EQUAL TREATMENT OF SECESSION CLAIMS: SLOVENIA, CROATIA AND KOSOVO. MISTAKES OF THE PAST AND MISTAKES OF THE FUTURE?

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"The explosion of nationalities, which is dividing countries with many ethnic groups, is a new challenge to peace and security."

Boutros Boutros-Ghali

Introduction

In the late eighties and early nineties of the twentieth century, Europe experienced massive reorganizations of state boundaries. That was the consequence of the collapse of federations like the USSR and The Socialist Federal Republic of Yugoslavia (SFRY). While the dissolution of the USSR was mostly peaceful, the situation in SFRY escalated and ended in violent ethnic conflict.

The immediate reaction of the international community to the self-determination claims of the Republics as well as ethno-national groups in SFRY did not favor the partition of the federation. All plans were aiming at the preservation of the unity. However international community itself was not unified in its opinions. Whereas Germany was supporting Slovenia and Croatia in their struggle for independence, the rest of the European Community (EC) and the US were against it, and eagerly wanted to find a solution, which presupposed the continuous existence of SFRY. Nevertheless, when all attempts to preserve the unity of SFRY failed, they decided to recognize the independence of those claiming it.

However not all claims to self-determination were recognized. It was decided that only the Republics of the Federation will be recognized as independent countries. That meant that Kosovo and Republic of Serbian Krajina, both of which claimed independence were not recognized as the recipients of the right to self-determination, since the position taken by the EC was that there should be no change in the republican boundaries. The principle that was used to establish the new borders was the principle of *uti possidetis juris*, which had the consequence that after the application, no further alterations of the borders was possible.

Recognition of the Republics furthermore created a situation in which new minorities were formed. A typical example for such situation was Croatia, which after proclaiming independence had four areas with substantial Serbian minority, namely Krajina, Slavonia, Southern Baranja and Western Sirmium. In order to accommodate the needs of these minorities, one of the prerequisites for the recognition was the adoption of minority rights protection, which as set out stipulated autonomous status for minorities in the areas in which they formed the majority.

The application of uti possidetis juris on the one hand created Slovenia, which was not submitted to any claims for further partition, and on the other hand Croatia, which even though it was recognized as an independent state, faced violent separatist movement of the self-proclaimed Republic of Srpska Krajina, whose claim to self-determination was not recognized, not even in the internal sense.

The aim of my thesis is to examine whether the claims to self-determination of ethno-national groups should be treated equally and if, under which circumstances. I will try to show that the use of *uti possidetis juris* was the easy way out and address the problems that have occurred because it was used, and furthermore address the problems that might have occurred were the treatment different.

In Chapter 1 I shall deal with general definition of the three key concepts, namely self-determination, secession and uti possidetis and than turn to the uniform use of norms. I shall lay bare the consequences uniform application of norms has for the equality of treatment and fairness.

In Chapter 2 I shall deal with the question who the recipients of the right to self-determination should be, by examining various theories of secession that provide us with different answers to this question. In addition to that I shall look at the circumstances under which secession should be granted in the framework of these theories.

In Chapter 3 I shall turn to the case of Yugoslavia and its recursive secessions. Firstly I shall look at the theories from the previous section and try to determine which, if any, theory is the most suitable when dealing with the case of the former Yugoslavia and than try to depict which groups should have been recognized as the recipients of the right to self-determination and under which circumstances.

Lastly in Chapter 4 I shall turn to the case study. I shall begin by giving a review of the international reaction to the break-up of SFRY and than examine, whether any other determination of boundaries, but the lastly adopted uti possidetis, were considered. Lastly I shall turn to the cases of Slovenia, Croatia and Kosovo.

Chapter 1: On the Uniformity of Norms, Equality and Fairness

In the past century two competing principles were used to establish boundaries of the newly emerged states. After World War I the dominant principle used was the one referred to as self-determination of peoples, whereas in the process of decolonization the principle used was uti possidetis juris. After the dissolution of SFRY, the principle applied was uti possidetis juris, which de facto meant, that former internal borders of the federation became international borders, i.e. the borders of federal republics became international borders of the newly established states. Considering the events following this decision show, that the principle could not be applied squarely to all republics, since even though it was suitable for Slovenia on the one hand, it was not suitable in the case of Croatia, Bosnia and Herzegovina and at the time Federal Republic Yugoslavia.

In this chapter I shall therefore discuss the suitability of uniform application of norms and juxtapose such treatment with the notions of equality and fairness. I shall begin with definitions of three key concepts, namely self-determination, secession and uti possidetis and then turn to the discussion on uniform application of norms.

1.1 Self-determination

The principle itself is dated in the late 18th century, marked by two events, namely the American and the French revolutions. (Hannum, 2001) However it must be noted that, even then the principle was understood in different ways. On the one hand it was understood as the right of people to choose their own government separate from their colonial rulers and on the other hand as the right of peoples to choose their rulers within their existing territory (Hannum, 2001). This leads us to the distinction that is made by several authors, namely between “internal” and “external” self-determination. When speaking of the internal self-

determination we speak about: *"a principle which encompasses the right of all segments of a population to influence the constitution and political structure of the system under which they live."* (Buchheit, 1978: 14) On the other hand when we speak about the external self-determination we are referring to: *"a principle whereby a group of people are entitled to pursue their political, cultural and economic wishes without interference or coercion by outside states."* (Buchheit, 1978: 14) If we rephrase the above into the language of rights we can note that the first one refers to the right to internal autonomy and the second to the right of external independence. (Buchheit, 1978)

Self-determination of peoples was the leading principle in border adjustment after World War I, after the American president Woodrow Wilson proclaimed it to be *"an imperative principle of action, which statesmen will henceforth ignore at their peril."* (Hannum, 2001: 407) Nevertheless, the principle was not used consistently, meaning that not all national aspirations were taken into consideration, living some groups 'trapped' in the newly created nation-states. The mechanism used to accommodate the needs of these groups was minority protection, based on bilateral and multilateral treaties between newly established states and the so called 'minority' states and the League of Nations, however it must be noted that these treaties were not enforced. Moreover, despite the fact that self-determination was used as the leading principle at the time, it was not included to be a part of international law in the era of the League of Nations. This becomes evident when looking at the ruling of the League in the case of the Aaland Islands, where they decided that "*Positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part, by the simple expression of a wish …"* (Hannum, 2001: 408)

After World War II, self-determination as a principle was included in the Charter of The United Nations and later the principle found its way in several documents of the UN. Let us turn to the most important ones. In the Declaration on the Granting of Independence to

Colonial Countries and Peoples from 1960, the principle of self-determination was formulated as follows: *"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."* (Declaration on the Granting of Independence to Colonial Countries and Peoples) However, it must be noted at this point that 'peoples' referred to peoples subjected "*...to alien subjugation, domination and exploitation...*" (Declaration on the Granting of Independence to Colonial Countries and Peoples) 'Peoples' in this sense take the territorial definition of people, meaning that the right is ascribed to people of an already existing entity. The principle is moreover to be found in two Covenants from 1966, namely International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, where it becomes clear, that *"the right is not limited to colonies but is exercisable everywhere and continuously"* (Franck, 1995: 155), and also in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance With the Charter of The United Nations (1970), where Principle 5 reads as follows: *"Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."* (Declaration on Friendly Relations). This formulation is even stronger than the previous ones, since it is not merely a negative freedom, but there is a positive duty on the side of the state to comply with the principle. Furthermore, the principle is included in two documents of the CSCE, namely Helsinki Final Act (1975) and the Charter of Paris (1990).

It can be noted at this point, that self-determination was predominately a political principle in the time after WWI, but has become a legal principle with the era of the United Nations. In words of Peter Radan: *"The character of self-determination as a jus cogens norm*

with its erga omens attributes makes it imperative to view self-determination in legal terms." (Radan, 2002: 19)

1.2 Secession

In the previous section it has been established that as of now self-determination is a part of international law. The question that remains to be answered is, whether there is a legal right to secession.

Secession is the process by which a group seeks to separate itself from the state to which it belongs, and to create a new state on a part of the territory of that state. It is not a consensual process, and thus needs to be distinguished from the process by which a state confers independence on a particular territory by legislative or other means, a process which may be referred to as devolution or grant of independence. Secession is essentially a unilateral process. (Crawford, 1997)

Secession in the colonial context could be seen in two ways; as either pursuing self-determination or in violation of the principle. In the former case the situation is described as follows: *"Where the territory in question is a self-determination unit it may be presumed that any secessionary government possesses the general support of the people: secession in such a case, where self-determination is forcibly denied, will be presumed to be in furtherance of, or at least not inconsistent with, the application of self-determination to the territory."* (Crawford, 2005: 384) In other words, where self-determination of a particular territory is forcibly denied the right to self-determination, provided the government can be looked at as being representative of the people of the territory, the principle of self-determination works in favor of the secessionary territory. However this only applies to self-determination units, not to secessions of fractions of self-determination units. (Crawford, 2005) This basically means that it only applies to the unit that has previously been determined as the one that is the

beneficiary of the right to self-determination. In this particular case, we are speaking of colonies.

Considering secession outside colonial context *"unilateral secession did not involve the exercise of any right conferred by the international law."* (Crawford, 2005: 388) Moreover, the state was entitled to oppose unilateral secession in accordance with the principles of sovereignty and territorial integrity.

Nevertheless, even though the right to secession is not a part of international law, secessionist territories could be recognized. This can be deducted from the ruling of the Canadian Supreme Court in reference to Quebec, where they basically stated, that although the right to secession is neither included in the Canadian Constitution, nor in the international law, the success of the secession depends on the recognition of the international community, which would base their decision on the grounds of legitimacy of the act. (Crawford, 2005) This basically makes the success of secession dependant on the political decision made by the international community.

Secession, as we have seen, is not a right enshrined in international law. According to Crawford, the status of secession in international law is as follows: *"The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."* (Crawford, 2005: 390)

Nevertheless, there is one more process that needs to be mentioned in this context, namely the process of dissolution, since the position taken by the international community was, that SFRY represents such a case. Dissolution can be closely connected to secession. The process may be triggered by secession or attempted secession of a part of the state. However, if the process *"…involves a general withdrawal of all or most of the territories concerned, and no substantial central of federal component remains behind, it may be evident that the predecessor state as a whole ceased to exist…"* (Crawford, 2005: 391)

1.3 Uti possidetis

Uti possidetis as a principle is looked at as a principle that helps to preserve the territorial integrity of states and limits the execution of the right to self-determination. (Franck, 1993) Applying uti possidetis means that the formerly drawn borders, such as the borders between colonies, which were settled internationally between colonial powers, or the internal borders of a federation, like in the cases of USSR, Czechoslovakia and SFRY, become external, i.e. international borders. Another characteristic of the principle is that once applied, no further alteration of the boundaries is possible.

Uti possidetis is a principle from Roman law, where it was used to resolve disputes between individuals over immovable property. Where there was no established title to land, *"the possessor, by virtue of his possession, was awarded the right to be free from disturbance by his adversary."* (Radan, 2002: 69) In other words, the principle was *"uti possidetis, ita possidetis"*[1] (Radan, 2002: 69) Later the principle was adopted into international law, and was at first used as a method to determine the territorial changes that had occurred as a result of armed conflict. (Radan, 2002) Before the nineteenth century, the principle to determine the boundaries was simply, that after the war has ended each party to the war, legally possessed the territory it controlled after the cease-fire. (Radan, 2002) Later the principle was included in the peace treaties, where the principle "*governed legal rights to property."* (Radan, 2002: 71) According to Radan, in that era, uti possidetis, since the conquered land belonged to the conqueror, unless expressed otherwise, was the principle that validated the use of force. This ended with the era of the UN, with the principle of territorial integrity that precluded the acquisition of territory through the use of force. (Radan, 2002)

Uti possidetis as a principle has two possible meanings, namely uti possidetis juris and uti possidetis de facto. According to the former, internal boundaries become the external ones,

[1] "As you possess, you may possess."

whereas the latter means that the boundaries of the new state include the territory actually possessed at the time of independence. (Radan, 2002) The principle that is being used is predominately uti possidetis juris, which was used both in the process of decolonization and after the dissolution of federations.

Uti possidetis served as the principle in three geographical areas, first it was applied in the case of South America, where three large Spanish territories that declared independence, split along their internal lines into new states. Later the principle was used in Africa, to determine the borders after the decolonization. According to Ratner, there were two possibilities discussed during the decolonization, either to completely reconstruct the borders to correct past injustices or to accept the existing lines. (Ratner, 1996) It was decided to use uti possidetis juris because it was believed that adopting a different principle would slow down the process of decolonization and because of the fear of possible war. (Radan, 2002) The principle was later yet again used, namely after the dissolutions of federations in Europe, namely USSR, Czechoslovakia and SFRY. Whereas in the cases of the Soviet Union and Czechoslovakia the successor states agreed among themselves to draw the external borders exactly overlapping with the former internal borders, the decision to apply the same principle in Yugoslavia was made by the Arbitration Commission of the EC Peace Conference on Yugoslavia. (Ratner, 1996)

1.4 Uniformity of Norms

As stated above, the principle used to determine the boundaries after the dissolution of SFRY, was uti possidetis juris. This practically meant that the boundaries of the newly created countries coincided with the former republican borders of the federation. However it should be noted at this point that before it was decided upon to use uti possidetis juris, it was clear that the situation in the various republics was far from similar. On the one hand, Slovenia was

a fairly homogeneous republic, which did not have any other ethnic group claiming independence, whereas on the other hand Croatia, Bosnia and Herzegovina and Serbia faced separatist movements from within. To take the example of Croatia, the Serbian population of the region of Krajina, demanded either to remain in SFRY or to become independent. By the time international community started pondering on its own decisions regarding the future of SFRY, Krajina Serbs had declared their wish to independence from Croatia based on the principle of self-determination. Hence, the question that needs to be answered is whether using uniform norms is adequate in respect to equal treatment and fairness.

