and they must be combated. That is why we must tell the other nations that we are [...] striving for

could not be used with much appeal in the areas of the former empire that had “socially less-developed peoples” and lacked a working class, and Lenin managed to get the Congress to return to the pre-1917 slogan of self-determination for the nations.⁹⁹⁹

As to the question who is the carrier of the nation’s will to separation, the Russian Communist Party stands on the historico-class point of view, taking into consideration the level of historical development on which a given nation stands: on the road from the Middle Ages to bourgeois democracy, or from bourgeois democracy to Soviet or proletarian democracy, and so forth.¹⁰⁰⁰

This party programme article outlined the Bolshevik view: in areas not under communist power the national self-determination slogan could be used to attract sympathy, as here the bourgeois revolution against feudalism was generally not completed. But nationalist opposition occurring in areas under communist power could be quelled, because here the right had moved to the workers who now represented the will of the nation. Thus within the issue of secession the two opposing principles of nationalism and internationalism, or communitarianism and cosmopolitanism, were contained in an uneasy alliance based upon historical development. Its use depended completely on the situation as interpreted by the Bolsheviks.

At the end of 1917 Lenin made a specific call to all Moslem workers in Russia and the eastern parts where the right of all peoples to self-determination was declared.¹⁰⁰¹ A special government proclamation in November claimed: “From now on, your customs and your religion, your national and cultural institutions will be proclaimed free and inviolable.

the voluntary alliance of the workers and peasants of all nations.” Speech Closing the Debate on the Party Programme (March 19, 1919), in: Lenin, V. I., “Eighth Congress of the R.C.P.(B.) March 18-23, 1919” in: Lenin, V. I., *Collected Works, vol. XLIX* (Progress Publishers, Moscow, 1964) pp. 141-225

⁹⁹⁹ Carr, *supra* note 56, pp. 274-7; Pipes, *supra* note 63, pp. 109-11; Smith, Graham (ed.), *The Nationalities Question in the Soviet Union* (Longman, London, 1990) p. 5

¹⁰⁰⁰ Fourth Article of the national programme of the Eighth Party Congress, March 1919, in: Pipes, *supra* note 63, p. 110

¹⁰⁰¹ Document in *Sobranie Uzakonenij, 1917-1918, no. 6, annex 2*, in: Carr, *supra* note 56, p. 269; text cited in: Pipes, *supra* note 63, p. 155, and Caroe, *supra* note 985, p. 105. Olivier Roy remarked on the confusion regarding the peoples of the empire evident in Lenin’s appeal. Among those addressed were the ‘Kyrgyz and Sarts’; an identification not communicating what Lenin wished, as ‘Kyrgyz’ referred to Kazachs and ‘Sarts’ to Uzbeks and Tajiks. ‘Sart’ identified sedentary peasants in a certain area without any ethnic or tribal implication; Roy, *supra* note 993, p. 17. On confusion as to the term ‘Sart’ throughout the Tsarist period, see Brower, Daniel, “Islam and Ethnicity: Russian Colonial Policy in Turkestan”, in: Brower, D. & Lazzarini, E. (eds.), *Russia’s Orient: Imperial Borderlands and People, 1700-1917* (Indiana University Press, Bloomington, 1997) p. 129; he explains Sarts to be townspeople. Pierce agrees with this definition, stating that villagers were called Uzbek. After 1917 both townsmen and peasants were called Uzbek, see Pierce, Richard, *Russian Central Asia, 1867-1917: A Study in Colonial Rule* (University of California Press, Berkeley, 1960) pp. 10-11. See also Park, *supra* note 836, p. 94, footnote 80. In counting the 1926 census results “Sarts” were added either to Uzbeks or Sart-Kalmyks; Hirsch, *supra* note 85, p. 105. See also pp. 150-3.

Manage in freedom your own national life.”¹⁰⁰² Between the revolutions, at their Seventh Conference in April, 1917, the Bolshevik Party had reaffirmed the right of all Russian nations to “free separation and the right to form their own independent states”.¹⁰⁰³ The next month the All-Russian Moslem Movement met in Moscow, demanding not independence but national autonomy. Congresses and meetings between various Moslem constellations were convened during the remainder of the year; some demanding independence, and others desiring autonomy within different areas.¹⁰⁰⁴ Between 1918 and 1919 most Moslem groups had rejected the Bolsheviks, but the ambitions of the ‘White’ armies of complete subjugation of non-Russian groups within a Russian Empire made the Bolshevik promises of self-determination seem a better option to some.¹⁰⁰⁵

A Congress of Moslem Communists was held in Moscow in November, 1918, and a Moslem Bureau was formed. This bureau set up Moslem communist cells in Turkestan, and *inter alia* sponsored the First Regional Conference of Moslem Organisations in Tashkent. The conference adopted a resolution which supported the creation of a “Unified Turkestan Soviet Republic” to be composed of Turkic groups from Azerbaijan to Turkestan.¹⁰⁰⁶ A “Turkestani delegation” applied to the Russian Communist Party to create an Autonomous Republic of Turkestan to be integrated into the RSFSR, keeping the area united in one administrative entity. Lenin rejected the proposal, and later wrote that

(1) We must establish a factual (ethnographic and otherwise) map of Turkestan, dividing it into Uzbek, Kirghiz, and Turkmen territories; (2) we must examine in detail the conditions for unity or separation in these three sections.¹⁰⁰⁷

In September 1920 the First Congress of the Peoples of the East (the Baku Congress) was convened, called by the Bolsheviks.¹⁰⁰⁸ Here world imperialism was condemned and distinguished from Soviet-state non-imperial colonisation, which instead had the goal of

¹⁰⁰² Kristian, *supra* note 991, p. 27

¹⁰⁰³ Park, *supra* note 836, p. 11. On the reality behind the term of independence Smith informed of a letter of September 22, 1922, from Stalin on his ‘autonomisation project’ in which he wrote to Lenin that, “a young generation of communists in the borderlands is refusing to understand the game of independence as a game, obstinately taking at face value words about independence and obstinately demanding from us the execution in practice of the letter of the constitutions of the independent republics [...]”. Smith, *supra* note 60, p. 184

¹⁰⁰⁴ Carr, *supra* note 56, pp. 322-334; Roy, *supra* note 993, pp. 37, 43. While Carr states that May 1917 was the first time the All-Russian Moslem movement met, Pierce gives an account of the All-Russian Congress meeting in secret in 1905 and 1906, leading to continued political activity in Central Asia. Pierce, *supra* note 1001, pp. 257-8

¹⁰⁰⁵ Nationalist military units cooperating with the Red Army were *inter alia* the Bashkir forces of Validov, the Kazach ‘Ush-Zhuz’ (The Three Hordes), that Tatar party ‘Milli Firqa’, the Persian ‘Jengelis’, the Sufi brotherhood ‘Vaisites’. Smith, *supra* note 60, p. 126.

¹⁰⁰⁶ Park, *supra* note 836, pp. 126-7

¹⁰⁰⁷ The delegation consisted of Ryskulov, Khodjaev and Ivanov. Carrère d’Encausse, *supra* note 70, p. 96

enriching local populations and building a better, socialist society.¹⁰⁰⁹ All did not agree with this interpretation of reality, as land, for example, was still systematically being expropriated from the local population by Russian settlers.¹⁰¹⁰ Moslem delegates from Turkestan protested against “red colonialism” and called for the removal of “your colonists now working under the guise of communism”.¹⁰¹¹

Between 1920 and 1923 many autonomous republics and regions (*oblasts*) were set up. They included Autonomous Bashkiri, Tatar, Kyrgyz, and Daghestani Socialist Soviet Republics, and Autonomous Chuvash, Mari, Votiak, Cherkess and Kalmykian *oblasts*.¹⁰¹² Self-government was unilaterally decided upon in each case by the central authorities, followed by an agreement between the central government and the territory. Thus the status of territories was determined within the framework of the Constitution of the RSFSR.¹⁰¹³ The language and symbolism of self-determination were still being used – one example is to be found in the March 1921 treaty between Bouchara and the RSFSR.¹⁰¹⁴

In 1921 Stalin published an article which examined the communist response to the national issue after 1917. He concluded *inter alia* that the right for nations to secede and create independent states had replaced the vague right to self-determination. Stalin also drew up a list of five areas which needed to be targeted in order for national equality to be

¹⁰⁰⁸ Roy, *supra* note 993, p. 39; Hirsch, *supra* note 85, p. 4

¹⁰⁰⁹ “This is a holy war for the liberation of the Peoples of the East, for the ending of the division of mankind into oppressor peoples and oppressed peoples, for complete equality of all peoples and races, whatever language they may speak, whatever the colour of their skin and whatever religion they profess. [...] Into the holy war for freedom, independence and happiness for all the peoples of the East, all the East’s millions of peasants and workers enslaved by Britain!”. Text from the “Manifesto of the Congress to the Peoples of the East” at: <http://www.marxists.org/history/international/comintern/baku/manifesto.htm> (accessed 22/01/2004)

Francine Hirsch noted that the criticism against Western-style imperialism was levelled not at its distinction between ‘backward’ and ‘advanced’ peoples, but at its exploitation of the less developed people for its own benefit. This important observation explains the ‘civilizing’ and modernizing mission that the Bolsheviks understood themselves to be faced with; see Hirsch, *supra* note 85, p. 18 ff. Marx himself justified colonialism and imperialism as they were the most efficient way for pre-industrial peoples to advance to a higher economic stage; see Connor, *supra* note 60, p. 9

¹⁰¹⁰ Roy, *supra* note 993, p. 50

¹⁰¹¹ Massell, Gregory J., *The Surrogate Proletariat: Moslem Women and Revolutionary Strategies in Soviet Central Asia, 1919-29* (Princeton University Press, Princeton, 1974) pp. 48-9; Carr, *supra* note 56, p. 342. For Bolshevik efforts to draw Moslem nationalists towards the Party, see Smith, *supra* note 60, pp. 125-35

¹⁰¹² Carr, *supra* note 56, p. 331; Pipes, *supra* note 63, p. 247. LeDonne writes that most national territories were created between 1920-21, before Gosplan presented its economic regionalisation programme. Faced with two methods of territorial organisation the government decided that the economic regions could not disrupt the national territories. Thus before 1924 such territories were included within larger economic regions. In the case of Turkestan the Turkestan Autonomous Republic (national) coincided with the Turkestan oblast (economic). LeDonne, John, *From Gubernia to Oblast: Soviet Territorial-Administrative Reform, 1917-1923* (UMI; degree date 1962) pp. 154-5

¹⁰¹³ Carr, *supra* note 56, p. 334

¹⁰¹⁴ *Ibid.*, p. 275, footnote 1

promoted in reality.¹⁰¹⁵ This now became the main response to the national issue: implementing the equality of nations. If self-determination under the bourgeois stage consisted of a legitimate demand for liberation, then national self-determination under the socialist stage instead required national equality.¹⁰¹⁶ This equality, in which “the flourishing of the nations”, or pluralism, was promoted, would undermine mistrust and the nations would then move closer together, known as “the rapprochement” of nations:

the blossoming of national cultures (and languages) in the period of the dictatorship of the proletariat in one country, with the object of preparing the way for their dying away and fusion into a single, common, socialist culture (and a single, common language) in the period of victory of socialism all over the world.¹⁰¹⁷

<i>Historical stage</i>	Bourgeois revolution	Socialist revolution	Socialism: dictatorship of the proletariat	Disappearance of nations
<i>Whose right</i>	bourgeoisie	workers		
<i>Content of right</i>	Secession and independence from imperialism and freedom from feudalism	Secession and freedom from capitalist inequality	Equality between nations	
	Freedom of choice	Freedom of choice	Equality; no choice	