Applying uti possidetis juris in the case of SFRY can be looked at as a blind implementation of equal treatment, namely treatment in the sense of simple equality. Simple equality is basically equality in its mechanical sense. To exemplify simple equality we can take the imaginary case of a humanitarian action, where blankets are being distributed amongst freezing people. We have person A, who is short and skinny and person B who is tall and obese. People handing out blankets have blankets of the same size, thus A and B receive the same type of a blanket. Whereas such a blanket suits A perfectly and keeps him warm, B's needs are not satisfied, since the blanket is not big enough for him. The principle used in the distribution was the principle of simple equality. This example leads us to the conclusion that simple equality does not lead to just results.

There are several objections that can be made against simple equality. One of them and probably the most obvious one is that simple equality can lead to unequal results as has been made clear with our example.

Another important objection is the so called moral objection, which is also made clear with our example. The moral objection is as follows:

"A strict and mechanical equal distribution between all individuals does not sufficiently take into account the differences among individuals and their situations. In essence, since individuals desire different things, why should everyone receive the same?" (Gosepath, 2001)

Since the blankets were of the same size, and the persons the blankets were distributed to were different in physical appearance, it is somewhat clear that the differences between the persons and thus the differences in their needs were not taken into consideration. The question raised by Gosepath can also be rephrased, not using the word desire but a far more important one, namely need. Taking differences into account is extremely important especially when we speak about equality.

Another problem we can associate with simple equality is that: *"Simple equality is very often associated with equality of results."* (Gosepath, 2001) As we have already shown above the use of simple equality does not lead to equality of results. Whereas A is warm, B is still freezing. When implementing the idea of equality the equality of results, even though it does not play the only role, should have an important role. If we want to create equality, the struggle for equality of results is not only understandable but also important. If we are distributing blankets because people are freezing, our main goal in distributing is to change the situation; to help people and make them warm. If after the distribution, we create the situation, in which we have satisfied the needs of some, but failed to satisfy the needs of others, our main goal has not been achieved. Thus we did not manage to have the expected result.

The last important objection to simple equality is that: *"... there is a danger of (strict) equality leading to uniformity, rather than to a respect for pluralism and democracy."* (Gosepath, 2001) This objection is connected to the objection that simple equality does not take differences between objects into account. If we apply simple equality in respect to groups

in multiethnic societies, we can see that, if the differences are not taken into account, then simple equality in fact does not respect pluralism.

When we now turn to the case of SFRY, we can note, that groups identified as the objects of treatment were former republics of the Federation. When it came to demands to secession equal treatment was granted to the republics, however not to territorially concentrated ethnic minorities within these republics, even though they also voiced their opinion.

The principle used to establish equality was uti possidetis. Since uti possidetis as such is a principle that does not take into account anything else but the former internal boundaries, I shall claim that it represents a case of simple equality. If we take a look at the case of SFRY, the use of the principle assumed that the results would be equal, and that the republics in question are all suitable for the use of the principle in such a way that republics are taken as units to be transformed into future states.

Looking at the consequences proves that this assumption was wrong. Even before the principle was used, the differences between the republics were somewhat obvious. Whereas Slovenia was quite homogeneous and did not contain any significant ethnic minorities, the situation in Croatia was much different. The case is analogous to the case of the blanket distribution quoted above. Whereas the principle of uti possidetis was suitable for Slovenia and satisfied its needs and desires, it was not good enough for the people of other republics.

After the cold war uti possidetis was used in accordance with three assumptions, namely that:

1) *It reduces the prospects of armed conflict by providing the only clear outcome in situations, when new states are created (if there was no uti possidetis, all borders would be open to dispute);*
2) *Cosmopolitan democratic states can function within any borders, so uti possidetis is as sensible as any other approach and far simpler;*
3) *Uti possidetis is asserted as a default rule of international law mandating the conversion of all administrative boundaries into international ones.* (Ratner, 1996: 591)

However it must be noted that the use of uti possidetis leads to situations where significant populations are left on the 'wrong' side of the border, leaving these populations unsatisfied and uncertain of their opportunities for political participation there, which leads to genuine injustices and instability. (Ratner, 1996) In accordance with this, we can say, that the above cited point 1) is not necessarily true, since the prospect of the armed conflict is not reduced, but just as high, as can be claimed in the case of SFRY, where dissatisfied 'trapped' minorities did not accept new borders.

Thus it can be claimed that uti possidetis should be looked at more critically. According to Ratner, this should be done, because: *"… application of uti possidetis to the breakup states today both ignores critical distinctions between internal lines and international boundaries and, more important, is profoundly at odds with current trends in international law and politics."* (Ratner, 1996: 591)

Let us first turn to the distinction between internal and international borders. One of the core differences is the function of the boundaries. While international borders have a dividing function, internal borders have a uniting function, in the sense, that the state is not concerned with protection from outside, but with "*binding together or managing separate areas as a whole."* (Ratner, 1996: 602) Moreover administrative borders are not static, i.e. they can be redrawn.

If we look at the administrative boundaries within Yugoslavia, we can note, that there have been several divisions throughout history. In the Kingdom of Yugoslavia, the unit was divided into 33 oblasti, rationale behind it being to divide the country into a larger number of administrative units, based on circumstances of natural, social and economic origin, not regarding former historical or cultural borders. In the year 1929 the division in administrative units was changed from the division in oblasti to the division in nine banovine.[2] These were to

[2] provinces

correspond to provincial needs and the principle of the central government. One of the functions of the division was to suppress nationalistic expression. In 1938 the new division was created with the Sporazum[3], which created a quasi-federal division of Yugoslavia. Sporazum was reached between Serbs and Croats, and created a federal Croatian Banovina, which was composed of Savska and Primorska Banovina and parts of four other banovine. The Croatian Banovina was granted extensive legislative competence. This reorganization was the consequence of Serb-Croat conflict, which was based on the suppression of nationalist movements. This suppression was viewed by the Croatians as *"a mask for Serb hegemonism."* (Radan, 2002: 141) After World War II there was yet another reconstruction of internal boundaries, when Yugoslavia became a federation of six republics. The new internal borders relied on the historical borders (interwar Yugoslavia borders, borders in the Austro-Hungarian Empire and the Ottoman Empire). In addition to the six republics, there were two autonomous republics recognized in Yugoslavia, namely Kosovo (border was established according to national criteria) and Vojvodina (border was established in accordance with historical borders), both of which were located in the Republic of Serbia. The borders, according to Tito, were not to divide people but to unite people within Yugoslavia. (Radan, 2002)

This example clearly shows that the internal borders in SFRY were drawn neither in accordance with the ethnic composition nor with the idea that this borders will function as international borders, i.e. dividing function, in mind. Thus, to use the words of Carl Jacobsen: *"Marshal Tito delineated borders for his Yugoslavia for his purposes-one of which was an ethnic mix that would preclude separatism….Like many other internal boundaries elsewhere, these stand as a testimony to their creator(s), not natural justice. To sanctify them as inviolable is to perpetuate and embed injustice, and conflict."* (Radan, 1997: 546)

[3] Agreement

Furthermore when the principle of uti possidetis is applied and internal boundaries become international ones, they also assume a different function. They assume the function of separation. Thus, even if the location of these boundaries was not important when they functioned as internal boundaries, it becomes important as they assume the function of international boundaries. Certain groups are no more divided by administrative boundaries, but become parts of different states. In addition to that, it also must be noted, that when internal boundaries are drawn, these are not drawn with considerations to possible secessions. (Ratner, 1996) Thus before applying the principle of uti possidetis several considerations should be made, namely: the age of the line, the process by which the line was drawn, i.e. whether it was drawn by consensus or by a dictator and the viability of the entities, i.e. whether the emerging unit is able to economically sustain itself. (Ratner, 1996)

We can thus conclude that the uniform use of uti possidetis is for several reasons, highly problematic when creating international boundaries.

If we now take a look at the norms at the disposal for determining boundaries of newly created sates, we have uti possidetis, which is static, on the one hand, and self-determination, which is dynamic on the other. According to T.M. Franck, the so called postmodern tribalism, which includes politically assertive clans, nations, denominations and ethnic groups, *"seeks to promote both political and a legal environment conductive to the break-up of existing sovereign states"*. (Franck, 1995: 144) The legal claim is based on the principle of self-determination. He believes that there is no simple or uniform claim to self-determination, but that the claim needs to be deconstructed. In his words: *"Once it is deconstructed, it becomes apparent that if differentiated claims are to be addressed than normative principles must be applied which are sensitive to these important differentiations."* (Franck, 1995: 144) One of such instances applies to the case of the SFRY, namely: *"A minority wishing which, if successful, will become the majority in a new state, with a new minority of persons who were*

previously among the majority in the parent state." (Franck, 1995: 145) In order to treat parties equally and also in respect to fairness, these differences must be taken into account.

Considering the two above listed norms, i.e. self-determination and uti possidetis, there were three ways in which they were applied. The international community could protect the territorial integrity (uti possidetis), meaning that it opposed the execution of self-determination. On the other hand it could embrace the execution of self-determination, like for instance in the case of decolonization. The third option is that it takes a neutral position between self-determination and the protection of the territorial integrity, as according to Franck seems to be the practice in the handling of the break-up of Yugoslavia. (Franck, 1993) By using the synthesis of self-determination and uti possidetis, there was no equality of treatment for the groups whishing to gain independence, nor was there fair treatment of all parties involved, since the practice on the one hand affirmed self-determination, but with the use of uti possidetis limited the right to the republics, without taking the differences between them into account.

Nevertheless, there is a fourth option, which is the already mentioned deconstruction of self-determination. The deconstruction of the principle should be based on the differences between cases, meaning that the difference between Slovenia (homogenous state) and Croatia (heterogeneous state), should be taken into account. (Franck, 1995) As already shown above, such modus operandi is needed, if we want to achieve equal treatment of the parties involved. In addition to this, it is needed to create fairness.

To apply norms uniformly, it can be claimed, is neither in accordance with equality, nor with fairness. The immanent differences between parties involved must be taken into account, if the treatment is to be both equal and fair. Several considerations should be made, before applying uti possidetis and as Franck rightly observed the norm of self-determination should be deconstructed, so that the different situation can be addressed more adequately.

Taking into consideration the treatment of parties in the case of SFRY, we can note, that applying uti possidetis juris as a norm regulating the boundaries did not reflect either. Whereas the principle of self-determination was applied to a certain extent, i.e. it was the claim of Slovenia and Croatia, that they are struggling for independence in the name of national self-determination, it was not granted to all groups within SFRY. As soon as uti possidetis was used as the principle, which determined the boundaries of the newly emerging states, it was clear that self-determination claims of some were satisfied, whereas the claims of others neglected. Looking at the situation in Croatia, where the Serbian minority in the region of Krajina clearly did not want to belong to the Croatian state, but rather wanted to stay in Yugoslavia or create their own state, we can without further ado say, that the decision to use uti possidetis juris, not only left them unsatisfied and on the 'wrong' side of the border, but also neglected their right to self-determination. Same can be said for the case of Kosovo, since they too expressed the wish to become independent, but were left to be a part of at the time Federal Republic Yugoslavia, now Serbia.

Thus several considerations should be made in order to create a fairer treatment and equal treatment of parties involved. The most important of the questions that need to be answered is: Who is the recipient of the right to external self-determination, i.e. secession and under what circumstances? I shall deal with this question in the following chapter.

Chapter 2: Theories of Secession

Theories of secession can be divided into primary right theories and remedial right theories. Primary right theories include National Self-Determination theories and Choice theories, whereas remedial right theories include the co called Just-Cause theories. In addition to these theories there are some theories, which are a combination of different kinds of theories. These theories will be referred to as Hybrid theories.

Remedial rights theories, as can be concluded from the name, require that the right to secession be granted to a group as a remedy for some kind of past injustices, such as for example gross human rights violations or illegal incorporation of that group into a state. Primary rights theories on the other hand, even though they also envisage secession for the groups that were subjected to unjust treatment, assert that secession can be granted even if that is not the case. (Buchanan, 2003)

Primary rights theories can be further divided in ascriptivist and plebiscitary theories. The former include National self-determination theories and ascribe the right to secession to distinct groups, whereas the latter assert that the right to secede belongs to a territorially concentrated group, the majority of which expresses the whish to secede.

We can note that remedial right theories are much more restrictive than primary right theories, since they are the only ones that require justifications on the side of the group that wants to secede. These theories can be subdivided into just-cause theories and remedial right only theories. Let us first turn to National self-determination theories.

2.1 National Self-Determination Theories

The National self-determination theories claim that nations not only have the right to self-determination, but also have the right to a state, in which they would represent the

majority. This would mean that every minority nation in a state, which consists of several nations, would have the right to secede, if the majority of the nation so whishes.

One of the most problematic issues concerning this theory is the ambiguous meaning of the concept of nation. In the words of Hugh Seton-Watson:

"What is the nation? Many people have tried to find a definition. But it seems to me, after a good deal of thought, that all we can say is that a nation exists when an active and fairly numerous section of its members is convinced that it exists. Not external objective characteristics, but subjective conviction is the decisive factor." (Bartkus, 1999: 14)

If nations are the ones who have the right to secession, it is of utter importance to define the term. What makes a group of people a nation?

There have been many attempts to define the term. The first distinction that can be made is the distinction between the so called ethnic and civic meaning of the term. According to ethnic nationalism, the membership in the nation is based on ancestry and believed to be an inherent characteristic. On the other hand, according to civic nationalism, membership in the nation is equated with citizenship and regarded as a political or legal category. (Greenfeld, 2001)

If the term nation is used to describe the ethnic group, then we are faced with the obvious problem; namely that the theories are too broad. If every nation has the right to secede in a multinational state, this could lead to a lot of secessions. Most of the world's countries are multinational or better said, there are extremely few, if any, that consist of one nation only. So any nation, that all of a sudden feels the need to secede, can do so, if it meets two very vague criteria. They need to be a recognized nation and they have to be the minority nation within a multinational state. Since these two requirements are easily met, secession is something that represents a threat to every multination state. Therefore, it is necessary to ask oneself, that if simply being a nation is a valid enough reason for secession. On the other

hand, if nation is defined in the civic sense, this whole criticism is unnecessary. Nations in the civic sense are not necessarily comprised of people belonging to the same ethnic group. If one is a citizen of a certain state, one is the member of the nation. A good example for that is the American nation of the USA, which is comprised of various ethnicities. However, if we define nations in the civic sense, than this whole theory does not apply, since civic nationalism already presupposes a state. So let us note that National self-determination theories do not deal with the civic definition of the nation.

2.1.1 John Stuart Mill

One of the defenders of these theories is John Stuart Mill. In his work "Considerations on Representative Government" in the chapter "Of Nationality, as connected with representative government" he presents his argumentation, which basically says that people of the same nationality should be united under the same government. The question is however, what constitutes a nationality and consequently a nation. According to Mill, what constitutes a nationality is the mutual feeling of sympathy and connectedness amongst members of a certain group.

"A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others---which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively." (Mill, J. S.)

The question that interests us the most is: What generates this feeling of sympathy and connectedness?

"This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Communities of language, and community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past." (Mill, J. S.)

This paragraph implies the definition of a nation in the ethnic sense. Whereas the first part clearly points into the direction of ethnic nationalism, saying that race, decent, language etc. are those which are important for the nation, the second part points out that a common ancestry and culture is not enough; that a nation also needs some common historical traditions and bounds to strengthen their feeling of national belonging.

Mill himself gives the counter example to the point, that a common language is necessary for the feeling of national belonging. His prime example is Switzerland, which is indeed a good example against the claims, that a country, which is composed of people speaking different languages, cannot achieve the feeling of common nationality amongst people. Switzerland being a country of four different languages, still possesses a high feeling of national belonging amongst people. Another good example he gives is Belgium, which is composed of two main groups, namely the francophone Walloons and the Flemish. They have a greater feeling of a common nationality, than they do with either France or the Netherlands.

Mill continues by giving his main argument for the nation-state:

"Where the sentiment of nationality exists in any force, there is a prima facie case for uniting all the members of the nationality under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed." (Mill, J. S.)

This argument is basically what the National self-determination theories of secession claim. Nations should have the right o have their own states, which in other words means, that they should be united under the same government. What is more important to us, is the reasons, why that should be the case. Mill's reasoning is as follows.

"Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist." (Mill, J. S.)

He believes that this is so, because different nationalities have different leaders who opt for different things. The same newspapers and other forms of media do not reach everyone and thus different nationalities get different information about happenings in the country. Because of that there is no possibility of common public opinion, which is important for the operation of the representative government.

Another consequence he draws from the non-existence of the feeling of commonality is the problematic operation of a common military. He notes that for the military the distinction between fellow-man and foreigners is extremely important, since they are bound to protect the fellows from the foreigners. If a country is composed of several nationalities the situation is created in which:

"An army composed of various nationalities has no other patriotism than devotion to the flag. Such armies have been the executioners of liberty through the whole duration of modern history. The sole bond which holds them together is their officers and the government which they serve; and their only idea, if they have any, of public duty is obedience to orders." (Mill, J. S.)

Because of all the above mentioned reasons, Mill concludes, that the state boundaries should coincide with the boundaries of nations.

However, even Mill recognizes that there are some problems with his view. The first point he makes is that there are geographical obstacles to his theory. Some nations are so dispersed, that it is impossible to bring them together. I believe that this is a very good point and also very representative of the real world situation in former Yugoslavia for instance, where Serbs not only lived in Serbia but also in several parts of Croatia and Bosnia and Herzegovina. The situation in Croatia clearly shows the problematic, since the two regions with almost purely Serbian population, namely Krajina and Slavonia are not connected, but divided by the territory that is populated almost purely by Croats.

Mill also acknowledges the fact that even after a nation is united in one state there is the possibility that it will not be the only nation in that state. He argues that in such situations, the two or more nations are always in an unequal position. In other words, one is always superior and the other inferior. He rightly believes that one nation can be merged with the other, and that it is possible that the two nations live under the same government.

"When the nationality which succeeds in overpowering the other is both the most numerous and the most improved; and especially if the subdued nationality is small, and has no hope of reasserting its independence; then, if it is governed with any tolerable justice, and if the members of the more powerful nationality are not made odious by being invested with exclusive privileges, the smaller nationality is gradually reconciled to its position, and becomes amalgamated with the larger." (Mill, J.S)

The extremely important point raised in this paragraph is the point that the government of joint nations, should govern with tolerable justice. To me that is the key problematic of the National self-determination theories. If the multi-national state does not put any nation in a position, in which this particular nation would suffer injustices, then the fact that the group constitutes a nation is not a valid enough reason for secession.

2.1.2 David Miller

Another important, more recent representative of these theories is David Miller. According to him there are two extreme ways in which national self-determination can be interpreted. The first interpretation is that if a minority group regards itself to be separate from the majority then separation from the state is in accordance with national self-determination. The second interpretation on the other hand, takes the definition of the nation in the civic sense, meaning that nations are defined by citizenship and an already existing state, thus the separation of the minority is not possible. (Miller, 1998) He himself wants to develop a coherent theory avoiding both extremes.

For the purposes of his theory he takes the following definition of a nation, i.e. a nation is *"a group of people who recognize one another as belonging to the same community, who acknowledge special obligations to one another, and who aspire to political autonomy- this by virtue of characteristics that they believe they share, typically a common history, attachment to a geographical place, and a public culture that differentiates them from their neighbors."* (Miller, 1998: 65)

Miller points out that there are different ways in which the minority groups form their identity. There are cases in which the groups do not feel that they share an identity with the majority, examples of which are immigrant groups. There are regional minorities, who perceive themselves as forming a different nation and endeavor greater or lesser degree of autonomy. Furthermore this should be distinguished from regions that are inhabit intermingled populations that identify themselves with different nations, like for instance in the case of Transylvania. Lastly there are regions, population of which bears a dual identity, i.e. an identity of a national minority within a larger nation, like for instance Catalans in Spain. (Miller, 1998)

Another important issue connected with secession is that it can not be looked at only in the sense of political separation, but also in the sense of territorial separation, which ultimately leads to the fact that the group separating itself from the 'mother' state should have a legitimate claim to the territory.

According to Miller such claim is established on the grounds that the inhabitants of a certain territory form a political community. As such they create laws, establish property rights, etc. The territory also has a symbolic significance for them, since they bury the dead on it, establish monuments, etc. All this gives them *"an attachment to the land that cannot be matched by any rival claimants."* (Miller, 1998: 68) This than also serves as the justification for the claim to *"exercise the continuing political authority over that territory."* (Miller, 1998: 68) Such a justification is stronger than the historical claim to land.

Thus it can be said that Miller introduces two criteria for secession, namely that the group forms a nation that has a clearly separate identity from the identity of the nation they want to separate from and that the group is capable to validate its claim to exercise authority over the territory it wants to occupy. (Miller, 1998)

In addition to these criteria there are several further considerations to be taken into account. Firstly, Miller rightly points out that it is unrealistic to assume, that after secession there will be a homogenous state created. Basically after secession one heterogeneous state is replaced by another. Thus the newly created minority should be taken into consideration, when deciding upon whether or not to recognize the secession claim. Thus, having that in mind, if a high possibility for maltreatment or even ethnic cleansing of the minority exists, then granting secession is not feasible. Thus *"qualitative judgments about how the status and welfare of different groups would be altered by the creation of a new state must be made."* (Miller, 1998: 71)

One of the possibilities to solve the problem is to grant secession, if the seceding group is willing to provide minority rights to the newly created minorities. However, as pointed out by Miller, not all groups are to be trusted to comply with the minority rights protection. According to him, there is a much greater possibility that Quebec, should it become independent, would comply with minority rights protection, than a society in which mutual hostility between groups exists. (Miller, 1998) His proposal to solve such a case is transfer of populations, which should not be done by the means of coercion, but on a voluntary basis. People would be given financial incentives to change their home and the whole process would be internationally supervised. (Miller, 1998)

The last consideration to be made is of economic nature. It basically states that secession is not possible if by secession the state would be deprived of a valuable resource. Furthermore, that seceding territory, if becoming a state, should be economically viable. (Miller, 1998)

Miller's theory is the most restrictive one in this section. I would agree with him in most points; however I believe that the transfer of populations is a bit far fetched and not feasible. It is rather hard to believe that a group of people would be prepared to leave their homes on a voluntary basis.

2.2 Choice Theories

According to the choice theories the right to secession is a matter of choice. Any group can secede if they want to, as long as it is the wish of the majority. The group, which wishes to secede, does not have to be a nation. According to these theories a group can secede, even though they are not victims of any injustices. Moreover the seceding group does not have to establish any special claim to the territory they intend to take. So choice theories claim, that if

the majority of a group of people, any people, wishes to secede, they have the right to do so. Let us look at the theory developed by Harry Beran.

2.2.1 Harry Beran

Beran's theory is based on the consent of the people. According to him political unity must be voluntary. Basically, the rightful unity of the state must be based on the willingness of the citizens of this state to be a part of it. (Beran, 1998) Thus if a group does not wish to be a part of the state anymore, they have a right to withdraw from it.

This rationale is based on the conception that the state is the agent of the people, and that this relationship is not irrevocable. Hence, all the rights the state holds, also the right to the territory, *"must be derived from the people whose agent it is."* (Beran, 1998: 35) This implies the right to secession. In Beran's words:

"If a substantial part of a state's population no longer wishes the present state to be its agent, it may terminate the agency relationship and remove itself from the state with its land." (Beran, 1998: 35)

When determining who the group that has the right to secession is, nations can be identified as the carriers of the right, however not only nations are the beneficiaries. The right can also serve the so called territorial communities, which are *"a social group that has a common habitat, consists of numerous families (i.e., is larger and more complex than a family), and is capable of self-perpetuation through time as a distinct entity."* (Beran, 1998: 36) Members of this group furthermore have a sense of belonging to this group, which however is not restricted to this group only, have relationships to each other and consciously perceive themselves to be a distinct group. (Beran, 1998) However, the group needs to satisfy two further conditions, namely that they are a politically and economically viable entity.

In order for the group to determine their political status, the use of referendums is usually the case, however sometimes, if the wish of the community is so clear, that there is no need for it.

Nevertheless, in divided societies, there are different options at disposal, not only secession. These options include minority rights, which are suitable when a small minority is not territorially concentrated and thus secession is not possible; power-sharing, which is most suitable in the case that the state consists of more or less numerically equal groups, which would not be economically viable or are so intermingled that secession is not an option; and federation, which can be used in a case, where a number of different communities can have benefits of local autonomy and at the same time be members of a larger political and economic entity. (Beran, 1998) Furthermore the group that secedes should not oppress or exploit sub-groups that can not secede.

To sum up, Beran's theory is based on consent of the people to belong to one state. If the group chooses, by the means of a referendum, not to belong to the state anymore, this is interpreted as withdrawal of consent and the group has the right to create an independent state, provided the state would be politically and economically viable. This in turn means that the newly created state has to grant the same right to a group within it, should this group withdraw its consent.

It may seem at first that one could object to this theory by using the slippery slope argument, namely that there would be endless division of states. However, even though there would definitely be a proliferation of states, not all groups would be able to satisfy the requirement of economic viability and more over not all groups desire to secede from their state.

2.3 Just-Cause Theories

Just-cause theories are the most restrictive theories, when it comes to secession. According to these theories, a group that wants to secede must be in position to demonstrate at least one of the following:

> *1. "that it has been the victim of systematic discrimination or exploitation, and that this situation will not end as long as the group remains in the state*
> *2. that the group and its territory were illegally incorporated into the state within recent enough memory*
> *3. that the group has a valid claim to the territory it wants to withdraw from the state*
> *4. that the group's culture is imperiled unless it gains access to all of the powers of a sovereign state*
> 5. *that the group finds its constitutional rights grossly of systematically ignored by the central government or the Supreme Court"* (Norman, 1997: 41)

According to these theories a group can secede only if secession is some kind of remedy for past injustices. These theories already encompass the two circumstances already recognized by the international law as being legitimate reasons for secession. The first such circumstance is the unjust military occupation of the state territory. An example for such secession would be Latvia, Lithuania and Estonia, when they seceded from the Soviet Union, did so as a just cause, since their countries had been violently annexed to Soviet Union. The other circumstance encompassed in these theories is the right of colonies to exercise the right to self-determination in the sense of decolonization.

On the other hand it can be said, that these theories give the opportunity to exercise the right of self-determination or more specifically secession to groups, which have been submitted to violations of human rights and injustices. Groups that could profit from this are for instance Kurds that have been submitted to severe human rights violations by Turkey.

If we now consider the objection that secession represents the fear of 'indefinite divisibility', we can note, that this objection does not apply to this theories. Since these theories require a lot more as criteria for secession than just the belonging to a certain

'distinct' group, the fear that more and more groups would claim the right is not plausible. What is more, because the criteria that have to be met are so strict, the fear of indefinite divisibility is not feasible.