E. H. Carr has noted the conflict here between freedom and equality. While freedom carries with it inequality, equality sacrifices freedom. Thus freedom in self-determination is abandoned for equality between the holders of the former right – a shift from freedom to structure. If national self-determination under socialism thus meant equality between nations, then a union of equal states in a socialist federation was a natural consequence of the doctrine.¹⁰¹⁸

¹⁰¹⁵ “1. The study of the economic conditions, social life and culture of the backward nations and peoples; 2. The development of their culture; 3. Their political education; 4. Their gradual and painless incorporation into the higher forms of economic life; and 5. The organisation of economic co-operation between the toilers of the backward and the advanced nationalities.” Stalin, J., “The National Question Presented” (1921), in: Stalin, Joseph, *Marxism and the National and Colonial Question* (International Publishers, N.Y., 1936) pp. 111-16 at 116

¹⁰¹⁶ Carr, *supra* note 56, pp. 279-280

¹⁰¹⁷ Stalin, *supra* note 81, pp. 256-66

¹⁰¹⁸ Carr, *supra* note 56, p. 280-1

ii: Designing a strategy

In the beginning of 1918 work began on a constitution for the state. As earlier noted, the Bolsheviks were centralists and originally firmly opposed to federalism. In 1903 Lenin chided Armenian social democrats for desiring a federal Russian republic, and in 1913 he explained that Marxists naturally were against federalism and decentralisation, adding that it was an inappropriate form for an entire state.¹⁰¹⁹ However, the Bolsheviks had also promised national self-determination, and Lenin explained in “State and Revolution” (1917), that the federal system could constitute a step forward under special circumstances; the primary one being the national issue.¹⁰²⁰ Groups within the territories that had seceded had to be reassured that their union with the RSFSR would not result in political subservience.¹⁰²¹ Federalism was thus a compromise, presented as a guarantee of equality, but was also seen as a passing phase in the state – this “special repressive force” which would itself come to pass.

A fundamental issue to be resolved regarding the nature of the federal system was whether the units making up the new state were to be determined on the basis of economy, geography, nationality, history or on some other basis. Stalin’s suggestion that the units should be established along national-territorial lines was accepted by the Constitutional Commission, and thus formed the basis of the 1918 constitution.¹⁰²² The borders of the state were, however, not yet settled, and the war was still not over, so what was described by the Constitution of the RSFSR of 1918 was a Russian republic of undefined territory and unclear units. There was furthermore silence regarding the difference in their status.¹⁰²³

¹⁰¹⁹ The reason why they naturally would be against federalism is the theory that in order for capitalism to fully develop it requires a centralist system and a large territorial organisation, and socialist revolution presupposes a developed capitalist system. Carr, *supra* note 56, p. 146

¹⁰²⁰ Lenin, V. I., “The State and Revolution” (1917), in: Lenin, V. I., *Collected Works, vol. XV* (Progress Publishers, Moscow, 1964) pp. 381-492. Federalisation in this case became a step towards centralisation, as the borderland republics which had gained independent status during the revolution could be brought back together. Carr, *supra* note 56, pp. 146-50

¹⁰²¹ Connor, *supra* note 60, p. 218

¹⁰²² Pipes, *supra* note 63, pp. 111-12. It is important to note that in analysing the meaning of the federalisation of the state and the nature of the units, the party’s *de facto* influence as a centralising factor is fundamental. The party was never divided along national lines, and the republican communist parties were subordinated regional branches of the Russian Communist Party; not autonomous, decentralised, national organisations. Thus the federal effect of the federal structure was clearly different from the European sense. *Ibid.*, pp. 242-6; also Rakowska-Harmstone, *supra* note 837, p. 68. Smith wrote that a certain degree of localism was tolerated, which for the republic leaders meant a complex role. Smith, Graham, “Post-colonialism and Borderland Identities”, in: Smith, Graham, & Law, Vivien *et al*, *Nation-building in the Post-Soviet Borderlands: The Politics of National Identities* (Cambridge University Press, Cambridge, 1998) pp. 1-20 at 4-5. On centralism in the economic planning and development of the USSR, see Liebowitz, Ronald, *The Spatial and Ethnic Dimensions of Soviet Regional Investment: 1956-1975* (Ph.D. thesis, UMI, 1985) pp. 47-62

¹⁰²³ Carr, *supra* note 56, pp. 148-50. Wherever the Bolsheviks came into power, they merely announced the territory’s “union” with the RSFSR. Pipes, *supra* note 63, p. 247

The need to implement the decision to create units based upon the national-territorial principle led the debate to continue on their form. The differences between nations, tribes and ethnic groups had not been agreed upon before national self-determination was promised. All persons in the units discussed did not identify themselves as being part of a nation. A clear case characterised by other identities and loyalties was Central Asia.¹⁰²⁴ Even the criteria for identifying a nation at all was disputed: either biology or outside factors such as culture, history and geography could be the factors determining a nation.¹⁰²⁵ And once all this had been clarified and agreed upon, there was the issue of establishing who was part of the different groups – a decision which would determine where the borders were finally drawn.¹⁰²⁶

On December 9, 1919, the Seventh All-Russian Congress of Soviets passed a resolution that the regionalisation of the RSFSR could not be postponed, and instructed the All-Russian Central Executive Commission (VTsIK) to resolve the problems related to territorial division, working out the general principles that would be used.¹⁰²⁷ Previously in 1914 Lenin had written that “the borders of the administrative divisions of Russia, whether rural or urban [...] should be reorganized on the basis of contemporary economic conditions and the national composition of the population.”¹⁰²⁸ For several reasons the present system had slipped into anarchy and scant attention was being paid to any central visions.¹⁰²⁹ An administrative commission, which was already functioning, was sanctioned by the VTsIK to work on the issue.¹⁰³⁰ On February 22, 1921, the State Planning Commission (Gosplan) was set up for the

¹⁰²⁴“The sedentary element in Central Asia regarded itself as being in the first place ‘Muslim’, and then as inhabiting a town or a definite region. Ethnic considerations had hardly any importance in their eyes.” Barthold in: Bennigsen, Alexandre & Quelquejay, Chantal, *The Evolution of the Muslim Nationalities of the USSR and Their Linguistic Problems* (Central Asian Research Centre, London, 1961). Roy, *supra* note 993, chapter 1. In preparing for the 1926 census local Central Asian officials claimed clan affiliation was the most meaningful identification; see Hirsch, *supra* note 85, p. 98. See complex identity in the case of Bukhara, in: Allworth, Edward (ed), *The Nationality Question in Soviet Central Asia* (Praeger Publ., London, 1973) pp. 143-58

¹⁰²⁵ In his 1913 article “Marxism and the National Question” Stalin attempted to define a nation as a “historically evolved, stable community of language, territory, economic life, and psychological makeup manifested in a community of culture.” As it was territory which was to be determined by the census Stalin’s definition was not entirely useful. Stalin, *supra* note 75, at 8

¹⁰²⁶ Hirsch, *supra* note 85, pp. 35-42, 83-90, 97-105

¹⁰²⁷ LeDonne, *supra* note 1012, p. 63.

¹⁰²⁸ Roberts, *supra* note 836, p. 45, on draft written by Lenin to Bolshevik factions in the Duma.

¹⁰²⁹ A January 27, 1918, decree by the Sovnarkom (The Council of People’s Commissariats - the executive and directive organ of the government) written by Lenin had allowed complete freedom of reorganisation in stating that, “Questions concerning changes in the boundaries of guberniyas, uyezds, and volosts will be resolved entirely by the provincial soviets and soldiers’ deputies.” Only on July 15, 1919, did the Sovnarkom decree that all changes henceforth would be decided by the NKVD (People’s Commissariat of the Interior). *Ibid.*, pp. 50-1

¹⁰³⁰ On May 20, 1921, the Commission presented the criteria to be used when making future administrative divisions. These were: 1) industrial concentration; 2) technical crops concentration; 3) population gravitation around industrial centres; 4) direction and nature of communications; 5) amount of population; and 6) ethnic composition. LeDonne, *supra* note 1012, pp. 63-70

purpose of “working out a single all-embracing state economic plan [...] as well as the means for carrying it out”.¹⁰³¹ One of their tasks was thus to work out a plan for regionalisation of the country, which they based primarily upon the “economic principle”.¹⁰³² This vision was criticised by ethnographers as European-style imperialism, and though both sides agreed that nations would disappear at some future time, there was disagreement as to when this might occur and when it did, by which process it would be facilitated. The use of the ethno-territorial principle for administrative borders was supported by the People’s Commissariat of Nationalities¹⁰³³ (Narkomnats), while the economic principle was advocated primarily by Gosplan and *inter alia* earlier accepted by the Eighth All-Russian Congress of Soviets at the end of 1920.¹⁰³⁴ Gosplan criticised the ethno-national principle on the basis of economic viability as well as on the grounds that Narkomnats was pushing national self-determination among peoples who did not have a strong sense of nationality, thus creating national identity where it did not, as yet, exist.¹⁰³⁵ Narkomnats officials responded by asserting that all peoples must have their own territorial units to avoid domination by other nations.¹⁰³⁶

iii: From vision to reality, or How it was actually done

The Soviet Union came into being with the ratification of the Soviet constitution by the Second All-Union Congress of Soviets on January 31, 1924. This was 10 days after the death of Lenin.¹⁰³⁷ The building of that federation was, however, not complete.

In 1923 the government announced plans for the first All-Union Census of the population which was to provide information on the ‘national’ composition of the federation in order to ensure national self-determination.¹⁰³⁸ Between 1924 and 1926 much frenetic work had to be

¹⁰³¹ Roberts, *supra* note 836, p. 95

¹⁰³² On Gosplan’s organisational theory, see LeDonne, *supra* note 1012, pp. 71-89, 104-14

¹⁰³³ The Commissariat was created by Lenin in November, 1917, with Stalin as chairman. It was dissolved in 1924 and incorporated into the second chamber of the USSR government’s legislative branch. Pipes, *supra* note 63, pp. 112-13, 248-50. The Narkomnats had national and regional departments, among them the Muslim Commissariat (Muskom) under the leadership of Mirsaid Sultan-Galiev. Its influence lasted from 1918-19.

Smith, *supra* note 60, pp. 41-3

¹⁰³⁴ Hirsch, *supra* note 85, pp. 42-52

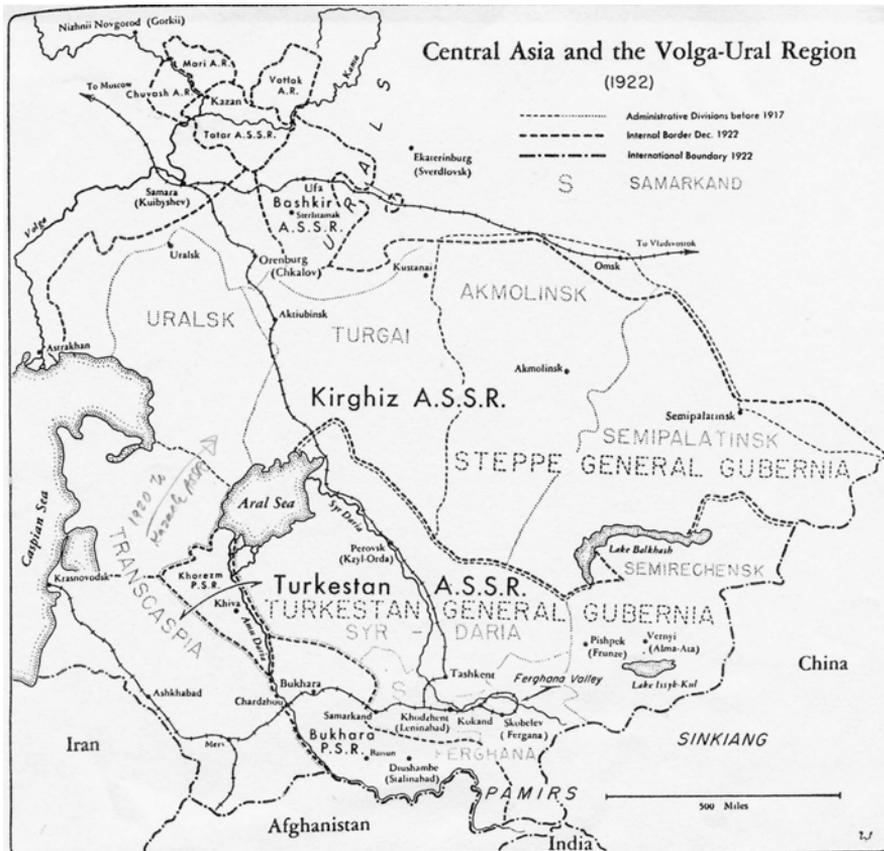
¹⁰³⁵ *Ibid.*, pp. 48-9; Roberts, *supra* note 836, pp. 112-15

¹⁰³⁶ Hirsch, *supra* note 85, pp. 53-4; Roberts, *supra* note 836, p. 121

¹⁰³⁷ Pipes, *supra* note 63, p. 293

¹⁰³⁸ The last census of 1897 accounted for 104 nationalities speaking 146 languages and dialects. Park, *supra* note 836, p. 4. The census had classified persons on the basis of religion and native language. With religion delegitimised and the abandonment of many native languages due to Russification, these criteria became quite unhelpful in determining nationality. Hirsch, *supra* note 85, pp. 67, 74, 77, 133. Compare the use of the population census with the Paris Peace Conference 1919-20 scarce use of the plebiscite.

done to come up with the list of nationalities (*narodnost*’ or *natsional’nost*’) for the census. Up until the day of the census, conducted in 1926, nationalities were included, removed or “penciled in again with question marks in the margins.”¹⁰³⁹



Map 7. Different Central Asian delineations and entities prior to the 1924 creation of the USSR.
 Map by Robert L. Williams in: Pipes, Richard, *The Formation of the Soviet Union*
 (Harvard University Press, Mass., 1997) p. 157. With kind permission of Harvard University Press.

It was only among these official nations that persons could make a selection of their nationality – a choice of which nation one ‘belonged’ to. With regard to the formation of national identities in Central Asia at the time Olivier Roy has suggested that “[t]he very concept of nation suggests that people should belong exclusively to either one or another.”¹⁰⁴⁰ It is clear that the official definition of nationality and the classification of peoples itself determined which peoples were entitled to territories and other rights.¹⁰⁴¹ The practical

¹⁰³⁹ *Ibid.*, p. 90. By 1928 some 172 nationalities had gained official status; *ibid.*, p. 78.

¹⁰⁴⁰ Roy, *supra* note 993, p. 116

¹⁰⁴¹ Hirsch, *supra* note 85, pp. 69, 78

consequences of one's choice were therefore a major consideration. For many groups this turned out not to be an issue of actual feelings of identity but primarily of access to land.¹⁰⁴²

Though national identification was to determine the territorial divisions, the economic principle entered at the stage of implementation. The primacy of economic considerations over ethnic ones affected the conclusions to be drawn from the 1926 census: after the census had been completed the government heeded the calls of 'major nationalities' (*glavnaia narodnost*) to include smaller peoples within them when calculating the census totals. This also meant including their land within the dominant nationality's unit, as well as promoting one language and culture – that of the dominant group. In effect, nation-state units were being created.¹⁰⁴³

In 1927 work began on a revised nationalities list which would include only the *glavnaia narodnost* of each territorial region. This meant consolidating 'smaller' peoples into larger groups, a further step towards creating nation-state units with dominant nationalities. Gosplan was actively involved in this consolidation process, which was thought to lead to more economically 'viable' units. Within this context the question of self-determination was raised – did this not run counter to the promise to allow the self-determination of peoples?¹⁰⁴⁴

Between 1928 and 1933 the census totals were published with a list of the major nationalities and a revised list of *narodnosti*; even fewer than included in the revised 1927 list of nationalities. The information was used in the late 1920s to demarcate borders, in some cases to legitimise the incorporation of smaller peoples into dominant neighbours, or the unification of smaller groups into greater national units. This occurred, among other places, in Uzbekistan, where a number of people who did not consider themselves to be Uzbek had been registered as such in 1926, and were thus forced to adopt a new language and culture.¹⁰⁴⁵ By the beginning of the 1930s the units making up the federation were the result of both the economic and ethno-territorial principles.¹⁰⁴⁶ The focus had by now clearly shifted from

¹⁰⁴² *Ibid.*, pp. 95-6, 148. E.g. the Uzbek-speaking Khidyr-Ali redefined itself as Turkmen in order to be included in Turkmenistan, within which the area it had strong economic ties with, had been included. Roy, *supra* note 993, p. 17

¹⁰⁴³ Francine Hirsch noted that the western European nation-state was the Soviet officials' ideal model for the economic development of a territory; Hirsch, *supra* note 85, p. 79. For the building of nations in Central Asia, see Roy, *supra* note 993, especially chapters 4-6. Bennigsen wrote in 1960 that "the main object of the nationalities policy, that is, the formation of modern nations, has already been achieved for some peoples and is in fair way to being achieved for others." Bennigsen & Quelquejay, *supra* note 1024, p. 35

¹⁰⁴⁴ Hirsch, *supra* note 85, pp. 105-10. In the late 1920s land was given and national-language schools were set up on the basis of *glavnye narodnosti* calculations. *Ibid.*, p. 108.

¹⁰⁴⁵ *Ibid.*, pp. 112-13, 135-6

¹⁰⁴⁶ *Ibid.*, p. 72. The units making up the USSR were classified in descending order: Soviet Socialist Republics (SSR), Autonomous Soviet Socialist Republics (ASSR), Autonomous Regions (AR or *oblasts*), and national territories (NT). After 1959 there were over 100 administrative entities: the RSFSR, 14 SSRs, 20 ASSRs, a large

protection of the interests of even small, vulnerable nations under the principle of self-determination, to the building of a modern state on the basis of large economic regions and major nationalities – a federation of nation-states.

When the Soviet Union was formed in 1924 the general framework of the state, such as national regions, *oblasts* and republics, had been retained. A systematic review of borders was therefore necessary. The connection between nationality and borders had immediately led to border disputes, many of them in Central Asia, and that same year a regionalisation commission was established to mediate such disputes.¹⁰⁴⁷ Three principles were used to resolve border disputes: the economic principle, the ethnographic or national principle, and the principle of ‘administrative order’. The goal when using the latter principle was to decide on a border using ‘administrative rationality’. This could conceal political concerns that could not be officially referred to, or seen, as decisive. The principle was first used when determining the Ukraine’s border, and was later often used when determining the borders of the Central Asian republics. Francine Hirsch noted that the use of the principle “established that not all national claims need be recognized.”¹⁰⁴⁸ TsIK’s official journal published articles prioritising economic development over the national principle in border delimitation. One article explained that the latter principle did not mean that all nations were guaranteed territories or that the borders would always be drawn so as to create nation-states.¹⁰⁴⁹

iv: Central Asia: Kokand and after...

Plans for the Russian conquest of Central Asia had been prepared as early as 1839.¹⁰⁵⁰ In 1847 the Russians built a fort at Raimsk at the mouth of the Syr-Darya. With the conquest of the Kokandian fort Ak-Mechet its middle course was under Russian command by 1853. In 1865 Tashkent was conquered by 1900 soldiers, with an artillery of 12 cannons.¹⁰⁵¹ Samarkand was captured three years later. The khanate of Kokand was annexed by Russia in 1876.¹⁰⁵² Nine

number of ARs (*oblasts*) and NTs. Liebowitz, *supra* note 1022, pp. 84-90. The SSRs were to enjoy equal status, while the ASSRs were part of SSRs.

¹⁰⁴⁷ The commission was established by the new Central Executive Committee (TsIK); Hirsch, *supra* note 85, p. 119

¹⁰⁴⁸ Hirsch, *supra* note 85, p. 128

¹⁰⁴⁹ *Ibid.*, p. 143

¹⁰⁵⁰ That year General Perovskii marched without success against Khiva, revealing the need to build more forts in the area if an advance was to be successful. The aim was both to suppress slave-trading Khiva and to counter Britain’s growing influence in Afghanistan. Pierce, *supra* note 1001, pp. 18-19; Caroe, *supra* note 985, p. 77

¹⁰⁵¹ Hopkirk, Peter, *The Great Game* (Oxford University Press, Oxford, 1990) pp. 306-20

¹⁰⁵² Pierce, *supra* note 1001, pp. 18-42

years later the Russian conquest of the region was complete, and in 1895 the Anglo-Russian Frontier Commission demarcated the border with Afghanistan.¹⁰⁵³

According to the recommendations of a special committee, which was set up by Tsar Alexander in 1867, the governate of Turkestan was established, alongside the protectorates of Khiva and Bouchara. The governate was sub-divided into *oblasts* (regions), *uezds* (counties), *volosts* (districts) and *auls* (family groups to which several households would belong). The policy was to weaken existing clan loyalties and cut across frontiers in an attempt to attach the non-Russian population's allegiance to the Tsar.¹⁰⁵⁴ Tashkent grew into an important economic centre of Russian Turkestan as the *gubernat* became a vital raw material supplier and a market for Russian manufactured goods.¹⁰⁵⁵ A wave of Russian peasants moved to Turkestan and the Steppes in order to relieve the overburdened central areas of the Russian Empire after the 1861 abolition of the serf system created an instant demand for more land.¹⁰⁵⁶ It could hardly be said that the principal sentiment characterising the native population for the Russian presence in Central Asia at that time was gratitude.¹⁰⁵⁷

¹⁰⁵³ Vaidyanath, R., *The Formation of the Soviet Central Asian Republics: A Study in Soviet Nationalities Policy 1917-1936* (People's Publishing House, New Delhi, 1967) pp. 30-1. In 1873 a formal understanding had been reached with Britain on the Amu-Darya as the dividing line between Russian and British spheres of influence, but the eastern and western reaches of the line had not yet been determined; Becker, Seymour, "Russia's Central Asian Empire 1885-1917" in: Rywkin, Michael (ed), *Russian Colonial Expansion to 1917* (Mansell Publ., London, 1988) p. 235. The Russo-Persian frontier was determined by treaty in 1881; Popowski, Josef, *The Rival Powers in Central Asia* (Archibald Constable and Co., Westminster, 1893) p. 51

¹⁰⁵⁴ Becker, *supra* note 1053, p. 239; Pierce, *supra* note 1001, pp. 47-50, 59-60. Though with lesser evidence for this than the above authors William Mandel goes even further: "In addition to the dividing up of the territory of Central Asia into 'native states' and Russian Turkestan, the native people were rendered still less able to organize themselves for independence by a gerrymandering of boundary lines which split every local nationality into a number of groups each with a different type of government to face." Mandel, W., *The Soviet Far East and Central Asia* (1944) pp. 100-1, in: Vaidyanath, *supra* note 1053, pp. 34-6