What seems the most important element of Just-Cause theories is the repair of past injustices. According to these theories we can look at secession as some kind of a remedy.

2.3.1 Remedial Right Only Theories

The Remedial Right Only Theories are a kind of Just-Cause theories. I shall rely very extensively on Buchanan's argumentation considering these theories. According to Buchanan there are two sorts of injustices that need to be recognized as a reason to grant the right to secession.

Firstly, when there are major and persistent violations of individual human rights and secondly, in the case of the unjust taking of a legitimate state territory.

His main idea is that individuals are morally justified in defending themselves against violations of their most basic human rights. When the last resort for stopping these injustices is secession, then, he believes, it is morally permissible for them to secede. (Buchanan, 2004) Even though states have sovereignty over their territory, in such cases secession is a legitimate act, since the basis of the state's claim to territory is the provision of justice, understood primarily as the protection of human rights. So secession to Buchanan is the last-resort remedy against these injustices. The first and second conditions of this theory are joined by the third condition, which should be recognized as a right to secede. The third condition is as follows:

"A group has the right to secede when there are serious violations of intrastate autonomy agreements by the state, as determined by a suitable international monitoring inquiry." (Buchanan, 2004: 357)

Why this condition is of utter importance, can be seen in the case of Kosovo. As Buchanan illustrates, these cases take the same path:

"Pressures from a minority group eventually result in the state agreeing to an intrastate autonomy arrangement; the state breaks the agreement; in response to the broken autonomy agreement autonomists become secessionists; and then the state violently attempts to suppress the secession." (Buchanan, 2004: 357)

In Buchanan's opinion, the response of the international community to this pattern is inadequate. They do not react until the phase of suppressing secession, which produces massive violations of human rights. Only then the international community is willing to intervene. (Buchanan, 2004)

What Buchanan suggests is a more proactive approach he calls the "isolate and proliferate" strategy. According to him the international community should:

1. *"help broker intrastate autonomy agreements as an alternative to secession,*
2. *monitor both parties' compliance with such agreements,*
3. *support the agreements viability by holding both parties accountable for fulfilling their obligation, and*
4. *provide an impartial tribunal for adjudicating disputes over whether either or both parties have failed to fulfill their obligations."* (Buchanan, 2004: 358)

The most important of the conditions is the fourth. It is important to have impartial information about who or if the obligations are fulfilled. Buchanan stresses the importance of this condition through the example of Kosovo. Even though there is no doubt, that Serbia violated Kosovo's autonomy, there is a dispute about who violated the terms of the autonomy

agreement first. Supposedly the Kosovo Albanians had abused their right to autonomy by excluding Serbs, and engaging in violent attacks on them. (Buchanan, 2004)

Thus, what Buchanan suggests is that international law recognizes the violations of intrastate autonomy agreements as a legitimate reason for secession. However two further conditions need to be met for the right to be granted. The first condition is that the state is responsible for the violation of the autonomy agreement and the second condition is that secession is a remedy of the last resort. This is very important, since the states usually look at autonomy agreements as a preliminary step to secession. Even though according to this theory, secession is not excluded per se, secession is only the last-resort solution. If the states act in accordance with the autonomy agreements and respect human rights, then secession is not feasible. It is therefore clear, that if secession occurs, it did not happen because of the autonomy, but because the state failed to fulfill its obligations. Another important part of the theory is that both sides are bound to fulfill obligations. Precisely because of that the monitoring of both parties is of utter importance. One could namely claim, that a group that was granted autonomy, could be granted the right to secession by provoking or even staging violations of the agreement. Since both sides would be monitored, such happenings are unlikely to be unnoticed.

2.4 Hybrid Theories

Hybrid theories take a position between the above listed theories. This basically means that these theories encompass elements from more theories. In this section I shall deal with the theories of Margaret Moore and Margalit and Raz, which take the position between National self-determination and Choice theories.

2.4.1 Margaret Moore

Margaret Moore's basic position is that secession should be in accordance with the democratic principle, i.e. that group should decide upon secession by the means of a referendum.

However, it must be decided which territorial unit is the one that is the most adequate to be considered. The territorial component is of importance, since it is closely connected with secession. It is not only about self-determination of people, but also about the removal of a territory from the state from which the group is separating. (Moore, 1998)

She singles out three possible conceptions connected to territory. The first one is looking at self-determination from the perspective of the administrative boundaries. If looking at it from this perspective, than the people are the inhabitants of the unit and ethnic and national differences are not taken into account. She believes that even though such a conception might have been adequate in the case of decolonization, since some of the colonies were composed of numerous ethnic groups and thus no substantial majority could be identified, it is not adequate in the cases were there is a *"majority national community which can be said to able to control the state, using standard democratic (majoritarian) principles."* (Moore, 1998: 138) She continues by asserting that: *"In cases where there is a dominant national majority which can control the new state, the administrative boundaries principle does not have the moral force, the legitimating force, to persuade those people whose aspirations are denied by this conception."* (Moore, 1998: 140) Furthermore, she notes that the internal borders were not drawn in accordance to ethnic composition but served different purposes, one of which was to effectively control the federations. (Moore, 1998)

The second option is to justify national self-determination by appealing to historical, religious and cultural arguments. She believes that these appeals cannot be the basis on

deciding on the rightful ownership of the territory, since the arguments are internal to *"a specific tradition and culture and cannot provide the basis for a neutral adjudication of the conflict."* (Moore, 1998: 141)

The third option is national self-determination as the ethnic and democratic principle. According to this view, *"any territorially concentrated national group-any group of people who identify themselves as belonging to a particular nation-has the right to self-determination."* (Moore, 1998: 150) This position is based on the principle of the democratic principle of a group's aspiration to be self-determining, in this case of a national group.

However, secession should be granted only in the cases when the group in question is nationally mobilized and a substantial number of members of the group share the same national identity and when different national groups are not intermingled on the same territory. (Moore, 1998) If the latter is the case, self-determination should take a different form, like for instance the form of a confederation.

2.4.2 Margalit and Raz

The theory of Margalit and Raz takes the position that the beneficiaries of the right to self-determination are the so-called encompassing groups. Encompassing groups according to Margalit and Raz must have six characteristics that are relevant for self-determination. These characteristics are:

1. Tradition. The group must have common characteristics and a common culture that cover varied and important aspects of their lives. *"With national groups we expect to find national cuisines, distinctive architectural styles, a common language, distinctive literary and artistic traditions, national music, customs, dress, ceremonies and holidays, etc."* (Margalit and Raz, 1995:82)

2. Acquiring a group culture. *"Their tastes and their options will be affected by the culture to a significant degree. The types of careers open to them, the leisure activities one learned to appreciate and is therefore able to choose from, etc. will be marked by the group culture...Their influence on individuals who grow up in their midst is profound and far-reaching."* (Margalit and Raz, 1995: 82)
3. Membership as a mutual recognition. *"One belongs to such group if, among other conditions, one is recognized by other members of the group as belonging to it... Membership in them is a matter of informal acknowledgement of belonging by others generally, and by other members specifically."* (Margalit and Raz, 1995: 83)
4. Self-identification. *" Our concern is with groups, membership of which has a high social profile, that is, group, membership of which is one of the primary facts by which people are identified, and which form expectations as to what they are like, groups, membership of which is one of the primary clues for people generally in interpreting the conduct of others. These are groups, members of which are aware of their membership and typically regard it as an important clue in understanding who they are, in interpreting their actions and reactions, in understanding their tastes and their manner."* (Margalit and Raz, 1995: 83)
5. Membership as a matter of belonging. *"Membership is a matter of belonging not achievement. One does not have to prove oneself, or excel in anything, in order to belong and to be accepted as a full member...One belongs because of who one is."*(Margalit and Raz, 1995: 84)
6. Anonymous groups. *"The groups concerned are not small face-to-face groups, members of which are generally known to all other members. They are anonymous groups were mutual recognition is secured by the possession of general characteristics."* (Margalit and Raz, 1995: 85)

One could agree that encompassing groups have the right to self-determination in order to protect their cultures and traditions.

However five further conditions need to be met in order for the group to justifiably secede. The first condition is that an overwhelming majority votes for the creation of a new state, not only a simple majority. The second condition that needs to be met is that the creation of a new state should not create a large scale new minority problem. Furthermore, the right should be exercised in accordance with the conditions that are necessary for the prosperity and self-respect of the group. The fourth condition is that the state can be created provided that the rights of all inhabitants of the new state will be respected. The last condition states that one should avoid or minimize substantial damage to the interests of inhabitants of other countries. (Margalit and Raz, 1990) One thing that should be added is the fact that encompassing groups include nations.

To sum up it can be said that there are different conceptions regarding the question who should have the right to secession. On the one hand the right should belong to nations, whereas the plebiscitary theories do not restrict the right to nations, but include other groups, which are referred to as territorial communities. Moreover according to the Just-Cause theories the right can only be granted as a remedy for past injustices.

Considering the case of the break-up of Yugoslavia, the question that needs to be asked is, whether either of these theories is able to give satisfactory answer to the secessions within secessions that were the case in the process of the break-up. I shall deal with this question in the following chapter.

Chapter 3: Recursive Secessions in Yugoslavia: In Search for the Most Suitable Theory

When speaking about recursive secession, one speaks about "*counter secessions by minorities within the new 'republics'*". (Pavković, 2000: 485) The case of SFRY can definitely be depicted as an instance of such a process. Whereas there were no counter secessions in Slovenia, Croatia and at the time Federal Republic of Yugoslavia (FRY) were faced by secessionist movements from their minorities. In Croatia the Serbian minority concentrated in the region of Krajina demanded the right to self-determination and in the FRY the Albanian population of Kosovo sought secession. If we take a look at the whole process of the break-up of SFRY, the recursive character is even more evident. First, Slovenia and Croatia declared their independence. These attempts of secession were followed by two other republics of the federation, namely Bosnia and Herzegovina (BiH) and Macedonia. Nevertheless, the claims to independence did not stop at the republican level. As already mentioned the region of Krajina, or better said, the self-proclaimed Republic of Serbian Krajina (RSK) sought to secede from Croatia; the Serb Republic from BiH; the Croatian minority of Herzegovina from BiH; and the Albanian minority from FRY. The secessionist movements, at least most of them, justified their demands to secession with two processes, namely the execution of the right to national self-determination and the referenda, which were conducted in support of their secessions. (Pavković, 2000)

Let us now turn to the theories of secession and examine whether any of the theories of secession we elaborated on in the previous chapter is capable of adequately addressing the problem of recursive secessions.

3.1 Theories of Secession and the Case of SFRY

If we first look at the National self-determination theories, we can note that these theories do not see the withdrawal of consent of a 'trapped' minority as a justifiable reason for secession. Especially taking into account the theory of David Miller, we can note that the objective of it is to secure the national identity of the greatest number of groups possible. However secession is not justifiable, if the identity of the minority that is to be left on the wrong side of the border is to be threatened or if the members of the seceding national group would have a weakened position in the remaining state. (Pavković, 2000)

Looking at the secessions in SFRY, we can note, that they were not justifiable according to David Miller. First of all the fact that the republics, as well as minorities expressed their wish to secede in referendums, i.e. that they withdrew the consent is as already stated above is not a justifiable reason for them to secede. Secondly, and most importantly, secessions in SRFY were not justified, since the identity of the trapped minorities was seriously put at risk. Keeping that in mind, of all Yugoslav republics, only Slovenia was able to satisfy this condition, since no minority identities were put at risk. However, the secession of Croatia on the other hand, at least in the eyes of the Serbian political leaders, posed a serious threat to the Serbian minority left behind in the country. The same can be said about BiH. (Pavković, 2000) Besides the threat to national identity from the republics, Serbs also claimed that their national identity would be endangered, if Kosovo was to successfully secede. In addition to that the same can be claimed from the Croatian side, concerning the possible secession of the RSK from Croatia, namely that the identity of the remaining Croatian minority would be seriously put at risk. All of which is to say, that Miller's theory would only give a satisfactory answer to the secession of Slovenia, whereas all other secessions according to his theory would not be justifiable.

Let us now turn to the choice theories, more precisely to Harry Beran's theory. According to him secession is justified under the conditions that the seceding group is capable of forming a politically and economically viable entity; since secession is based on the withdrawal of consent of the people, the same right, i.e. the right to secession should be given to sub-groups in the newly created states, provided they can fulfill other conditions; and the group can secede if by doing so it would not oppress nor explore a sub-group that can not secede. The second condition can be rephrased in the following way: *"the equality of rights to secession protects the political liberty of the groups who are 'trapped' against their will in seceding territories."* (Pavković, 2000)

Again it can be said that Slovenia satisfied all of the above mentioned conditions, so its secession was justifiable. On the other hand Croatia, BiH and FRY failed to satisfy the second condition, since even though Serbs of Croatia and BiH have expressed their wish to secede from the newly created states; this wish was not respected by the republics. Nevertheless, BiH represents a special case, because the Serbian population in the republic was not so strictly divided from other national groups as it is nowadays, and so secession might not have been the best option. The secession of Kosovo from FRY would according to Beran's theory be justifiable, since it was in the accordance with the second condition, however that would also mean that Kosovo should give the same right to the Serbian minority should they decide to withdraw.

As rightly pointed out by Pavković, Beran's conditions are based on a liberal theory and none of the seceding republics of SFRY had at the time established a liberal legal order, nor were they liberal in their political practices. Because of that they would most likely fail to satisfy the second condition, i.e. to guarantee free expression of secessionist attempts to the 'trapped' minorities. (Pavković, 2000) Even with that in mid, the secession of Slovenia would still be justifiable, simply because of the fact that there were no further secession claims

within the country. Nonetheless, according to Pavković, the secessions of the 'trapped' minorities, i.e. Serbs from Croatia and BiH and Albanians from Kosovo, would have been justifiable *"had their 'trapped' minorities been able to express their views on their possible secession through referenda."* (Pavković, 2000: 499)

The next theories we have to review are the remedial right only theories. Here we shall take a look at Buchanan's theory. In short the right to secession can only be granted as a remedy for past injustices. It is justifiable in two instances, namely that the group and its territory have been illegally incorporated into a state or when there were gross and persistent violations of individual human rights. (Buchanan, 2004) When it comes to recursive secession it can be noted that Buchanan does not suppose a right to secession to 'trapped' minorities, unless secession is a remedy.

We can note that Buchanan's theory does not find any secession in SFRY justifiable. That derives from the fact that none of the secessionist groups in former Yugoslavia had experienced the forceful removal of their territory, nor was their group existence physically threatened. Since Buchanan strongly relies on international law, it can be said that in the instances of an unjustifiable secession his preference lies with the protection of the territorial integrity of the state. (Pavković, 2000) Moreover his theory does not differentiate between the secessions in SFRY. As already noted above, to him the fact that in Slovenia no further secession claims have been made, and in Croatia and BiH that was the case, is irrelevant. All secessions are equally unjustifiable. In the words of Pavković: *"Buchanan's theory systematically ignores the actual causal consequences of attempted or successful secessions and, partly as a result of this, fails to provide any criteria for differentiating among Yugoslav secessions."* (Pavković, 2000: 495) The only instance in which secession might be justifiable according to Buchanan is the case of Kosovo, since the autonomy of the province was revoked by Serbia. Nonetheless, as he himself points out, the problem is that it is impossible

to determine who started violating the rights of whom and thus no determining answer can be given in the situation.

The last theories to be addressed are the hybrid theories. Let us firstly turn to the theory by Margaret Moore. Her theory requires a referendum, which is to be used to establish consent to the new state and that other national minorities are not intermingled with the group that wants to secede and are furthermore not geographically concentrated. If that is the case another solution should be found, like for instance a confederation. (Moore, 1998)

Again the secession of Slovenia is justified by this theory. Even though at the time of the secession claim there was a Serbian, Croatian and Bosnian minority in Slovenia, they were not geographically concentrated and thus the secession was justifiable. By the same rationale the secession of Croatia was not justifiable, since it had a territorially concentrated Serbian minority, which opposed the secession. However the secession of the RSK would be justifiable, since it had no territorially concentrated Croatian minority opposing secession. By the same token, the secession of Kosovo from FRY would be justifiable. (Pavković, 2000) The case of BiH represents yet another instance of an unjustifiable secession. However the problem in BiH was that it represents the case, where different national groups are intermingled on the same territory. Thus, in accordance to Moore, secession is not the way to go about, but rather a different arrangement should be made, like for instance a confederation.

The last theory is the one by Margalit and Raz. According to the theory the recipients of the right are the so called encompassing groups, which also include nations. Furthermore five conditions need to be met in order for a secession to be justifiable, namely that more than a simple majority votes in favor of secession; that a large scale minority problem is avoided; that the right is exercised in a matter that it secures the prosperity and self-respect of the group; that the basic rights of all are respected and that the substantial damage to the interests of other countries be avoided or minimized. (Margalit and Raz, 1990)

This theory is important, since it introduces quantitative measures. The purpose of introducing *"quantitative measures-such as the amount of damage and the size of minority population- is to avoid arbitrary judgments by providing universally applicable and thus objective criteria for the assessment of particular secessions."* (Pavković, 2000: 496) However they do not tell us how to arrive at the required quantities nor do they tell us how to use them in particular cases. (Pavković, 2000)

Thus the secessions in Yugoslavia are hard to judge. Taking the case of Slovenia, it is not clear whether or not the secession was in accordance with the fifth requirement, namely whether Slovenia's secession substantially damaged the interests of others. Furthermore, the secessions of Croatia and BiH seem to be in breach with the requirement that no large scale minority problem should emerge, thus their secessions seem unjustifiable. If we now take a look at the secession of Krajina and Kosovo, it is not clear whether the percentage of the Croats and Serbs is high enough to say that a large scale minority problem has been crated or not. All of which is to say that without specifying what counts as substantial damage and what as a large scale minority problem, one can not decide on whether or not the secessions are justifiable. Hence, we can not give any precise assessment of the theory by Margalit and Raz.

In conclusion it can be said, that only Beran's theory would provide a satisfactory approach to recursive secessions, since all other theories fall short at least in one respect. The most inadequate theory seems to be the remedial right only theory, since it bars all secessions in SFRY. Whereas one must agree that territorial integrity is important, it should not be upheld at all cost. Another thing that is important is, that ethno-national groups can be looked at as the recipients of the right to self-determination, and provided they fulfill other criteria the right to secession. Looking at the case of SFRY, as has already been established, we can note that picking only republics as the recipients of the right to independence was not adequate, since it was not in accordance with the recursive character of the process of the

break-up. Beran's theory seems to be the best starting point for the most suitable theory concerning recursive secessions in SFRY; however I believe that certain other requirements need to be introduced.

3.2 Towards the Most Suitable Theory of Secession

When it comes to recursive secessions, the best way to ensure equal treatment of all parties is to adopt the principle of the withdrawal of consent. As the basis we can take Beran's theory. That is that the seceding group should be large enough, however not large in the sense of numerical size, but in the sense of being able to constitute a politically and economically viable unit. The next requirement is of utter importance, namely that the seceding group should ensure the same right to the sub-group that is to become a part of their territory. Precisely this requirement is the one that protects the political liberty of the 'trapped' groups. Also it is important to consider the sub-groups that do not meet the first criteria and thus can not create a state of their own. Such groups should not be exploited or oppressed by the seceding group in any way. Basically we can say that the seceding group has to act in compliance with basic human rights and minority rights. The process to establish the will of the people is the use of referenda, which should be held on a popular basis on the territories that want to withdraw. Of course it seems almost needless to mention, that the majority of the voters should be in favor of the withdrawal.

When deciding upon who the right holders are, we can again affirm Beran's position that the right holders should be territorial communities. Territorial communities are best fit, because secession is not only a political separation, but also the separation of territory. Thus the group that wishes to secede needs to present a valid claim to the territory it wants to withdraw from the state. A valid claim can be established in accordance with Miller's

conception of group's legitimate claim to the territory it inhabits. This claim is based on the grounds that the inhabitants of a certain territory form a political community. As such they create laws, establish property rights, etc. Moreover the territory over time has a symbolic significance for the group, since the land is used to bury their dead, establishing of monuments, etc. (Miller, 1998)

This makes their claim to the territory superior to other claims, like for instance claims based on historical arguments. Furthermore all of the above mentioned gives the group the right to continue to exercise their political authority on the territory.

One thing that should be noted at this point is depicting territorial communities as the right holders does not exclude ethno-national groups as beneficiaries of the right to secession, since they can form a territorial community, the precondition being that the group is territorially concentrated.

Having established that, we should further consider the cases where the territory is inhabited by several distinct groups. As already briefly mentioned above in such instances the state to be has to respect basic human rights of the group and minority rights. It seems plausible to assume autonomy in the areas where such groups form a majority and fall short of establishing a state of their own, because they could not create a viable state, should they so wish.

To sum up, a territorial community (can also be ethno-national groups) has the right to secession, if the majority of this community votes in favor of it; if they are geographically concentrated and have a legitimate claim to the territory they want to withdraw; if they will grant the same right to any smaller territorial community within their newly created state; if by seceding they can create a politically and economically viable state; and lastly the group has to respect human rights and minority rights of the groups that find themselves in their state, because they can not or do not want to secede.

Such a theory seems to be the most suitable for recursive secessions. Thus let us turn to the case of the dissolution of SFRY.

Chapter 4: Case Study: Slovenia, Croatia and Kosovo

The response of the international community to the break-up of Yugoslavia can be divided in different stages and different arenas. The response to the break-up is very significant, since it gives an insight on how decisions on norms were being made and what kind of argumentation underlined the decision making. Moreover, by analyzing the conduct of the international community we can deduct the standards that secessionist regions need to meet in order to be recognized as independent entities. The break-up of SFRY, it can be claimed, represents an instance, where the international community was put under a lot of pressure, since the conflict was accompanied with large-scale violence and thus considerations about internationalizing the conflict played an important role in the decision making process. In order to show what the initial position was and how it changed the best way to go about is to give reference to it chronologically. The response can furthermore be divided between two arenas, namely between the European Community (EC) and the United Nations (UN). I shall start by looking at the response of the EC and the UN and try to depict the most important events and arguments presented in the process. I shall than turn to cases of Slovenia and Croatia, more specifically to the consequences the decisions of the international community had for both countries.

4.1 The response of the EC

In September 1990 the parliament of the Republic of Slovenia declared that the legislation of the federal institutions would no longer be applied within the republic. In December of the same year the Croatian parliament declared the supremacy of its own

legislation over the federal one. (Weller, 1992) Slovenes and Croats wanted a change in the federal relations between the republics. They wanted to achieve a loose federation or a confederation. However, the negotiations on the federal level failed. This failure was based in *"the intransigence of the Serbian leadership, which had hitherto dominated the political structure of the federation."* (Weller, 1992: 569)

The EC at the time did not support the separation of Croatia and Slovenia from SFRY. Furthermore the position was that were the republics to declare independence unilaterally, they would not recognize them. The rationale behind it was that the international status quo had to be preserved. One of the underlining reasons for that was that the post-communist states were active participants in the process of reshaping European political and security institutions. Thus their disintegration would weaken and discredit those institutions. (Crawford, 1996) Another consideration was that, *"since these states were moving toward democracy, self-determination via fragmentation would raise the specter of nationalist rivalries in Europe again, and EC officials referred to what they believed were consensual norms of international law against premature recognition of belligerents in a civil war."* (Crawford, 1996: 491)

The alternative to the principle of territorial integrity was self-determination. This however was rejected, since a number of separatist movements within the EC member states had appealed to the principle of self-determination, demanding a greater or lesser degree of autonomy. The example for this is Catalonia, which had asserted its independence within the EC. Furthermore France and Belgium were facing a similar problem, since some regions were pressing for more independence, i.e. greater degree of de-centralization. (Crawford, 1996) Hence it seems that the EC did not want to affirm the principle of self-determination in the Yugoslav conflict, since they feared that might have consequences for their domestic affairs.

In May Norbert Gensel, a foreign policy expert of the SPD, stated that Yugoslavia was at the brink of war and that there is no will amongst the parties to stay together. He suggested that the EC should reconsider sticking to the unity of the Federation and recognize the right of the Yugoslav peoples to self-determination, even if that led to the independence of Slovenia and Croatia. He also noted that Croatia could only be recognized as an independent state, if it granted autonomy to its Serbian population, and that the internal borders of Yugoslavia should only be changed by consent. (Libal, 1997)

In spite of the position by the EC, on June 25 1991 both Slovenia and Croatia declared their independence. The immediate consequence of these declarations was a military action of the Yugoslav Peoples Army (JNA) in Slovenia, which started on June 27 1991. In this time the first international intervention in Yugoslavia started in the form of the EC Troika, which was composed of three EC's foreign ministers, namely Jacques Poos (Luxembourg), Gianni de Michelis (Italia) and Hans van den Broek (Netherlands). The Troika proposed a tree point plan, which consisted of the following:

1) resolution of the presidential crisis (started on May 15 1991, when Stipe Mesić was blocked by the Serbian leadership as the chairman of the Federal Presidency);

2) three month moratorium on the declarations of independence;

3) retreat of the army from Slovenia. (Gow, 1997)

They tried to secure signatures by imposing an arms embargo on the whole Yugoslavia and by blocking financial aid to the country, which amounted to approximately one billion US dollars.

In this time a CSCE meeting was held. In the statement that was issued on July 1 *"the committee underlined the importance of an immediate and complete cessation of hostilities by all parties involved, and for the prompt implementation of the commitment, resulting from recent conversations among all concerned Yugoslav parties, to the immediate return to their*

barracks by all the relevant units of the JNA, as well as the territorial defense forces of Slovenia." (Weller, 1992: 572) This is also reflected in the third point of the Troika plan.

The conflicting underlining principles in the case of SFRY as mentioned above, were territorial integrity on the one hand, and self-determination of peoples on the other. These were both enshrined in the Helsinki Final Act from 1975. Principle I. of the before mentioned act reads as follows:

"The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence." (Helsinki Final Act)

Territorial integrity is addressed in further detail in Principle IV. of the same Act, where the participating states *"will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force."* (Helsinki Final Act)

Nonetheless it should be mentioned at this point that the protection of territorial integrity in this sense means protection from outside threats. In the case of SFRY, the threat did not come from the outside, but from the inside of the country. If we further take a look at the Principle VIII., which deals with equal rights and self-determination of peoples we again find the principle of territorial integrity, which once more addresses the participating States, which need to act *"in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States."* (Helsinki Final Act) It can thus be concluded that the upholding of territorial integrity is an obligation of states not of peoples, which can be rephrased as the obligation of nonintervention.

Despite the formulations analyzed above, according to Weller, it *"had been felt convenient to claim that the principle of territorial integrity also precluded internal attempts at secession."* (Weller, 1992: 572) This becomes clear in the instance of the military actions in Slovenia, which from the Serbian side was seen as the action to reunify the country. Nevertheless, the use of force was condemned by the international community, while still supporting the territorial integrity of SFRY.