¹⁰⁵⁵ Higher yielding American cotton strains were introduced to the region in 1884 and turned it into the main raw material supplier of the Russian textile industry. Akiner, Shirin, "Uzbekistan and the Uzbeks", in: Smith, Graham (ed.), *The Nationalities Question in the Post-Soviet States* (Longman, London, 1996) p. 338; Vaidyanath, *supra* note 1053, pp. 41-9. Rakowska-Harmstone claims that the Russian conquest was in part prompted by the need to replace the cotton supply cut off by the American Civil War (1861-65); Rakowska-Harmstone, *supra* note 837, p. 13. This theory is somewhat undermined by the figures of cotton imports from the USA to Russia, which increased dramatically during this period: 444' puds in 1862; 587' puds in 1863; 933' puds in 1864; 1,124' puds in 1865; 2,372' puds in 1866; 2,536' puds in 1867, see Kostenko, L. F., *The Turkistan Region; Being a Military Statistical Review of the Turkistan Military District of Russia*, vol. III (Calcutta, 1884) p. 28. While Kostenko described the lower quality of Central Asian cotton, though noting the near perfect climate for growing it, and the need for the supply of cotton not to be at risk in the future, he instead emphasised the "immense" importance of Central Asia "as a mart for the cotton manufactures of European Russia". His argument for changing Russia's source of cotton supply was that the major part of the American cotton passed through England, causing Russia's "most important branch of her manufacturing industry to be completely in the hands of England." A "less hazardous and expensive route" for cotton to reach Russia was needed. American cotton seed had been experimentally planted in Samarkand in 1871. *Ibid.*, pp. 20-33. Support for the argument of alternative transport was found in the rapid building of the Trans-Caspian line, begun in 1880. Caroe, *supra* note 985, pp. 86-7

¹⁰⁵⁶ Between 1897 and 1907 the population of Russian Turkestan increased from 5.28 million to 6.24 million, mostly as a result of Cossack and Russian peasant settler immigration. Many more peasants settled in the Steppes governate, as confiscation of nomadic territories involved less fierce opposition than that by Turkestan's

On March 3 and 5, 1917, a few days after the Tsar's abdication, a Soviet of Workers' Deputies and a Soviet of Soldiers' Deputies, which were affiliated to the Petrograd Soviet, were set up in Tashkent. A rival Turkestan committee supporting the provisional government was set up at the same time. Both groups consisted only of Russians.¹⁰⁵⁸ Eight months later, the government-supportive committee was successfully overthrown by the soviet, which proclaimed the first Soviet government in a former Russian colony at their third congress between November 15 and 22, 1917. Moslems were expressly excluded from government positions by a special resolution, as the 'victors alone' should form the new government. Rebellions in the city were brutally crushed. The 'revolution' in Turkestan was a purely Russian affair, and was neither supported by, nor involved, the local population.¹⁰⁵⁹ With the outbreak of the civil war, Central Asia was soon cut off from central Russian administration.¹⁰⁶⁰

In response to the February Revolution and following events, various Moslem initiatives were taken. In April the All-Russian Moslem Congress met in Ufa and Kazan, and was attended, among others, by Jadidists and Tatars. Calls were made for the establishment of a federal and democratic Russian republic, for the granting of equal rights to the Moslems of Russia, and for the formation of a Bukharan government under a local Jadidist party.¹⁰⁶¹ The following month the First All-Russian Moslem Congress met in Moscow, and after lengthy debates it adopted a resolution recommending that the state be structured as a "united (federal) republic based on territorial autonomy; for Muslim peoples with no territorial claims, a people's republic based on national cultural autonomy shall be secured."¹⁰⁶² Self-rule for the Moslems was, however, not an option that was acceptable to the local Russians. The Jadidists and conservatives thus met in the Second Extraordinary Regional Moslem Congress in

settled population. The large-scale confiscation of land led to starvation among the nomadic population: between 1903-13 the Kyrgyz population fell by 7-10 per cent. See Vaidyanath, *supra* note 1053, pp. 33, 38-41.

¹⁰⁵⁷ For rebellions in 1892, 1898, and 1916, see Pierce, *supra* note 1001, pp. 221-33, 271-96 and Caroe, *supra* note 985, pp. 88-91.

¹⁰⁵⁸ Pierce, *supra* note 1001, pp. 299-300

¹⁰⁵⁹ The 'revolutionaries' of Turkestan, unlike Lenin, did not seek the support of the Moslem population in overthrowing the Turkestan Committee, but directed its appeals only to Russians. Park, *supra* note 836, pp. 12-13. In the Marxist scheme the traditional Central Asians were clearly not ready for revolution. Lenin explained, however, in 1921 that "backward countries . . . [with feudal or semi-feudal systems could indeed] pass on to a soviet system and, via certain developmental stages, to communism, bypassing the capitalist stage of development." Lenin, *Sochineniia* (4th ed.) vol. 31, pp. 207-9, 215-20 in: Massell, *supra* note 1011, p. 42

¹⁰⁶⁰ Vaidyanath, *supra* note 1053, p. 76

¹⁰⁶¹ Sabol, Steven, "The Creation of Soviet Central Asia: the 1924 delimitation" 14 *Central Asian Survey* 2 (1995) pp. 225-41 at 228

¹⁰⁶² Daulet, Shafiga, "The First All Muslim Congress of Russia, Moscow, 1-11 May, 1917", 8 *Central Asian Review* 1 (1989) pp. 21-47 at 41-2. This compromise formula was unpractical and most likely the reason why the resolution was adopted by the majority of delegates present.

September, in order to map out a blueprint for the autonomy of Turkestan within Russia.¹⁰⁶³ Following the Bolshevik Revolution and the proclamation of the Tashkent Soviet government with its exclusion of native participation, the Central Council of Muslims convened a Third Moslem Congress where the demand for autonomy was repeated and the formation of a Moslem government ordered.¹⁰⁶⁴ At the Fourth Extraordinary Moslem Congress, in the city of Kokand, the autonomy of Central Asia was proclaimed according to the principle of self-determination.¹⁰⁶⁵ A rival government to that of Bolshevik Tashkent was set up, calling itself the Muslim Provisional Government of Autonomous Turkestan.¹⁰⁶⁶

Though demonstrations took place in Tashkent in support of the Moslem government no violence was directed against the Tashkent soviet, which thus remained unseated. The Kokand government appealed several times to the central Soviet authority to recognise it and dissolve the Tashkent Soviet on the basis of the principle of self-determination.¹⁰⁶⁷ The Fourth Regional Congress of Soviets met in Tashkent in January, 1918, and replied: “We subordinate entirely the principle of national self-determination to socialism [...]”¹⁰⁶⁸ On February 18, 1918, the city of Kokand was ransacked by troops from the Tashkent Soviet and thousands were massacred.¹⁰⁶⁹ It was clear by then that the self-determination that was proclaimed by the Bolsheviks was not available for the people of this area. The revolution was understood to be cloaked, and fundamentally unchanged, Russian colonisation.¹⁰⁷⁰

The existence of the Autonomous Soviet Socialist Republic (ASSR) of Turkestan, attached to the RSFSR, was proclaimed by the Fifth Regional Congress of Soviets on April 30, 1918,

¹⁰⁶³ Vaidyanath, *supra* note 1053, pp. 70-5

¹⁰⁶⁴ Park, *supra* note 836, p. 14

¹⁰⁶⁵ “The Fourth Extraordinary Congress, expressing the will of the peoples of Turkestan to self-determination in accordance with the principles proclaimed by the Great Russian Revolution, proclaims Turkestan territorially autonomous in union with the Federal Democratic Republic of Russia.” Resolution of December 11, 1917, in: Vaidyanath, *supra* note 1053, pp. 80-1; also in: Sabol, *supra* note 1061, at 230

¹⁰⁶⁶ A Turkmen National Executive Committee was also set up; even setting up a Turkmen national army in February 1918. This was quickly disarmed by the Tashkent Soviet, but later in the summer an uprising overthrew Bolshevik rule in Transcaspia. A Transcaspian government was formed, which enjoyed British support for a short time. Tashkent regained control of the area by February, 1920. Park, *supra* note 836, pp. 22-30

¹⁰⁶⁷ Stalin responded saying that the soviets were autonomous and “discharge their duties by relying on their actual forces. [...] T]he native proletarians of Turkestan ... should themselves dissolve [the Tashkent Soviet] by force, if such force is available [...]”. A. Park has suggested that the Kokand government’s reservation of 1/3 of their Constituent Assembly seats for non-Moslems and guarantee of minority rights was the last straw for the Tashkent Soviet. *Ibid.*, pp. 17-18

¹⁰⁶⁸ Pipes, *supra* note 63, p. 175; Vaidyanath, *supra* note 1053, pp. 82-3

¹⁰⁶⁹ For a description of the events as well as the Tashkent revolt, see Hopkirk, Peter, *Setting the East Ablaze* (W.W. Norton & Co., London, 1984) pp. 22-5

¹⁰⁷⁰ One of the Tashkent commissars explained that as the Revolution in Central Asia had been carried out by Russians, “[i]t is only fair that its directions should be theirs.” *Ibid.*, p. 22. Gen. Mikhail Frunze remarked that, “European Communists, mainly railway workers [...] maintained the principle of pure dictatorship of the proletariat and attempted to apply this principle to life in spite of the fact that this actually meant the dictatorship

and was created out of the former Turkestan governate.¹⁰⁷¹ In response to the Kokand massacre, large-scale starvation caused by the war, and the oppressive policies of the Tashkent soviet, the *Basmachi* movement, a rural uprising consisting of various local groups, rose up against the Bolsheviks and put up fierce resistance for several years.¹⁰⁷²

Not even a month after the events in Kokand the president of the Tashkent-based government decided to take complete control also over the emirate of Bouchara, which along with the khanate of Khiva had become Russian protectorates in 1868 and 1873. The Red Army troops were, however, beaten back, and it was only in 1920 that Bouchara was proclaimed a People's Republic (PR).¹⁰⁷³ Khiva was proclaimed the People's Republic of Khorezm (KhPSR).¹⁰⁷⁴ In the autumn of 1919 the Red Army broke White resistance and gained control over Central Asia. The Commission for Turkestanian Affairs (*Turkkomissia*) was set up to reverse the policies of the Tashkent government and its aspirations to autonomy from Moscow.¹⁰⁷⁵ The resolution creating the commission emphasised the fundamental role played by self-determination in the RSFSR's policies.¹⁰⁷⁶ On April 11, 1921, the ASSR Turkestan was formally included within the RSFSR.¹⁰⁷⁷

of a small group of the local European population over the Muslim masses." in: Rakowska-Harmstone, *supra* note 837, p. 21

¹⁰⁷¹ Park, *supra* note 836, pp. 64-5; Roy, *supra* note 993, p. 58; Vaidyanath, *supra* note 1053, p. 87. The first constitution of the Turkestan ASSR was passed by the Congress of Soviets of Turkestan on October 6, 1918; Smith, *supra* note 60, p. 46. The new republic was isolated from the RSFSR until late 1919, due to the war. One of the first telegrams arriving in 1919 from the party's Central Committee reminded the Tashkent government that it was important to govern on the basis of proportional inclusion of all groups within government. They also required that land owned by Moslems not be occupied without local Moslem consent. It is reported that the Tashkent authorities were shocked by the telegram. Carr, *supra* note 56, pp. 336, 339; Vaidyanath, *supra* note 1053, pp. 90-101. However, Smith recorded that in the April 1918 (!) elections to the Tashkent Soviet 40 per cent of the elected delegates were Moslem. Smith, *supra* note 60, p. 131. He earlier writes that communications between Turkestan and Russia were restored only in October 1919. *Ibid.*, p. 99

¹⁰⁷² Caroe, *supra* note 985, pp. 114-30; Park, *supra* note 836, pp. 34-42; Pipes, *supra* note 63, pp. 256-60; Rakowska-Harmstone, *supra* note 837, pp. 21-30, 37-8; Roy, *supra* note 993, pp. 46-9

¹⁰⁷³ Hopkirk, *supra* note 1069, pp. 28-9. The city was conquered by General Frunze on September 2, 1920; Roy, *supra* note 993, p. 60

¹⁰⁷⁴ LeDonne, *supra* note 1012, p. 47

¹⁰⁷⁵ Upon victory the same Gen. Frunze, who was by then part of the commission, sent a message to Moscow that the "road to the cotton of Turkestan" was now open. Massell, *supra* note 1011, p. 48

¹⁰⁷⁶ "The self-determination of the peoples of Turkestan and the abolition of all national inequality and all privileges of one national group over another constitute the foundation of all the policies of the Soviet Government of Russia and serve as a guiding principle in all the work of its organs, and it is only through such work that the mistrust of the native toiling masses of Turkestan for the workers and peasants of Russia, bred by many years of domination of Russian Tsarism, can be finally overcome." Part of resolution in: Vaidyanath, *supra* note 1053, p. 101. This period of tolerance towards local customs and 'nativization of the apparat' lasted until 1927, when Islam was attacked and collectivisation followed; Rakowska-Harmstone, Teresa, "Islam and Nationalism: Central Asia and Kazakhstan under Soviet Rule", 2 *Central Asian Survey* (1983), pp. 7-87 at 24-9

¹⁰⁷⁷ Park, *supra* note 836, pp. 59-70. According to LeDonne, *supra* note 1012, p. 46, the decree on the Turkestan Autonomous Republic was proclaimed by the Central Executive Committee on April 11, 1922.