As rightly pointed out by Weller, the obligation not to use force, which was advocated by the international community, was not clear. Namely, if the right to self-determination protects an entity from the use of force by the central authorities, then this means that there is no substance to the principle of territorial integrity, since, if no use of force can be applied, then the central authorities can not impose unity and the continuation of territorial integrity. (Weller, 1992) Nevertheless, as can be seen from the statement of the CSCE, the international community repeatedly stressed that no force should be used, which leads us to believe that at some level republics within the federation were looked at as the entities to which the none use of force applied.

The third Troika visit to Yugoslavia ended with the signature of the agreement on Brioni. With the signature of the agreement the military actions in Slovenia came to an end. On July 18 JNA withdrew from Slovenia, following the decision of the federal presidency in Belgrade. (Libal, 1997)

In the meantime, the presidency of the EC switched from Luxembourg to the Netherlands (on July 1 1991). The Dutch presidency as early as on July 13 1991 made a proposal on border adjustment in SFRY. The proposal starts off by stating the importance of reconciling various principles (territorial integrity and self-determination) and that the selective application of these principles needs to be avoided. More specifically the formulation is as follows: "*The principle of self-determination e.g. cannot exclusively apply*

to the existing republics while being deemed inapplicable to national minorities within those republics." (Owen, 1996: 32, 33) The Presidency continued with the development of a tentative proposal, which would serve as the basis for further discussion on the conflict resolution in SFRY. They developed four points:

1. *"We seem to agree that it is not possible for Yugoslavia to continue to exist within its present constitutional structure intact. The joint declaration of Brioni clearly states that a new situation has arisen in Yugoslavia.*
2. *It is equally difficult to imagine that Yugoslavia could peacefully dissolve into six independent republics within their present borders. Both Serbia and Serbian elements in the federal administration-not least the JNA- have made in plain that they will never tolerate the emergence of an independent Croatia with 11 per cent Serbs within its borders.*
3. *A loosely structured Yugoslavia consisting of six sovereign republics is not likely to assuage these Serbian concerns either. The higher the degree of sovereignty for Croatia, the greater the need for solid guarantees for the Serbian minority in Croatia. The looser the federal structure, the more difficult it will be to supply such guarantees.*
4. *The foregoing seems to point into the direction of a voluntary redrawing of internal borders as a possible solution."* (Owen, 1996: 33)

They continued by acknowledging the fact that it is impossible to redraw the borders in such a matter that no national minorities are left on the wrong side of the border, however they believed that it can not be denied that to reach the aim of reducing the number of national minorities in every republic, better internal borders than the existing ones could be devised. (Owen, 1996) Furthermore they stressed that, if one starts to think in terms of independent republics, one must take the Helsinki Final Act's first principle into account, which would mean that the frontiers could only be changed peacefully and by agreement; that is the agreement between all republics and the federal authorities. (Owen, 1996)

This proposal was rejected by all other EC member states. They gave three main reasons for rejecting it, namely:

1. Such conduct would open a Pandora Box; i.e. it would have consequences elsewhere.
2. It was considered 'out of date' to redraw the boundaries along ethnic lines.

3. The republican boundaries could not be redrawn because of many areas were ethnic majorities were not geographically concentrated. (Owen, 1996)

Meanwhile, in Croatia the first attack of the Serbian irregulars was performed on July 19 in Vinkovci. By the mid-July the fighting had intensified. The regions in which the fighting was the most intense were the ethnically mixed regions, especially the Krajina region, which had a Serbian majority. Whereas JNA withdrew from Slovenia the fighting in Croatia on the other hand continued and intensified, the attacks being preformed by both the irregulars and the JNA. As a consequence of that, the EC Monitoring Mission, which was situated in Slovenia, was extended to Croatia. In August artillery attacks on the Croatian city of Vukovar began, which were followed by the attacks on Osijek and Dalj. (Libal, 1997) This increase of violence had the consequence that the EC started to seriously consider intervention in Croatia. Nevertheless, the EC abandoned the plan, since Serbia rejected it. In this time only Germany seemed to consider the option of recognizing the countries in order to internationalize the conflict. (Weller, 1992)

In August the EC yet again expressed that the increasing violence in Croatia is not tolerable and that they will *"never recognize changes of frontiers which have not been brought about by peaceful means and by agreement."* (Weller, 1992: 575)

It is important to note here that the EC did not accept that the self-proclaimed Republic of Serbian Krajina could lawfully receive military assistance by the JNA. (Weller, 1992) Moreover, due to the military actions in Croatia, the EC stated to consider recognition, using it as a threat to make JNA comply with the international agreements; however they did not act on it. (Crawford, 1996)

In the same month another important thing happened, namely most of the republics of the USSR declared their independence. The EC members extended recognition to these

republics, so the rationale for not recognizing Slovenia and Croatia became weaker. (Crawford, 1996)

The future of Yugoslavia was to be decided within the framework of the EC Peace Conference on Yugoslavia. The international community began the Peace Conference on Yugoslavia in Hague under the chairmanship of Lord Peter Carrington (7.9.1991). The Conference produced various treaty plans. The most important of them was the treaty plan from October 1991, which envisaged Yugoslavia as a very loose confederation and amongst others had a provision that in the framework of general settlement, the republics that wanted independence could be recognized within the existing borders. The plan furthermore encompassed special minority rights provisions that envisaged autonomy for regions were minorities formed a majority and protection of human rights in general. (Gow, 1997) The plan was accepted by all republics but Serbia. In the framework of the Conference the Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Commission) has been established. The role of the Commission was to give legal advice to the Conference.[4]

On September 8 the referendum on independence was held in Macedonia in which the majority of the population voted in favor of independence. On September 17 Macedonia proclaimed independence. On September 22 yet another part of Yugoslavia proclaimed independence, namely Kosovo.

On September 11 the European Parliament issued a resolution on Yugoslavia in which they emphasized *"the right of democratic self-determination of all the republics and autonomous provinces and demanded that legitimate representatives of the democratically elected parliaments of Vojvodina and Kosovo participate in the Peace Conference"* (Libal, 1997: 51) On September 23 an agreement on recognition within the EC has been reached. The republics had the prospect of being recognized at the end of the negotiation process in the

[4] The decisions that dealt with border adjustment will be dealt with later on.

framework of a general settlement, which had three components: *"a loose association or alliance of sovereign or independent republics; adequate arrangements for the protection of minorities, possibly including special status for certain areas; no unilateral changes in borders."* (Libal, 1997: 63) The same agreement has been reached by the EC foreign ministers at their meeting at Haarzuilens. On October 7 the three month moratorium on the declaration of independence of Slovenia and Croatia agreed on Brioni expired. Three days later Hans van den Broek set a two month deadline for the negotiation process.

On November 18 the city of Vukovar fell. On November 27 Germany announced that they are going to recognize Slovenia and Croatia by Christmas. The position of Germany on the matter of recognition was as follows: *"If the republics unilaterally fulfilled the conditions for a comprehensive political settlement set by the EC, Germany was ready to recognize their independence after 10 December. She was not prepared to wait for an EC consensus on that matter, since none was required under the rules of the European Political Cooperation still valid at that time."* (Libal, 1997: 78, 79) They believed that they are not going to be the only ones reaching such a decision, but rather that other EC countries are going to follow. Especially after the fall of Vukovar in November, Germany felt that the EC failed in their efforts to secure peace, and demanded that a stronger pressure be put on Serbia. On December 7 the first opinion of the Badinter commission has been issued. The conclusion of the fist opinion was that SFRY was in the process of dissolution.

Three days later the two month deadline for a political solution of the conflict expired. After December 10 all republics demanding independence accepted the principles of the CSCE documents the Charter of Paris and Helsinki Final Act, which basically deal with the protection of minority rights and inviolability of borders. On December 16 the EC foreign ministers decided that they are going to recognize republics wishing it. The republics would have to comply with the "Guidelines on the Recognition of New States in Eastern Europe and

in the Soviet Union", which basically stipulated the respect of the Charter of UN, Helsinki Final Act and the Charter of Paris; guarantees for ethnic and national groups; respect for the inviolability of boundaries; disarmament and nuclear nonproliferation and the commitment to settle by agreement. In addition to these Guidelines, the republics of Yugoslavia had to meet additional conditions, namely: *"acceptance of the provisions laid down in the draft convention worked out by Lord Carrington, especially those in Chapter II. on human rights and the rights of ethnic and national groups"* (Libal, 1997: 84) and *"continued support for the efforts of the UN and for the continuation of the Conference on Yugoslavia."* (Libal, 1997: 84)

On December 23 Germany recognized Slovenia and Croatia, however suspended the establishment of diplomatic relations with the countries until January 15. On January 11 1992 the Badinter Commission issued their opinions on eligibility of republics to recognition. The Badinter Commission found that Slovenia and Macedonia fully qualify for recognition. It had some remarks about the qualification of Croatia, however lastly gave a positive opinion. On January 15 1992 the rest of the EC member states recognized Slovenia and Croatia.

4.2 The response of the UN

The UN at fist did not take part in the Yugoslav conflict. The Security Council met for the first time three months into the conflict, in response to requests of two neighboring countries of SFRY, namely Austria and Hungary, Canada and Yugoslavia itself. (Weller, 1992)

They discussed the draft resolution S/23067. All of the participants seemed to agree that the use of force should not be used to alter frontiers in Yugoslavia. It was also clear, from the opinion of Austria that the republican borders were the ones to separate the entities in

Yugoslavia. The Austrian delegate amongst other stated that the principles on which the future relations between Yugoslav people should be based are *"the non-use of force, the right to self-determination, the unacceptability of any changes by force of the borders between Yugoslav republics, the full implementation of the Paris Charter for a New Europe concerning democracy, the rule of law and respect for human rights, and the conclusion of the binding agreements on the protection of minorities and effective guarantees for equal participation in the political process by all groups."* (20. Items Relating to the Former Yugoslavia)

The meeting ended with the adoption of the draft resolution, known as Resolution 713 on September 25 1991. In the resolution support for the EC and CSCE efforts to resolve the conflict was expressed. Furthermore it affirmed the condemnation of the use of force and urged the parties involved in the conflict to agree to a cease fire and resolve the conflict peacefully within the framework of the EC Peace Conference on Yugoslavia. The resolution also enshrined a complete arms embargo on Yugoslavia and affirmed non-intervention of other states. (20. Items Relating to the Former Yugoslavia)

The resolution was adopted in a language that can lead us to believe that the conflict in Yugoslavia was still seen as an internal matter and that the resolution was adopted out of fear that the conflict could spill over to the neighboring countries. Thus it can be said that the conflict was seen as a threat to peace and stability in the area. That can be supported by the fact that no suggestion was made to invite Slovenian or Croatian delegation to participate. Moreover the authority of the Yugoslav delegation was not questioned at all. In addition to this, the US Secretary of State addressed the situation in Croatia as internal aggression. (Weller, 1992)

Nevertheless, by appealing to the principle of the prohibition of the use of force and no change of boundaries by using force, they were appealing to the principles that are bound to

intra-state relations, not internal relations of the state. Moreover the protection of the internal borders from the use of force can be looked at as an indirect confirmation of the principle of uti possidetis juris outside of the colonial context and recognition of the republics as separate entities, i.e. de facto independent entities.

The UN involvement in the conflict started immediately after the adoption of the resolution, by establishing contact with the parties of the international community involved in the conflict (EC, CSCE, and lord Carrington) and the Minister of Foreign Affairs of Yugoslavia. The representative of UN was Cyrus Vance. (Weller, 1992)

In that time a rump presidency of Yugoslavia has been created; i.e. four (out of eight) members have decided to conduct the affairs of the federation themselves. (Weller, 1992) This action was addressed in the report by Vance, in which he found that *"the de facto authority of the central government in Yugoslavia had been seriously impaired…"* (Weller, 1992: 581) He also concluded that the situation in Yugoslavia has deteriorated since the adoption of the Resolution 713. Moreover he found that the thereat to peace and stability continued to exist, and that the cease-fire agreements continued to be broken. (20. Items Relating to the Former Yugoslavia)

On November 23 a meeting, chaired by Vance, was held in Geneva, in which Slobodan Milošević (the president of Serbia), Franjo Tuđman (the president of Croatia) and General Kadijević (the Minister of Defense of SFRY) signed an agreement that provided for *"an immediate lifting by Croatia of its blockade of Yugoslav army barracks, the immediate withdrawal from Croatia of blockaded personnel and their equipment, and most importantly, a cease-fire, which was to come into effect on 24 November 1991."* (20. Items Relating to the Former Yugoslavia) They also discussed the deployment of peace-keeping forces in Yugoslavia and all parties deemed it was to be done as soon as possible. On November 27 1991 the Security Council of the UN adopted the Resolution 721, which dealt with the

question of a peace-keeping operation in Yugoslavia, which was to begin, if all parties worked in compliance with the agreement signed in Geneva. Before the peace-keeping operation could start, the parties had to agree on the areas in which the peace-keepers could be deployed. Serbia was unwilling to allow the UN peace-keeping forces into the areas in Croatia, which were controlled by them. That had the consequence that the CSCE, although embracing the policy of the UN, emphasized that *"the stationing of peace-keeping forces must not in any way endorse the seizure of territory by force."* (Weller, 1992)

In December yet another resolution on Yugoslavia was adopted. In the Resolution 724 the Security Council found that the conditions to deploy peace-keeping forces in Yugoslavia still have not been met, since the unconditional cease-fire enshrined and agreed upon in the agreement signed in Geneva was still not implemented. (20. Items Relating to the Former Yugoslavia) The same was found to be the case in the following UN resolution from January 8 1992.[5]

In the meantime a plan for the deployment of the UN peace-keeping forces in Yugoslavia was established. The plan involved *"the deployment of troops and police monitors in certain areas in Croatia, to be designated as 'United Nations Protected Areas' (UNPAs), which would be demilitarized and the armed forces in them withdrawn or disbanded."* (Weller, 1992: 584) The mission of the troops deployed in the areas was to ensure that the areas remained demilitarized and to protect the persons living there from the fear of armed attacks. They should moreover ensure that the local police forces did not discriminate on the grounds of nationality or abusing human rights. There were three UNPAs designated, namely Krajina, parts of eastern Slavonia and parts of western Slavonia. (Weller, 1992)

[5] Resolution 727

In February, following the report of the Secretary-General to the Council, cease-fire was generally holding, so it did not represent an obstacle in deploying peace-keeping forces in the area. Furthermore he noted that two signatures of the agreement in Geneva, namely Milošević and General Adzić (Acting Secretary of Defense of SFRY) maintained their full support for the plan of the Secretary General for a UN force. The local Serb leaders of the areas of eastern Slavonia and western Slavonia also accepted the plan. However, the plan was rejected by Franjo Tuđman and the Serbian leaders of Krajina. (20. Items Relating to the Former Yugoslavia) The leader of Serbs in Krajina, Milan Babić, objected to the deployment of troops in Krajina, since it has proclaimed its independence and wanted the troops to be located on the borders of the self-proclaimed entity to protect its independent status. (Weller, 1992) The Secretary General viewed that the agreement of both parties is of utter importance, since it was needed for the peace-keeping operation to begin. Both sides finally agreed to the plan. The peace-keeping operation was launched on March 9 1992, after the adoption of the resolution 743 (February 21 1992), according to which the Security Council decided to establish the United Nations Protection Force (UNPROFOR).

4.3 The Rulings of the Badinter Commission

The rulings of the Badinter Commission are important, since they served as the justification for the final recognition of the republics. In this section I shall limit myself to the opinions connected to uti possidetis juris, i.e. opinions 1, 2 and 3.

The first opinion was issued on the grounds of a letter to the Commission by Lord Carrington, in which he posed the question on whether the republics that declared independence are seceding from SFRY or the federation is in the process of dissolution. The Commission noted that the Republics have expressed their desire to become independent by

the means of referenda (Slovenia, Croatia, Macedonia) and by a sovereignty resolution in BiH; that the composition and workings of the essential federal organs no longer meet the criteria of participation and representativeness inherent in a federal state and that the federal authorities were not capable to enforce respect for the cease-fire agreements. On the grounds of these findings they concluded that SFRY is in the process of dissolution and that it is up to the republics to settle issues related with this process. (Ramcharan, 1997) With this opinion the republic were directly depicted as those to whom the right to independence applies.

In the second opinion the Commission considered the question of whether or not the Serbian population of Croatia and BiH has the rights to self-determination. The Commission noted that *"it is well established that, whatever the circumstances, 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."* (Ramcharan, 1997: 1262) In this opinion uti possidetis juris is listed as the principle that applies to SFRY, meaning that the internal borders of the republics are henceforth considered as international borders. The opinion of the Commission was thus that the Serbian population of BiH and Croatia is entitled to human rights and minority rights protection, but not to separation from the republics.

In the third opinion the Commission considered the question, whether the internal borders between Croatia and Serbia, and BiH and Serbia can be regarded as frontiers in terms of public international law. The opinion was based on the fact that both republics, namely Croatia and BiH sought international recognition and thus *"except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of the territorial status quo and, in particular, from the principle of uti possidetis."* (Ramcharan, 1997: 1264) In this opinion the Commission depicts the principle of uti possidetis as a general principle of international law, which has the purpose to

prevent independence and stability of new states that are endangered by *"fratricidal struggles."* (Ramcharan, 1997: 1264)

With all of these opinions it was clear that the republics were the only recipients of independence and that uti possidetis juris was to be the principle used for border adjustment and that hence only republics will be granted independence.

In conclusion it can be said that in the initial phase, the international community wanted to preserve the unity of SFRY and did not in any way recognize the proclamations of independence of the above mentioned republics. Nevertheless, by adopting the obligation that no force should be used, which started to be the leading principle in the discussions on SFRY, the international community indirectly depicted the republics as separate entities that are entitled to such a protection. That is because, as has been shown in the analysis of the principles of Helsinki Final Act, these principles apply to states and not to peoples. So in the Yugoslav conflict, the non use of force and territorial integrity was ascribed to the republics. This is supported in the fact that the international community made several appeals that the internal borders between the republics should not be changed by the use of force. In the framework of the EC this switch appeared to have happened quite early into the conflict, though it was made indirectly. The direct reference to the republics was lastly made in the framework of the EC Peace Conference for Yugoslavia. The UN entered the conflict much later, and basically supported the decisions made by the EC and the Peace Conference. The final decision that republics are the only eligible entities for independence was lastly made by the Badinter Commission, which also explicitly mentions the use of uti possidetis as the norm to be applied for border determination.

One of the most important aspects is the fact that the proposal made by the Dutch presidency was made so early, and most importantly envisaged a plan that would be much more consistent with the actual situation in the Federation, namely that the internal borders

should not be looked at as inviolable, but that the possibility to redraw the borders should be considered. Thus, I find it very surprising that the proposal was so firmly rejected. The underlining arguments for rejecting the plan to redraw the boundaries were that such a conduct would open a Pandora box. This view was also supported while arguing for the unity of the federation. The fear existed that should the international community validate the norm of self-determination in the case of SFRY, this would have an effect on their domestic situation. Even though it is true that some countries faced the appeals to decentralization of power it does not mean that the groups within their countries demanded secession, so validating self-determination would not necessarily harm this countries in any way. The second objection that redrawing the boundaries according to ethnic lines is 'out of date' is simply superficial and without much substance. If redrawing the borders according to ethnic lines is done by consent and serves as the prevention of conflict it can not b considered 'out of date' but 'in place'. The last consideration that many ethnic groups are not geographically concentrated has much more weight. However, even if it is undeniable that may areas were in fact populated by more than one ethnic group and that the groups were intermingled, there were some areas, where that was not the case. These areas were also those who themselves claimed the right to secede, like for instance Krajina and Kosovo. Thus it is unclear why one would so firmly reject the redrawing where it is possible.

The answer to this perhaps lies in the fact that when deciding on recognition of the republics states had their own political motivations in mind. States that were themselves faced with separatist movements did not want to affirm the possibility of self-determination, since that would mean that they themselves would have to grant the same rights to the separatist groups. Thus it was more convenient for them to find a solution, which would uphold the territorial integrity and interpret self-determination only in the internal sense, even if they did not deem it the most suitable solution for SFRY.

The rejection of this proposal and lastly adoption of uti possidetis juris for all republics that claimed independence had different consequences for the republics. Let me first turn to Slovenia.

4.4 Slovenia

The ethnic composition of Slovenia in 1991 was 90% Slovenian, which made it the most ethnically homogenous republic. Besides Slovenians, the republic had an Italian, a Hungarian and a former Yugoslav minority.

The shift towards independence began as early as in 1989, when the Slovenian parliament passed various new amendments to the republican constitution, which *"underlined Slovenian sovereignty, and declared that only the Slovenian parliament itself could authorize the declaration of a state of emergency in Slovenia, or the movement of Yugoslav military forces into the republic."* (Ramet, 1993: 871) In December of the same year the Slovenian parliament moreover adopted new laws on elections and political association, which legalized political pluralism. (Ramet, 1993)

That led to first democratic elections in the republic after more than four decades, which were held in April of 1990. The newly elected leadership of Slovenia (Demos) in June announced that they would write a new constitution of the republic pronouncing it an independent state and lastly in the beginning of July issued the declaration of independence. (Ramet, 1993)

The referendum on independence was held in December of the same year. 93, 2 percent people voted in the referendum out of which 88, 4 percent voted in favor of independence. Slovenia lastly proclaimed independence on June 25 1991. The underlining justification for independence of the republic was the right of the Slovene nation to self-

determination. (Grafenauer, 1991) The declaration of independence was followed by a military suppression on the side of JNA, which started on June 27 and lastly ended with the signature of the Troika Three Point Plan on Brioni on July 7 1991. On July 18 JNA withdrew fro Slovenia, following the decision by the federal presidency in Belgrade.

With this act all hostilities in Slovenia have come to an end. None of the three minority groups sought to secede from the republic. Slovenia was recognized by the EC on January 15 1992.

We can thus conclude that the use of uti possidetis juris in the case of Slovenia was adequate, since it created a fairly homogeneous state that did not face any further separatist movements from within. Moreover the decision to separate from SFRY was based on the popular referendum and can be looked at as withdrawal of consent. The situation in Croatia on the other hand was completely different.

4.5 Croatia

Croatia was a fairly homogenous state, with 85% of Croats; however it had an 11, 5 % Serbian minority, which was geographically concentrated, especially in Krajina and Petrinja. (Weller, 1992) In December 1990 the Croatian parliament declared the supremacy of their legal system over the federal one. The first Croatian constitution after the multi-party elections included in the preamble the historical right of the Croatian nation to full sovereignty. (Pavković, 2000) In July of the same year, after Croatians declared that they are going to change the constitution, a Serb National Council was elected by a large popular assembly of Serbs in Croatia. This Council passed the Declaration on the Autonomy and Sovereignty of the Serb Nation in Croatia. Furthermore they organized a plebiscite of the

Serbs in the Serb controlled regions of Croatia in which 99% of those voting declared themselves for Serb autonomy and for remaining in Yugoslavia. (Pavković, 2000)

In March 1991, three months before Croatia declared independence, the Serbs of Krajina declared separation from Croatia. In May a referendum on Croatian independence was held. The outcome was 93% in favor of independence. However it should be noted at this point that the referendum was largely boycotted by the Serbs. On June 25 1991 Croatia proclaimed its independence.

In January 1992 the European Commission recognized Slovenia and Croatia. By that time Slovenia had control over its territory, whereas Croatia did not have control over the territory that was recognized to be the territory of the Croatian state.

In December 1991 the Serbian population of Krajina proclaimed the so called Republic of Serbian Krajina [6](RSK), which at first consisted of the former Serbian Autonomous District of Krajina[7], which was established in December 1990, after the constitutional changes were made. The consequence of that was that the Croatian authorities sent its special police forces into the area. (Pavković, 2000) In February 1992 Western Slavonia, Slavonia, Baranija and Western Sirmium[8] were annexed to RSK.

From the beginning of the RSK the Croatian population of the region was being attacked. These attacks ended with substantial number of the Croatian population either killed or fleeing from the area. Basically the Croatian population was being forcibly removed from the territory, which was officially granted to be Croatian, however was in full control of the Serbs. The RSK also made various attempts to enlarge its territory.

In 1992 a cease-fire agreement was reached between Croatia and the RSK. However this agreement made no significant change to the situation. The RSK did not allow the refugees to return to their homes. It also did not change the fact, that RSK functioned as a de

[6] Republika Srpska Krajina
[7] Srpska autonomna oblast
[8] Srem

facto independent state, even though it was not internationally recognized. Though Croatian government did set aside two autonomous regions for ethnic Serbs in Krajina, they thought that it came too late and did not agree to it.

The RSK was functioning as a de-facto state in the sense that it had an army, a parliament, ministries etc. Its economy however was dependant on Serbia and was constantly declining. The economic situation affected the army which was becoming weaker. On the other side, the Croatian army was becoming stronger, which was one of the reasons, why Croatia was able to regain the majority of their territory in 48 hours.

The RSK finally sized to exist after the operation "Storm" in August 1995. Before the operation the Z-4 plan was offered to both sides as a solution to the problem. The plan would grant a very far-reaching autonomy to the Serbian population of Krajina, Slavonia, Southern Baranja and Western Sirmium. The plan was at first accepted by the Croatian side and rejected by the Serbian side. On the eve of the operation "Storm" the Serbian side accepted the plan; it was however never implemented, since Croatians with the operation "Storm" regained the power over their territory. In the operation the Croatian side counted 80.000 soldiers; another 120.000 soldiers have been mobilized. On the other side, the army of RSK counted only 37.000 soldiers. The Croatian army managed to overtake RSK in only 72 hours.

The operation had another consequence. This time the Serbian population was fleeing the country and the majority of refugees from the former RSK still have not returned to their homes. The number of refugees varies. Croatia claims that there were 90.000 refugees, the UN estimates the number to be 150.000 and the Serbian authorities' claim the number is between 200.000 and 250.000. According to the census of 1991 Serbs comprised 11, 5 % of the Croatian population, whereas in the latest census of 2001 only 4, 54 % of ethnical Serbs reside in Croatia.

Whereas the use of uti possidetis was not problematic in the case of Slovenia, since there were no further separatist movements in the country, it was completely wrong for Croatia. Instead of creating a just situation for all parties involved, the stubbornness of the EC, that the boundaries are not to be changed ended in not one but two exoduses, firstly of the Croatians and then of Serbs. Thus is seems that the plan proposed by the Dutch presidency would perhaps make much more sense.