On January 31, 1924, the first constitution of the Union of Soviet Socialist Republics (USSR) was adopted. The USSR was the result of a union between the RSFSR and the Soviet Socialist Republics (SSRs),¹⁰⁷⁸ established by an agreement entered into on December 29, 1922.¹⁰⁷⁹ All the existing administrative entities were dissolved, and the map was redrawn.¹⁰⁸⁰ The process was only finally completed three years after the second USSR Constitution of 1936.

It has been noted earlier that nationality was not a natural form of identification in Central Asia. Instead one belonged to a tribe, clan, religion, way of life (nomads or settled peoples) or referred to one's place of origin. Though ethnographic studies of the population had been conducted since the area had come under Russian administration in the 1860s, and the population classified in *inter alia* a Tashkent census in the early 1870s, the aim or effect then was not to alter existing identities by homogenisation or assimilation.¹⁰⁸¹ Turkestan was understood to have an important role to play as a 'show window to the east' and Moscow was therefore cautious so as not to gain the image of coloniser. However, retaining Turkestan as one political unit was unacceptable as that national-cultural unit would be difficult for the central government to control. The chosen alternative was instead to divide the area into several national units.¹⁰⁸²

The territorial separation of groups from one another in the 1920s was not, however, only a nation-state project by Moscow. The idea accepted by the Turkestan Bolsheviks at the time was that the dichotomy between the nomadic and sedentary populations had created 'national' frictions, which by Tsarist exploitation had caused hostility and violence to arise between the

¹⁰⁷⁸ These had, however, been equal only in theory. In 1919 e.g. the commissariats of the non-Russian republics were replaced by the RSFSR's commissariats by a VTsIK decree, and the RSFSR's authority was further broadened. The federal government was in effect vested in one of the federal states - the RSFSR. Pipes, *supra* note 63, p. 253; see also Park, *supra* note 836, pp. 59-63

¹⁰⁷⁹ The agreement was accepted by the Congresses of Soviets of the four federating republics: the Ukraine, Belarus, the RSFSR and "Transcaucasia". Pipes, *supra* note 63, pp. 269-76

¹⁰⁸⁰ The result of the creation of new entities in Central Asia was the forging of radically new identities. It is only the motivation behind this policy which is characterised differently: for purposes of modernisation, colonisation, "divide and rule" in light of pan-Islamic or pan-Turkic loyalties, unification of nations or other reasons. See different explanations in: Carrère d'Encausse, *supra* note 70; Glenn, John, *The Soviet Legacy in Central Asia* (Macmillan Press Ltd., London, 1999) chapter 3; Hirsch, *supra* note 85; Rakowska-Harmstone, *supra* note 1076, at 27; Rakowska-Harmstone, *supra* note 837, p. 27; Roy, *supra* note 993; Smith, *supra* note 60, p. 84; Vaidyanath, *supra* note 1053, pp. 228-35; Akiner, Shirin, "Melting Pot, Salad Bowl – Cauldron? Manipulation and Mobilization of Ethnic and Religious Identities in Central Asia", 20 *Ethnic and Racial Studies* 2 (1997) 362-96 at

¹⁰⁸¹ Brower, *supra* note 1001, pp. 122-31. He explained the aim to have been to undermine Islam politically and keep more radical groups from influencing others.

¹⁰⁸² Roberts, *supra* note 836, pp. 136-8

tribes. This was understood to be counterproductive to socialist development, and as expressed by a local Bolshevik, the peoples in the region “would achieve less in the struggle with their own adversities than they could achieve with unification along national and economic lines.”¹⁰⁸³ In 1921 Turkestan formed autonomous regions based on nationality.¹⁰⁸⁴ On December 29, 1921, a sub-commission on regionalisation was created under the Turkestan Gosplan, and commissions were designated for the five existing oblasts.¹⁰⁸⁵ It has been suggested that one of the reasons for the break-up of Turkestan, Bouchara and Khiva was the local Soviet authorities’ belief that the construction of national entities would undermine the influence of traditional leaders, as it was only after the ‘elemental longing’ of the nations to have their own state formations was satisfied that the people would realise that it was their own tribal or clan leaders who barred the way to their economic development.¹⁰⁸⁶

I think that the recent delimitation of national frontiers in Turkestan may be regarded as an excellent example of how the Soviets can be brought into closer touch with the masses. The bourgeois press regards this delimitation of frontiers as “Bolshevik trickery.” Yet it is clear that this is a manifestation not of “trickery,” but of the profound aspiration of the masses of the people of Turkmenistan and Uzbekistan for their own organs of government, which shall be close and comprehensible to them. In the pre-revolutionary era, both these countries were torn into fragments, into various khanates and states, and were a convenient field for the exploitative machinations of the “powers that be.” The time has now come when these scattered fragments can be *reunited* into independent states, so that the toiling masses [...] can be welded with the organs of government.¹⁰⁸⁷

In drawing the borders of the Central Asian republics in 1924 it soon became clear that identification had such practical results as on which side of a border a town ended up after the delimitation was completed, and which language one then would have to speak. A redefinition

¹⁰⁸³ Khodzhaev, head of the 1920 Boucharan government, to the Second Session of the All-Union Central Executive Committee, in: Park, *supra* note 836, p. 89. It is interesting to note that after the 1924 delimitation Uzbekistan included half of the population of Soviet Central Asia, 2/3 of the total wealth, 4/5 of the gross agricultural income, most of the irrigation system, 110 of 132 of the cotton ginning mills, half of the region’s fuel industry, and so on. That this assisted the development of the other SSRs and ASSRs is questionable. *Ibid.*, pp. 100-6

¹⁰⁸⁴ A Turcoman autonomous republic was formed out of the Transcaspian region; a Kyrgyz region was formed from the Jetyysuisk and Syr-Darya regions. Lenin had previously suggested a similar division for the region to the Commission for Turkestanian Affairs in 1920. *Ibid.*, p. 91; LeDonne, *supra* note 1012, p. 46. The Turkestan Autonomous Republic included five *oblasts*: Syr-Daria, Semirechensk, Fergana, Samarkand and part of the Transcaspian oblast. Three new Central Asian *gubernias* were created between 1918-2: Amu-Daria, Aktyubinsk and Kustanai. *Ibid.*, pp. 42, 45-7

¹⁰⁸⁵ The plan was to divide Turkestan into 11 okrugs, but the reform was, however, delayed until 1924. *Ibid.*, p. 103

¹⁰⁸⁶ Another reason Vaidyanath gives is protecting the local Soviet regimes from future pan-Turkic aspirations. Evidence presented is the Bolshevik reluctance in establishing the Central Asiatic Federation as well as the policy of isolating Kazakhstan from its Turkic neighbours. Vaidyanath, *supra* note 1053, pp. 164-6, 183-6, 247

¹⁰⁸⁷ Stalin, J., “The Political Tasks of the University of the Peoples of the East” (1925), in: Stalin, Joseph, *Marxism and the National and Colonial Question* (International Publishers, N.Y., 1936) pp. 206-220 at 208-9

of identity thus took place quickly, developing into growing national sentiment. Communities caught on the ‘wrong’ side of a border faced discrimination, demands to assimilate, and sometimes even loss of land. Whatever the real reasons for the border disputes were, arguments were now being advanced in the *lingua* of nationality, as opposed to traditional identities.¹⁰⁸⁸ The national considerations which had earlier been given to smaller groups within the SSRs were no longer taken. Autonomy for minority nationalities within the new republics was not required, so the strategies became homogenisation and assimilation. The national delimitation itself became the final solution to the national issue.

The national principle was the main principle which was to be applied in border delimitation in Soviet Central Asia. The economic principle was only to be applied in special circumstances.¹⁰⁸⁹ The Commission on National Delimitation was set up to work out the borders of the area by May 1924.¹⁰⁹⁰ That same year, the SSRs of Turkmenia and Uzbekistan came into being out of the ASSRs of Turkmenistan and Turkestan and the PRs of Bouchara and Khorezm.¹⁰⁹¹ They were accepted into the USSR in May 1925. Large parts of Turkestan were included in the ASSR of Kazakhstan, in the Autonomous Region (AR) or *oblast* of the Karakalpak and the AR of Kara-Kyrgyzia.¹⁰⁹² The Tajik Autonomous Soviet Socialist

¹⁰⁸⁸ In light of the conflicts, the regionalisation commission e.g. decided in 1927 that the borders between Uzbekistan, Kazakhstan and the Kyrgyz ASSR could not be altered for three years. Hirsch, *supra* note 85, pp. 133-47. For a discussion on the importance of collectivisation and the *kolkhoz* in the reshaping of traditional solidarity groups and identities in Central Asia, see Roy, *supra* note 993, chapter 5

¹⁰⁸⁹ Park, *supra* note 836, pp. 94-5; Roberts, *supra* note 836, pp. 136, 148

¹⁰⁹⁰ Sabol, *supra* note 1061, at 235

¹⁰⁹¹ The *oblast* or province of Turkestan, established in 1865, was turned into a governate two years later; finally abolished in 1924. In 1882 Semirechie was detached from Turkestan and added to the newly created Steppes *gubernat*. Turkestan now consisted of the two *oblasts* Syr-Darya and Ferghana and the *okrug* of Zeravshan (Pierce, *supra* note 1001, pp. 47-55). In 1886 Samarkand *oblast* was created out of Zeravshan and part of Syr-Darya (Becker, *supra* note 1053, p. 236). The Transcaspian province, earlier the Transcaspian section from 1873 (Pierce, *supra* note 1001, p. 38), was created in 1881 after the battle of Geok-Tepe, and under the control of the viceroy of the Caucasus until 1890 (Becker, *supra* note 1053, p. 236), was added to Turkestan in 1898 together with Semirechie *oblast* in another great reshuffle (Pierce, *supra* note 1001, pp. 55-6). The Transcaspian province was proclaimed the Autonomous Soviet Socialist Republic (ASSR) of Turkmenistan in 1921, attached to the RSFSR. The PR of Khorezm was, during its existence, divided into one national area and three national *oblasts*; the Kazach-Karakalpak, the Turkmen and the Novo-Urgench *oblasts* (Vaidyanath, *supra* note 1053, p. 146). In 1924 the PR of Khorezm was divided between Uzbekistan and Turkmenistan. The PR of Bouchara had also established a Turkmen *oblast* in 1923. Bouchara was now broken up between Uzbekistan, Tajikistan and Turkmenistan. When the borders were finalised in 1936 the former khanate of Kokand had been divided between Uzbekistan, Tajikistan, Kyrgyzstan and Kazakhstan.

¹⁰⁹² The Governate of the Steppes, created in 1882 out of Semirechie of Turkestan and Akmolinsk and Semipalatinsk of Western Siberia (Becker, *supra* note 1053, p. 236), was turned into the Kyrgyz ASSR on August 26, 1920, as part of the RSFSR. There were discussions on including all Kazach-majority territories, thus also parts of the Transcaspian *oblast*, which was still part of Turkestan. Some areas of the Transcaspian were also transferred in 1920 (Vaidyanath, *supra* note 1053, pp. 148-9). A part of that territory was later included in the AR of Karakalpakia, formed in 1924 and included within the Kazach ASSR, and also included parts of the PR of Khorezm and the ASSR of Turkestan. On December 5, 1936, Kazakhstan became an SSR, and Karakalpakia was transferred to Uzbekistan as an ASSR (see USSR Constitution, 1936, Chapter II, Article 26). Today it has the status of autonomous republic within Uzbekistan. For a discussion as to possible reasons for the

Republic (ASSR) was autonomous within Uzbekistan until 1929, when it was changed into a union republic (SSR).¹⁰⁹³ The *oblast* of Khodzhent, or Leninabad, was attached to the new republic at the same time.¹⁰⁹⁴ Though considered to be more Tajik than Uzbek, Samarkand remained within Uzbekistan,¹⁰⁹⁵ but was replaced by Tashkent as the capital of Uzbekistan in 1930.¹⁰⁹⁶ The AR of the Karakalpaks, first a part of the ASSR of Kazakhstan, was proclaimed as an Autonomous Republic (ASSR) within the RSFSR in 1932, but was transferred yet again four years later – this time to Uzbekistan. That same year the AR of Kyrgyzia (formerly Kara-Kyrgyzia) was made a Soviet republic (SSR).¹⁰⁹⁷ Territorial exchanges were made between the union republics even after their establishment.¹⁰⁹⁸ But the Central Asian delimitation plans were not without Soviet critics. The People’s Commissar for Foreign Affairs, Georgiy Chicherin, was one of the more vocal opponents.¹⁰⁹⁹

After the first wave of changes connected with the creation of the USSR and the All-Union census had passed, the process of further deepening the Revolution and ‘modernising’ the peoples of the Union began.¹¹⁰⁰ The peoples could be placed on a scale of development which

transfer of Karakalpakistan to Uzbekistan, see Roy, *supra* note 993, p. 71 and Vaidyanath, *supra* note 1053, pp. 238-40

¹⁰⁹³ T. Rakowska-Harmstone has suggested two reasons for the change: the divide-and-rule policy, and the potential role of the Tajiks in exporting communism over the border; see Rakowska-Harmstone, *supra* note 837, pp. 71-4. See Hirsch, *supra* note 85, pp. 153-64, on developing Tajik and Uzbek identity and the separation of the groups by territory.

¹⁰⁹⁴ Though the national argument was given for the transferral, that the population was primarily Tajik, without it Tajikistan could not have met the economic criteria for becoming a union republic. Rakowska-Harmstone, *supra* note 837, p. 37. The question is: if the majority was Tajik, why had it not been included within the Tajik ASSR in 1924?

¹⁰⁹⁵ The decision that Samarkand and Bouchara would remain was made on the basis of the principle of “administrative order”. Hirsch, *supra* note 85, p. 162

¹⁰⁹⁶ Tashkent had been the capital both of the Turkestan Governate (1876-1918) and the ASSR of Turkestan (1918-24). In 1924 Samarkand became the capital of SSR Uzbekistan (Vaidyanath, *supra* note 1053, p. 211). Tashkent had risen to prominence under Russian rule, so one can speculate on the reasons for making it the capital again in 1930. One author remarked on the “deep political significance in Russia” of capital transfers and suggested a motive: “It seems that some Uzbek communist intellectuals, instead of applying themselves to the transformation of Samarkand into a bulwark of the Soviet régime, were seduced by the spirit of that old oriental city where every stone breathes Moslem tradition.” He continued: “The change-over from Samarkand to Tashkent meant in practice that the essentially national Uzbek atmosphere which prevailed in the former town was to be superseded by that of a half-European international city – Tashkent.” Kolarz, Walter, *Russia and Her Colonies* (George Philip & Son Ltd., London, 1952) pp. 275-6

¹⁰⁹⁷ Roy, *supra* note 993, pp. 58-61. The Kyrgyz Autonomous Region was created in 1924 and included in the RSFSR. In 1927 it was changed into an Autonomous Republic (ASSR); Vaidyanath, *supra* note 1053, pp. 193, 225

¹⁰⁹⁸ E.g. Uzbekistan ceded the village Uch-Kurgan (presently in the south of Kyrgyzstan) and several other villages to Kyrgyzia between 1927-9. Vaidyanath, *supra* note 1053, p. 222, footnote 59

¹⁰⁹⁹ Chicherin warned in 1924 that the liquidation of Bukhara and Khiva and the “plan to eliminate all traces of these two states by merging them with parts of Turkestan and re-dividing them” would lead to international criticism and internal instability. Karasar, Hasan Ali, “Chicherin on the Delimitation of Turkestan: Native Bolsheviks Versus Soviet Foreign Policy. Seven Letters from the Russian Archives on *Razmezhevanie*”, 21 *Central Asian Survey* 2 (2002) 199-209 at 204

¹¹⁰⁰ See the ‘Assault’ period (1927-41) in: Rakowska-Harmstone, *supra* note 1076, at 29-32

began with their identification in clans and tribes, into nationalities, and finally as Soviet.¹¹⁰¹ The number of official nationalities was again reduced. The 1937 list of nationalities included 106 *natsional'nosti*, which was 66 fewer peoples than in 1927.¹¹⁰² At the end of 1939 the list to be used in the next census was completed: it included 59 major *natsional'nosti*, 39 ethnographic groups, and 28 national minorities; 47 more *natsional'nosti* thus disappeared after 1937.¹¹⁰³ Stalin's definition of a nation was increasingly being used, where territory was one of the four characteristics of a nation. Smaller peoples without designated territory were incorporated into neighbouring peoples, and their national schools and institutions were shut down.¹¹⁰⁴ An exception was made in the case of Jews, as the Jewish *narodnosti* were given the *oblast* of Birobidzhan, north of the Chinese border, in 1934.¹¹⁰⁵ The list of *natsional'nosti* after the results of the 1939 census were published included only the 57 "largest *natsional'nosti*"; a further consolidation of the national-territory policy. It was explained that peoples who were not sufficiently developed had been consolidated with their neighbours, and only those who had passed the more primitive stages of development, and thus had economic viability, were classified as *natsional'nosti*.¹¹⁰⁶ This was, in effect, a merging of the economic principle into the very national principle. The entire process of classification of groups and giving or withholding territory from them must be said to be slightly opaque.¹¹⁰⁷

At the time of the second world war, because of suspicions of disloyalty many 'suspect' peoples were stripped of their national regions, village soviets and kolkhozes, and even

¹¹⁰¹ Hirsch, *supra* note 85, pp. 211, 246, 257

¹¹⁰² *Ibid.*, p. 269

¹¹⁰³ *Ibid.*, p. 284. The term *natsional'nost* included nations, *narodnosti*, and national groups. Nations were the main populations of SSRs and ASSRs. *Nardnosti* were the main populations of autonomous oblasts and national regions. National groups were peoples who were a national minority in the USSR but in large numbers live outside the USSR. *Ibid.*, p. 278

¹¹⁰⁴ *Ibid.*, p. 259. Economic viability sometimes determined who a people were united with. The Vod were united with the Izhor, with which they had stronger economic ties, rather than the Vep, with whom they had closer linguistic ties. *Ibid.*, p. 270. In 1939 there were six people on the list without national territory inside or outside the USSR. *Ibid.*, p. 287, footnote 55.

¹¹⁰⁵ Hirsch, *supra* note 85, p. 285. This was 11 years prior to the creation of Israel. No other groups which had an existing 'mother state', such as Poles, Germans, Koreans, Bulgarians or Greeks, were given any territorial unit; see Connor, *supra* note 60, p. 221

¹¹⁰⁶ Hirsch, *supra* note 85, p. 286

¹¹⁰⁷ Bennigsen wrote that "the selection of what groups should be called upon to evolve as nations has sometimes seemed to be arbitrary, and some of the newly formed nations do not fulfil Stalin's four criteria. This conflict between doctrine and reality would be impossible to explain if one left out of account the political requirements which, sometimes profoundly, influence the action of the authorities. These requirements have risen out of some of the problems which confronted the central government during the periods when it was fighting against Muslim trends towards autonomy (1923-38). Among these problems should be mentioned in the first place the desire to prevent the creation on the ruins of the formed Muslim community of a single Turkic community on the lines aspired to by some Tatar Communists [...] . It was for this purpose that the authorities concentrated on [...] preventing the use of the Chagatay language which could have united all the Turkic peoples of Central Asia, on weakening the more important groups by splitting them into several nations or *narodnost'*, and in general by

deported.¹¹⁰⁸ Self-definition of *natsional'nost* was denied in passports and at census registration. In the early passport of the 1940s *natsional'nost* was distinguished from census *natsional'nost*, in that the former was based on generational lineage while the latter retained the method of self-definition. Identity thus increasingly became an inherited category, which “create[d] a framework for the Union and its parts to reproduce themselves in their established forms.”¹¹⁰⁹ Both the identity of the citizen and the structure of the state were by then firmly fixed.

vi: National transformation and Russification: ideological colonisation

The transformation into a Union consisting of national territories and territorial nations was now complete.¹¹¹⁰ A major difference suggested between the European nation-states and the Soviet entities was, however, that the latter were not constructed to function independently, neither politically nor economically. This conclusion is based *inter alia* on cases of border delimitation reflecting neither geography nor ethnicity.¹¹¹¹ Additional evidence presented for this conclusion is the small influence the union republics had over their own affairs, and by the Soviet practice of placing a Russian decision-maker behind a local national within the party and government hierarchy. The Central Asian republics were in an even more vulnerable position than other republics, as there was, for example, no indigenous proletariat or groups with satisfactory qualifications to participate in political and administrative life. Peasants and nomads were instead perceived to have threatening clan and religious loyalties, and therefore to be a potential counter-revolutionary force.¹¹¹² Additional factors that had colonising effects were the centralising role of the Communist Party in the running of the state, which further downgraded the effects of a federal structure, and the command planning

restricting the nationalities to the geographical limits of their national territory.” Bennigsen & Quelquejay, *supra* note 1024, pp. 35-6

¹¹⁰⁸ Hirsch, *supra* note 85, p. 311; Smith, Graham (ed.), *The Nationalities Question in the Soviet Union* (Longman, London, 1990) p. 7

¹¹⁰⁹ Hirsch, *supra* note 85, pp. 312-26

¹¹¹⁰ For the creation of a culture and history for each of the official nationalities, *ibid.*, pp. 289-308

¹¹¹¹ Roy, *supra* note 993, pp. 68-71. Caroe discussed *inter alia* the borders, irrigation canals and the location of the five capitals, and commented drily: “The position of Alma-Ata on the edge of the huge Kazach republic is particularly strange, and not altogether explicable by the fact that here are grown the largest apples in the world.” Caroe, *supra* note 985, pp. 145-9

¹¹¹² Park, *supra* note 836, pp. 377-88. Just after the USSR was created and the borders between the Central Asian republics were drawn the newly formed Uzbekistan Communist Party was purged of 16,000 of its members; only 1,000 Uzbeks remained. The party became dominated by Russians, and only after Stalin’s death were Uzbeks promoted to high positions in the party. Rashid, *supra* note 984, pp. 90-1

system together with regional specialisation policies of the Union, which caused many republics to function merely as the raw material suppliers for other republics who processed the materials.¹¹¹³