4.6 Kosovo

Kosovo in SFRY enjoyed the status of an autonomous province within the republic of Serbia, which de facto meant that it enjoyed almost all privileges of a republic. It had its own constitution, government, national bank and moreover an equal voice within the federal presidency of the federation. (Caplan, 1998) This was the case until March 1989, when Serbia abolished the autonomous status of the province, which resulted in a crisis that had an effect on the collapse of the federation. (Caplan, 1998) Following this abolishment of autonomy, Serbia passed various laws that deteriorated the situation of Albanians in the region. The laws amongst other made it *"a crime for Albanians to buy or sell property without special permission of the authorities."* (Caplan, 1998: 751) Moreover numerous Albanians lost their jobs in the firms that were owned by the state. The situation also affected the students, who were barred from entering the universities. In addition to that, the curricula were changed, and the language of conduct became Serbian and Serbian versions of history were introduced. (Caplan, 1998) The leader of Kosovo Albanians, Ibrahim Rugova, was maintaining peaceful resistance to this. According to Caplan, he believed that this way he could gain international support for independence of the region. (Caplan, 1998)

In July 1990 the Kosovo assembly issued a declaration of independence, thereby proclaiming the province an independent and equal unit in the Yugoslav 'Federation-Confederation'. (Pavković, 2000: 491) They based this on the right of people of Kosovo to self-determination. In September 1991 a plebiscite was held, in which 87% of eligible voters voted, 99, 4 % of them voted for independence. (Pavković, 2000) In December 1991, when all republics wishing it submitted their requests for recognition to the Peace Conference on Yugoslavia, Kosovo has done the same. (Weller, 1999) However as detailed in the sections 4.1 and 4.3 of this paper, the international community depicted the republics as those who will be granted independence, so Kosovo was not granted the right.

The Carrington plans, which envisaged autonomous status for minorities in the areas in which they formed a majority, and the compliance with this provisions was listed as one of the prerequisites for recognition of republics, were rejected by Serbia. Furthermore, by the time Serbia or better said FRY was recognized by the European Union (EU), in 1996, this plans were abandoned. The EU *"merely observed at the time that it 'considers' that improved relations between the FRY and the international community will depend, inter alia, on a 'constructive approach' by the FRY to the granting of autonomy to Kosovo."* (Caplan, 1998: 750) All of which is to say that not only the claim to independence of the province was rejected in 1991, but also their autonomous status not restored by 1996. Thus it is not surprising that the Albanians of Kosovo were left disappointed. Nevertheless, Rugova continued to plea for maintenance of peace. His hope that international community would thus support Kosovo's independence nonetheless was not reached. Robert Gelbard, Clinton's special envoy in March 1998 stated: *"Rugova should know by now that independence is not an option."* (Caplan, 1998: 751) The same opinion was shared by European officials.

The disappointment drove Kosovo Albanians towards armed struggle. The support for the Kosovo Liberation Army (Ushtria Çlirimtare e Kosovës- UÇK) was rising. UÇK

performed a series of attacks on Serbian police stations and army sites in Kosovo. This had the consequence that by July 1998 this organization was in control of approximately 30 % of the territory. The actions of the UÇK were looked at as a fight for the freedom of Kosovo. In February 1998, Gelbard declared that UÇK is a terrorist group. Shortly after this Milošević started attacks against the local population. In these attacks numerous unarmed civilians were killed. Milošević described the action *"a campaign against terrorism."* (Caplan, 1998: 753) These campaigns continued for several months. In the international arena, considerations on international intervention in the conflict have been made. Again the sates were considering the principle of territorial integrity, which obliged the states to non-intervention. Thus Germany in June rejected the use of force by NATO unless it is authorized by the UN Security Council. (Caplan, 1998) Nonetheless, in October 1998 NATO issued *"an activation order for military strikes."* (Weller, 1999: 217)

In the beginning of October 1998, the first draft settlement for Kosovo was produced by Chris Hill, US Ambassador to Macedonia. The draft did not presuppose any legal status of Kosovo; it was merely dealing with the restoration of self-governance on the territory. (Weller, 1999) Both sides reacted cautiously to the draft. The Serbian side did refer to the points concerning political settlement, which led to the suspension of the NATO military intervention. (Weller, 1999) Hill produced another plan, which was rejected by both sides.

In December the armed forces of FRY launched yet another attack on Kosovo. The UN addressed the situation by demanding that both sides cease hostilities. NATO went further to say that if FRY will not comply with the appeals of the international community they are prepared to authorize air strikes against FRY. (Weller, 1999)

Meanwhile the Contact Group (US, UK, France, Germany, Italy and Russia) presented the parties with the ground principles that were to become the basis for the talks in Ramboiullet. These basically consisted of the call to immediately cease hostilities; peaceful

solution through dialogue; interim agreement, a mechanism for the final settlement after an interim period of three months; territorial integrity of FRY; protection of rights of the members of all national communities; free and fair elections in Kosovo under the supervision of the OSCE; international involvement and full cooperation of parties on implementation. (Weller, 1999) Furthermore it addressed the governance in the province; stating that the province should be self-governed by democratically accountable Kosovo institutions; high degree of self-governance through own legislative, executive and judiciary bodies; fair representation of all members of national communities at all levels of administration and government; local police should be constructed in accordance with ethnic make-up. (Weller, 1999) In addition to that it included basic human rights protection, election of an ombudsman and the establishment of a dispute resolution mechanism, and of a joint commission to supervise the implementation. (Weller, 1999) The conference eventually opened on February 6 1999. On February 14 the Contact group determined that the agreement should be reached by February 20. When it became clear that the agreement would not be reached by the deadline, it was postponed to February 23. The conference ended without both parties signing the agreement. There was to be a follow-up conference in Paris in March. (Weller, 1999)

The Kosovo delegation in Paris confirmed that they are accepting the agreement presented in Ramboiullet. The FRY, instead of confirming the agreement, presented their own, corrected version of it, which was severely modified, amongst other striking out the international presence in the province. Thus it became clear that the FRY had no intention to sign the Ramboiullet Accord. On March 18 the Kosovo delegation signed the agreement. When all attempts to persuade the FRY delegation to sign the Accord failed, the co-chairman of the meeting stated that the Ramboiullet Accord is the only peaceful solution to the conflict and that the negotiations are adjourned, unless FRY is willing to sign the Accord. He also

warned the Serbian authorities not to start military offensives, since these would be severely sanctioned. (Weller, 1999)

FRY however had previously deployed troops in the region and started with offences during the talks in Paris. On March 22 one final attempt was made by the negotiators to persuade FRY to sign the Ramboiullet Accord, however it resulted in failure. Moreover the following day the parliament in Belgrade voted to reject the Accord. Thus NATO authorized the military intervention. (Weller, 1999) NATO attacks were launched on March 23 and ended in June.

On June 10 1999 the Security Council adopted the resolution 1244, in which they decided that the political solution of the crisis will be based on the Annexes 1 and 2 of the resolution, which were accepted by FRY. With the resolution an international civil presence was established, which was to provide an interim administration for Kosovo, so people of Kosovo could enjoy substantial autonomy within FRY. It also amongst other stipulated withdrawal of military, police and paramilitary forces and the Rambouillet accords. (Resolution 1244)

With this resolution Kosovo became a UN protectorate under UN Mission in Kosovo (UNMIK). In this time the final status of the province was subordinated to the standards in the province. In 2003 the Contact group announced that the final status can be reviewed in mid-2005. In 2004 the tensions in the province exploded again. Following the unfounded allegations that Serbs were drowning Albanian children resulted in fighting in Mitrovica. In the riots that lasted for two days 19 people were killed and 900 wounded. In 2005 negotiations on the final status of Kosovo again led to disagreement between the sides. Serbia still refuses to give up Kosovo, whereas the Kosovo Albanians will not accept anything less than independence. In October 2005 the Secretary General appointed Martti Ahtisaari, former president of Finland, to lead the settlement effort. Negotiations between Serbs and Kosovo

Albanians under Ahtisaari lasted from February to September 2006. They delayed the presentation of the Proposal for Kosovo due to the elections in Serbia that were held in January 2007. The proposal was than presented to both side in the beginning of February. It was followed by additional meetings with both sides; however when it became clear that the sides are not closer to a compromise, the negotiations were formally closed on March 10 2007. Nonetheless, Ahtisaari stressed that the resolution of the status of Kosovo is urgently needed. Ahtisaari's plan for the status of Kosovo is now being discussed in the Security Council of the UN. (International Crisis Group)

The plan presupposes the status of Kosovo as independence under international monitoring. It presupposes Kosovo to be a multi-ethnic society that governs itself democratically and with full respect for the rule of law, the highest level of internationally recognized human rights and fundamental freedoms, and which promotes the peaceful and prosperous existence of all its inhabitants. In addition to this Kosovo will have the right to negotiate and conclude international agreements and the right to seek membership in international organizations. Furthermore Kosovo has to protect and promote the rights of the members of national communities, which includes culture, language, education and symbols. It also provides for the representation of the members of communities in public institutions. Moreover, to protect the rights of Kosovo non-Albanian communities in the legislative process, the Settlement also provides that certain, enumerated laws may only be enacted if a majority of the Kosovo non-Albanian members of the Kosovo Assembly agree to their adoption. Furthermore the plan takes special considerations for the Serbian minority, giving them a high degree of autonomy in the municipalities in which they form a majority, amongst other allowing them to accept funding from Serbia, and create cross-boundaries cooperation with Serbian institutions. It also enshrines the protection and promotion of cultural and

religious heritage, which ensures the undisturbed operation of the Serbian Orthodox Church in the region. (The Comprehensive Proposal for Kosovo Status Settlement)

Giving Kosovo independence seems to be the best solution to the problem. The years preceding the dissolution of SFRY and the events that happened afterwards show that uti possidetis was not the best solution, since it did not preclude the conflict but merely prolonged it for additional sixteen years, which is not to say that the conflict will be entirely resolved with the adoption of the proposal. There is a possibility of recursive secession in this case. The Serbian minority that is to be left in Kosovo is mostly territorially concentrated on the north of the province, which borders with Serbia. Taking into account that Serbs are not satisfied with the independence of the region, it is thus possible that the Serbs will try to separate themselves from the region and be included into Serbia. This again shows that the model of withdrawal of consent of the territorial community can adequately address such a situation and perhaps another escalation of violence can be precluded.

Conclusions

Considering the uniform use of norms, as has been made evident on the case of the break-up of SFRY, we can say that such a conduct, when it comes to determination of boundaries is inadequate. Even though uti possidetis juris was seen as the principle that would reduce the prospect of an armed conflict, since it would produce the only clear outcome and thus borders would not be disputed, that was not the case. Moreover, with the use of the use of this principle, the former internal boundaries assume the function of the external, i.e. international boundaries. This is highly problematic, since the internal boundaries do not have a separating, but a uniting function, which also means that they are not drawn with the considerations of possible secessions in mind. As has been determined, the internal boundaries of Yugoslavia have changed many times throughout history and were not drawn in accordance to the ethic composition of the regions. Furthermore it can be claimed that they were drawn in manner that precluded separatism, hence taking that for granted created a situation, which left the newly created minorities dissatisfied and frustrated.

It has furthermore been established that the uniform use of norms does not take differences between cases into account and is thus not in accordance with neither equality nor fairness. By applying the same principle in the case of SFRY, the needs of Slovenia on the one hand were accommodated, whereas the needs of other republics and the newly created minorities within those republics were not. Thus, the best option seems to be not to rely on uti possidetis, but to deconstruct the principle of self-determination. This implies that when deciding on the use of norms, one has to look at the actual situations in the areas and apply norms determining the new boundaries in accordance with that situation. When it comes to secession claims it is thus of utter importance to determine who the recipients of the right should be.

The examination of the theories of secession showed that there are several answers to this question. National self-determination theories ascribe the right to nations. They basically state that nations have the right to secession, if they whish to do so. According to the Choice theories the right belongs to territorial communities, which can also be nations, which in referenda express the wish to secede. The Just-cause theories see secession as a remedial right only. This means that the right to secession can only be granted, if a group was subjected to certain kind of injustices. Hybrid theories on the other hand combine the views of the national self-determination and choice theories, i.e. the beneficiaries of the right are nations, provided they express the wish through referenda. All of these theories offer additional criteria this groups need to satisfy in order to be eligible for secession.

Since the case of SFRY was the case of recursive secessions and attempted secessions, it has been determined that the only theory that adequately addresses such a phenomenon is the theory that takes the withdrawal of consent as the basis. The best way to address the issues of the trapped minorities seems to be to allow secession for the territorial communities, which can also include ethno-national groups, provided they express the withdrawal of consent in referenda, are politically and economically viable and have a valid claim to the territory they want to withdraw. In addition to that the groups need to be territorially concentrated.

The analysis of the situations in the republics after the break-up of SFRY has shown that the decision that only the republics have the right to create independent states, i.e. the use of uti possidetis juris, did not create a situation that would be undisputedly accepted by all parties. As has been shown the newly trapped minorities did not accept the situation, which led to violent conflict. This was most evident in the case of Croatia, which was not in control of its territory, since the territorially concentrated Serbian minority, which proclaimed the Republic of Serbian Krajina took control over the region.

The consequences were drastic for both sides. At the beginning the Croatians were massively expelled from the region and after Croatia took over the territory almost the entire Serbian population fled. The example of Kosovo also shows that the rejection of their claim to independence in 1991 and the creation of FRY, did not solve the situation, but merely delayed it for sixteen years.

Thus it can be said that the analysis of the situation by the Dutch presidency was accurate and the strong rejection of their proposal to redraw the boundaries in accordance with the ethnic composition of the region a mistake.

We can conclude that in cases similar to the case of SFRY, the adoption of a more liberal perspective towards secession seems to be a good option. Allowing territorially concentrated groups to determine their status by the means of referenda definitely precludes the dissatisfaction and frustration of such groups, i.e. the groups that are to be left on the 'wrong' side of the border. However, further considerations are necessary. The political and economic viability is definitely important, since it does not make sense creating states that are not able to establish political institutions or are not able to economically sustain themselves. Nevertheless, this position is not without problems and further considerations should be made on qualitative measures of the two criteria.

If we thus take a look at the initial quote by Boutros Boutros-Ghali, we can conclude that instead of looking at the 'explosion of nationalities' as the biggest threat to peace and security and sticking to the application of uti possidetis juris, the international community should put its efforts into dealing with the situation by taking the complexity of the issue into account and address it adequately.

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