At the same time as national structures and cultures were promoted, their creation came from above – from the centre, and unofficial nationalism and local nationalists were quelled.¹¹¹⁴ Both the centralising trend and the encouraging of national differences, though at first glance seemingly contradictory, consolidated the power of the Soviet regime where its position had earlier been weak, and ‘recreated’ groups, drawing them to turn their loyalty and expectations towards the USSR instead of towards one another.¹¹¹⁵ Russian became the official language of the state, and with the developing myth of “the great Russian people” who are “the leading Soviet nationality” and “the elder brothers” coupled with the effects of centralisation, the USSR became more and more Russified.¹¹¹⁶ Hirsch has concluded: “In effect, the Soviet Union of the late 1930s was a collection of Soviet nations unified through a colonial type framework.”¹¹¹⁷ Not all post-Soviet scholars, however, are drawn to the conclusion of outright economic colonialism, and some argue that the Central Asian republics were “net fiscal beneficiaries of Soviet rule”.¹¹¹⁸

¹¹¹³ On specialisation policies for Central Asia and cotton, see Rumer, Boris Z., *Soviet Central Asia* (Unwin Hyman Inc., London, 1989) pp. 62-75. For early Uzbek opposition (e.g. the peasant slogan “You cannot eat cotton”) to the Soviet cotton policy, in which *inter alia* grain farming was diminished, causing further reliance on Russia, see Kolarz, *supra* note 1096, pp. 276-8. Rice cultivation was banned in the 1930s. Rashid, *supra* note 984, p. 91. For Soviet regional investment and the difficulties involved, see the dissertation by Liebowitz, *supra* note 1022, especially pp. 192-211

¹¹¹⁴ “[N]ational in form, socialist in content”: slogan inspired by the *Communist Manifesto*, “Though not in substance, yet in form, the struggle of the proletariat with the bourgeoisie is at first a national struggle. The proletariat of each country must, of course, first of all settle matters with its own bourgeoisie.” Slogan found in: Connor, *supra* note 60, pp. 37, and note 7 at 240-1. For a more sympathetic account of Bolshevik cultural policies, see Smith, *supra* note 60, chapter 6. On ‘official nationalism’ and colonialism, see Benedict Anderson, *Imagined Communities*, 2nd ed. (Verso, London, 1991) p. 184

¹¹¹⁵ Vaidyanath, *supra* note 1053, pp. 247-8

¹¹¹⁶ Stalin’s toast to the Russian people, May 24, 1945 and the re-interpretation of history, in: Rakowska-Harmstone, *supra* note 837, pp. 67-93. See also Glenn, John, *The Soviet Legacy in Central Asia* (Macmillan Press Ltd., London, 1999) pp. 86-8. When the Arabic alphabet was replaced by the Latin alphabet in 1925 (which in turn was replaced by Cyrillic in 1940) a Soviet scholar wrote: “This was not just the change of the alphabet. It carried with it the loss of the influence that the religion and the clergy had over the life of the people”, in: Rakowska-Harmstone, *supra* note 1076, at 26, 35. For discussion as to reasons behind “the alphabet controversy”, see Caroe, *supra* note 985, pp. 155-9; Glenn, John, *The Soviet Legacy in Central Asia* (Macmillan Press Ltd., London, 1999) pp. 81-2; Smith, *supra* note 60, pp. 166-8

¹¹¹⁷ Hirsch, *supra* note 85, p. 309. Park, *supra* note 836, finds the continuation of the Russian Empire’s colonial policies evident by 1927. In her study on Tajikistan T. Rakowska-Harmstone observed that Tajik society in the late 40s to early 50s closely resembled Asian and African colonial societies with Europeans in control of the power structure, the actual management of society and also holding a privileged position in all areas of society. Rakowska-Harmstone, *supra* note 837, pp. 139-41, 269-71

¹¹¹⁸ Smith, G., “Post-colonialism and Borderland Identities”, in: Smith, Graham, & Law, Vivien *et al*, *Nation-building in the Post-Soviet Borderlands: The Politics of National Identities* (Cambridge University Press, Cambridge, 1998) pp. 1-20 at 7-8

In 1956 Nikita Khrushchev, the new general secretary, rebuked Stalin and condemned his practices. His maltreatment of national groups was said to have tainted the image of the USSR as a model of the multinational state.¹¹¹⁹ What was now introduced into the nationalities policy was a strategy of even closer cooperation (*sblizhenie*) between the nations so that they in time would be merged (*sliianie*) into a unified Soviet state.¹¹²⁰ At the 22nd Party Congress in 1961 a declaration was adopted which stated that the nationalities problem had been resolved, and that all ethnic groups and peoples had been fused together.¹¹²¹ Preceding the adoption of the 1977 Soviet constitution there were suggestions to abolish the federation, as the nations had now drawn close enough. Leonid Brezhnev, however, warned against speeding the process and eradicating national identities completely, and the rights of the union republics were thus only reduced, and not completely eliminated.¹¹²² While the constitutions of 1924 and 1936 claimed that the USSR was “formed on the basis of the voluntary association of Soviet Socialist Republics having equal rights”,¹¹²³ the 1977 constitution claimed the state was the “result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics.”¹¹²⁴

vii: 1991

During the attempted Moscow coup of August 19, 1991, Central Asian leaders¹¹²⁵ supported the communist attempt to overthrow Mikhail Gorbachev and to prevent the signing of a new union treaty due the following day – support which ironically ensured that Russian public opinion backed a move for Russian independence from the USSR. The logic behind the Central Asian leaders’ support for a continuing federation was the dependency of the republics on the RFSFR. The long-term economic and political colonialism meant that without Russia the republics would have great difficulty surviving the challenges facing them.

¹¹¹⁹ Connor, *supra* note 60, pp. 53-4

¹¹²⁰ Rakowska-Harmstone, *supra* note 837, pp. 90-2. On the changing speed of the policies after Stalin regarding the *rapprochement* of nations and later their merging, see also Connor, *supra* note 60, chapter 10

¹¹²¹ Rashid, *supra* note 984, p. 35. Rashid contrasts policy with a list of examples of national unrest from this period up until independence; pp. 35-7

¹¹²² E.g. each union republic’s right to secede from the USSR (Chapter VIII, Article 72). Smith, Graham (ed.), *The Nationalities Question in the Soviet Union* (Longman, London, 1990) p. 10

¹¹²³ 1936 Constitution, Article 13 (right to secede in Article 17)

¹¹²⁴ 1977 Constitution, Article 70. The right of the Union Republics to secede was set out in Article 72.

¹¹²⁵ Excepting Kyrgyz president Askar Akaev, who condemned the attempt.

The treaty setting up the Commonwealth of Independent States (CIS)¹¹²⁶ was originally signed by Russia, Ukraine and Belarus in Minsk on December 8, 1991. On December 21 the new CIS was formed at Alma Ata with 11¹¹²⁷ of the 15 former USSR republics as members.¹¹²⁸ The treaty establishing the CIS stated that the Parties “acknowledge and respect each other’s territorial integrity and the inviolability of existing borders within the Commonwealth.” They also contracted to “guarantee openness of borders”.¹¹²⁹ Article 3 of the Charter of the CIS laid down that the members had to abide by *inter alia* the following principles:

inviolability of state frontiers, recognition of state frontiers and renouncement of illegal acquisition of territories,

*territorial integrity of states and refrain from any acts aimed at separation of foreign territory [.]*¹¹³⁰

The five Central Asian republics later also signed bilateral agreements to preserve their borders. Several of the former Soviet Republics still, however, retain territorial claims against one another. Although there is presently little use of force between Armenia and Azerbaijan, the territorial dispute concerning Nagorno-Karabach has not been finally settled.¹¹³¹ Within a number of the independent states there are also continuing secessionist attempts.¹¹³²

¹¹²⁶ Agreement Establishing the Commonwealth of Independent States: The Minsk Declaration and Agreement, 31 *ILM* 138 (1992)

¹¹²⁷ Belarus, Russia, the Ukraine, Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

¹¹²⁸ Text of Protocol to the Agreement Establishing the Commonwealth of Independent States, 31 *ILM* 140 (1992). The Baltic States and Georgia are not part of the CIS.

¹¹²⁹ Article 5 of the Agreement Establishing the Commonwealth of Independent States, 31 *ILM* 138 (1992) at 144

¹¹³⁰ Charter of the Commonwealth of Independent States, 34 *ILM* 1279 (1995) at 1283

¹¹³¹ de Waahl, Thomas, *Black Garden: Armenia and Azerbaijan Through Peace and War* (N.Y. University Press, N.Y., 2003); de Waahl, T., “Karabakh Ceasefire Under Strain”, IWPR Caucasus Reporting Service (CSR) No. 190, August 7, 2003; “Karabakh Talks Lead to Peace Vow”, BBC News, December 20, 2003

¹¹³² In Georgia there are three secessionist attempts (Abkhazia, Adjara and South Ossetia). See e.g. ICG Europe Report No. 151, “Georgia: What Now?”, December, 3, 2003; “Georgia, Russia Assess Prospects for Turning a New Page in Bilateral Relations”, 7 *RFE/RL Caucasus Report* 3, January 15, 2004. In Russia Chechnya has attempted to break away. See e.g. Gall, Carlotta & de Waahl, T., *Chechnya: A Small Victorious War* (Pan Books, London, 1997); “Chechnya: The Fighting Goes On”, IWPR CRS No. 214, January, 14, 2004

7.2.2 Some conclusions

The greatest difference between the Yugoslav break-up and the dissolution of USSR is that in the latter case there was general agreement between the federal units to preserve their former borders as their new international ones. The main issue which has been problematic for the former Republics in Central Asia is not that of historical claims against one another, but the uncertainty as to where the boundaries actually lie. Different maps and leases between the former Republics in many cases give rise to several options of location. The situation shows some similarity to the Latin American case in the early 1800s and the great uncertainty as to where the administrative boundaries were located.

The relations between the newly independent Central Asian Republics were relatively peaceful after 1991, although there remained a great deal of uncertainty as to where the international boundaries were located. The border tensions that today exist between Central Asian states have their origin from 1999, when Uzbekistan effectively closed its international boundary. It seems clear that the boundary location uncertainty has not in itself caused the primary tensions between the Central Asian states. Instead, it is the change of boundary function – turning the international boundary into a ‘hard’ or closed boundary – that has both aggravated the relations between the states and added to the already severe economic hardship on the populations. The citizens inhabiting the enclaves suffer even more from the closed borders than others, because their movements are increasingly restricted.

Nationalism has been a relatively unimportant force for decision-makers. It has not been the primary identity of the inhabitants, and it does not seem to be one of the more pressing issues for the populations of the area. It does, however, enjoy increasing importance and can easily be abused by leaders and oppositions when it becomes connected to the strengthening of the identity and hegemony of the titular nation, carrying with it privileged positions and access to resources, particularly land.¹¹³³

Shifting the location of boundaries between the various states therefore seems to have importance for the populations primarily because the boundaries have such a ‘hard’ character. It is not an issue primarily connected to identity and security, as in the *Krajina*. There are identity effects on those who end up on different sides of a boundary, but the main difficulties appear to lie in being able to pass the boundary at all, and the effects this has on social relations and day-to-day survival. It would seem, then, that the issue of boundary functionality

¹¹³³ See e.g. Bohr, A., “The Central Asian States as Nationalising Regimes”, *supra* note 704; ICG Asia Report No. 16, “Incubators of Conflict: Central Asia’s Localised Poverty and Social Unrest”, June 8, 2001

greatly affects both the inter-state and the intra-state relations in Central Asia. The question of either retaining, or not retaining, a certain boundary in the Central Asian states has less effect on the maintenance of international peace and security than a reduction of boundary functions would. The problem is suggested not to be primarily one of location, but of boundary function.



Map 7. Central Asia. UN Map No. 3763 Rev. 4.
With kind permission of the UN Cartographic Office.

The principle of self-determination, as it is related to the maintenance of international peace and security in Central Asia, poses a requirement on states to take the economic needs of their populations into account by opening their boundaries up to such activities to a much greater extent than is done today. The principle of self-determination is not as concerned with the actual location of the post-Soviet boundaries, and the ethnicity of those on either side, as it is with reducing the frustrations and tensions arising within and between the states from the restrictive boundary policies.

The UN and its Member States also have duties under the principle of self-determination in relation to Central Asia. These require them to promote respect for the principle in light of the peace and security implications of not doing so. The issue should be brought up on the international arena, and the relevant states highly encouraged and supported to take necessary steps to fulfil their international obligations.

8. APPLYING THE THEORY TO REALITY and OTHER CONCLUSIONS

8.1 General conclusions

The thesis has attempted to argue against the common position that the principle of self-determination, as contained in the UN Charter, today is largely irrelevant to boundaries. Space has been devoted to the norms that are often argued to preclude the application to territorial and boundary issues beyond the context of decolonisation. In examining the norms on territory it has been suggested that there is, in fact, no general prohibition against changing boundaries. The territorial principles were concluded either to be aimed towards specific activities, such as the use of force, as reinforcing treaty norms, especially *pacta sunt servanda*, or as not constituting binding PIL norms at all. They do not rule out the general application of the principle of self-determination to boundaries, which requires consideration of those affected. This does not mean that all boundaries can be constantly changed by anyone. The thesis has suggested how the principle of self-determination should be applied generally, and also specifically, to boundary changes.

Under the first UN Charter Purpose the Organisation has a duty to respond to situations that already threaten, or may come to threaten, peace. Changes to the status, location or function of a boundary may cause unrest as it affects the whole population of state, a specific group, or the borderlanders in differing – but very noticeable – ways. As unrest due to boundary changes has been shown to be closely related to conflict, such unrest is of interest to the international community, and the situation should not be considered to fall solely within the domestic affairs of states. This also means in practice that since the situation falls under Article 1 of the UN Charter, this involves responsibilities for the Organisation and member states.

Under the second UN Charter Purpose the Organisation has a duty to respect the self-determination of peoples for the purposes of maintaining peace and security. The core aim of the principle requires consideration of the legitimate interests of the most vulnerable, oppressed or exploited. Self-determination for purposes of peace holds that stability based only on force is not merely unacceptable, but also threatens long term peace. Consideration of those affected in different areas opens up for a consent and agreement that allows for peace based on respect and legitimacy, not force. The principle of self-determination is clearly not reduced to requiring independence for colonial entities. This is but one situation where the

principle has been recognised to require specific state responses. The character of self-determination as a principle also allows it to be relevant to groups not included under the right of self-determination. The groups that fall within the ambit of the principle as contained in the UN Charter are those who, if not shown consideration, would play part in a situation threatening international peace and security.

The UN Charter Purposes are to be interpreted inter-relationally and in light of the aims of the international community. This means that the interpretation of the Purposes should be inter-dependent, teleological, and made in specific and 'meta-contexts' with the aim of maintaining long-term international stability. Understanding the contexts to which the Purposes are relevant means studying situations thoroughly, and being sensitive to differences, as these may play an important role in providing windows of opportunity and guides to appropriate solutions. It further involves using the insights gained in other relevant disciplines.

In responding to a boundary situation that may develop into, and come to threaten, international peace and security, an inter-relational interpretation requires that the principle of self-determination is respected. In the context of tense boundary situations such an interpretation requires that the wishes, needs, and fears of affected populations are seriously considered, and that steps are taken to reduce the negative effects of the boundary changes and related fears. The paramount words from the interplay of self-determination, boundaries and peace are *consent* and *respect*. These represent the same spirit that has passed through the various historical applications of self-determination. Seeking the consent of interested parties is vitally important, both in inter- and intra-state contexts in that it reduces the risk of territorial solutions needing implementation and maintenance by force.

With specific regard to boundaries, an inter-relational interpretation requires that all options must be considered in order to respect the needs of affected populations and with the aim of creating long-term peace. Though existing territorial principles that limit the modes by which self-determination could be expressed or respected should be taken into account, the prohibitions primarily relate to inter-state force, and do not generally rule out, or greatly limit, the application of the inter-related Purposes. In clear text, *uti possidetis* does not incapacitate the relevance of the principle of self-determination to boundaries, but is subordinate to the principle.

Granting independence is not the primary application of the principle of self-determination in tense boundary situations. The option suggested in a specific context should instead respond to the problem or frustrations in the specific case, and though relocation of a

boundary may in certain cases be necessary in the interests of international peace, reducing boundary function may in many cases correspondingly defuse a threatening situation.

An inter-relational approach carries with it several implications. One concerns the application of *uti possidetis*, which should only be used as one of several options for settling boundary disputes, and only in cases where all parties have consented to its application. *Uti possidetis* neither fulfils the evidence required for the existence of a rule of customary international law, nor gives sufficient evidence to show that it provides a peaceful resolution in the absence of consent. On the contrary, both in cases where there has been consent to the application of *uti possidetis*, and where consent has been absent, violent conflict has erupted.

However great the importance of consent is, the given consent of states does not resolve all boundary tensions, as those relating to functionality may have both an intra-state and an inter-state character. Another implication is, therefore, that the functionality of boundaries cannot be considered to fall solely within the domestic or sovereign affairs of states to the extent that negative effects cause unrest related to a risk of conflict. While the *right* of self-determination has further implications for the functionality of boundaries,¹¹³⁴ the *principle* of self-determination, as codified in the UN Charter, is always closely related to the maintenance of international peace and security. It is in the latter context that the Organisation has a basis for requiring states to have their boundaries function according to certain standards that show consideration for affected groups.

The final implication of an inter-relational interpretation of the two UN Charter Purposes is that it is vital to gain an understanding of what any boundary change implies, what the needs of those affected are, and what steps may adequately be taken to try to respond to those needs. It is the aim of the Purposes which are to be fulfilled, and decisions made on their basis require solidity. The international law assumption that all boundaries are alike must therefore be discarded, as must the presumption that political strategies have a similar result in any place, regardless of political, cultural and historical context. The primary aim of responding to tensions must be clear and open to critical examination, in order that long-term peace have the highest priority – not an export of particular political systems or ideas.

Returning to the requirement of keeping all options open, this means that discussions on the location of boundaries are not to be considered the root of all international evil. There are no international law norms that prohibit discussion and change. The general prohibition

¹¹³⁴ As the right of self-determination forms a basis for the exercise of all other rights contained in the ICCPR and the ICESCR (1966) it also effects the decisions that states make about how their boundaries are to function. This is especially pertinent as the right of self-determination includes economic aspects.

related to boundary change only concerns the use of force to change the boundaries of another state.¹¹³⁵ No international law norm prohibits locational boundary alterations where the parties agree to this.

An inter-relational interpretation of the two first UN Charter Purposes goes further, however, as it is directed both towards states and towards the UN as an organisation. There may, in certain cases, exist a duty for states to discuss boundary changes or measures relating to the functionality of specific boundaries that would respect the wishes and concerns of affected populations. There may also be a duty for the Organisation and for member states to require this of other states where disrespect shows signs of leading to tensions, or is likely to do so.

The duty implied for states in the principle of self-determination should be understood as consisting of the two steps of process and result. Process implies that consideration consists of taking the views of those affected into account, while result implies that an option that responds to their needs must be selected and applied. The option may consist of a change of boundary location, a change of boundary functionality, setting up a boundary regime that takes the special needs of a group or borderlanders into account, or of other concrete measures that respond to different needs.

Tensions and conflict are too serious for haphazard guesswork, and in order to understand a situation and be able to respond appropriately assumption which are not based on knowledge of the context must be discarded. Again, the importance of Political geography and history, as part of the 'meta-context' for a legal response to boundary changes that cause tensions, cannot be overestimated.

The Balkans

With the shift from centralism to effective federalism the function of the federal boundaries in the SFRY had already changed, from merely signifying national equality within the state to practically marking differences. With the internationalisation of the boundaries, the change was even more dramatic: the change of status meant a change of position and identity, turning Yugoslav minorities into majorities, majorities into minorities, and causing a separation which led to a vulnerability to political manipulation. The change of function meant that the boundaries would no longer be relatively invisible, but would carry with them restrictions on

¹¹³⁵ The prohibition is contained in UN Charter Article 2(4) and is an inter-state prohibition.

travel, transport of goods and so on. The change in boundary status carried with it altered identities for many groups, which had more than mere practical implications, and many became vulnerable to propaganda and political manipulation. Consent was not attained for the application of *uti possidetis- as-law* to the federal boundaries, which meant that accommodation was ruled out. Force was projected as a primary alternative to acceptance of the imposed remedy.

A study of the boundaries in their historical and present context and a projection of what effect *uti possidetis* would have, could have assisted the European ministers – intent on finding a solution – to exclude *uti possidetis* and instead suggest a solution more appropriate to the problems experienced. Because the fundamental problem for those affected by the boundary status change was identity and safety – not cross-boundary passage for economic purposes – suggesting solutions by way of regimes would probably not have had any great impact. The primary option remaining seems to have been that of discussing boundary changes of location that would have accommodated some – though not all – interests, especially those of vulnerable minorities. The Canadian position on any future secession of Quebec shows better possibilities for a peaceful solution, as it requires a discussion on the future location of its now federal, then international, boundaries prior to independence.

The context of the *Sandžak* is different from that of the dissolution of the SFRY in the early 1990s, and the institution of a boundary regime – following the internationalisation of the federal boundary at the likely separation of Serbia and Montenegro – may be an appropriate response that may have a certain effect in reducing tensions. The majority of the population of *Sandžak* is, and would remain, minorities if the separation of the two entities takes place, and the difference would primarily be the effective separation of the population. Responding to the separation by open boundary policies may help reduce the frustration that would be likely to simmer. A long-term approach that considers the legitimate interests, fears and concerns of the population should be devised as soon as possible in order to reduce the likelihood of unrest and any open clashes.

Central Asia

In the context of the common boundaries of the post-Soviet Central Asian states, the population of the Ferghana Valley and of the enclaves are especially negatively affected by the closed boundary policies of several states. That the problems are practical and economic,

and not primarily ones related to identity, can be argued by the fact that effects were experienced by the population not at the time of independence, but when the boundaries were more or less closed in 1999. An appropriate tension reducing response would be one that ended the restrictive policies and practices.

It is in cases such as these that the form or character of the principle of self-determination as contained in the UN Charter Purposes reveals its special importance. Even though there might be no conventional human rights remedy available at breaches of the right to self-determination in a specific situation, the UN and member states are under an obligation to require state responses that consider the interests of those most affected by the life of the boundary. This is the case even though the group may not be a traditional 'people'. The duty could, for example, be formulated as entering into a productive dialogue, precisely because non-respect risks becoming a threat to peace and stability.

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Borders, and changes to them, remain a challenge for international law. The dominant territorial assumptions, on which much of the legal response has been based, would stand to gain from a deeper understanding of boundaries and their effects. Different contexts do require different responses. This thesis argues that the principle of self-determination, as interpreted in the light of maintaining international peace and security, places obligations on states which not only relate to issues of boundary location, but also of the functionality of boundaries. In practice this means that consideration of those affected by boundaries, and also of changes to them, is required.

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