

# Decolonization and the right to self-determination: the legal ground and its margins

La descolonización y el derecho a la autodeterminación:  
el terreno jurídico y sus márgenes

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## Abstract

The ideas about self-determination evolved from the Wilsonian understanding of self-governance - to a norm and drive for decolonization that changed the 20th century's landscape. Despite its general proclamation as a right to all, the UN applied it as a "principle of saltwater". Hence, the only legitimate right holder – colonial peoples could realize self-determination under several legal instruments and within the principle of uti possidetis juris that preserved the artificiality of the borders. The legal controversies of the decolonization processes are numerous and its loose end appears to be present up to now since the same principles were applied during the dissolution of the socialistic federations after the fall of the Iron Curtain.

## Keywords

Decolonization, self – Determination, UN instruments, Uti Possidetis Juris, Socialistic federations

## Resumen

Las ideas sobre la autodeterminación evolucionaron de la comprensión Wilsoniana del autogobierno a una norma y un impulso para la descolonización que cambió el panorama del siglo XX. A pesar de su proclamación general como un derecho de todos, la ONU lo aplicó como un "principio del agua salada". Por lo tanto, el único titular legítimo de derechos, los pueblos coloniales, podían realizar la autodeterminación bajo varios instrumentos legales y dentro del principio de uti possidetis juris que preservaba la artificialidad de las fronteras. Las controversias legales de los procesos de descolonización son numerosas y su cabo suelto parece estar presente hasta ahora, ya que los mismos principios se aplicaron durante la disolución de las federaciones socialistas tras la caída del Telón de Acero.

## Palabras Clave

Descolonización, Autodeterminación, Instrumentos de la ONU, Uti possidetis juris, Federaciones socialistas

## INTRODUCTION

The idea of self-determination was a part of major upheavals throughout human history, having different substance and applied differently in various contexts. Considering the contemporary international law, self-determination as principle was incorporated into the UN Charter. The right deviating from the principle, was shaped in the period of decolonization, and its main developments were in the postcolonial era. Though it is generally considered that the established principle was too vague to provide a right to self-determination, the subsequent developments led to the acknowledgment of the right in the customary and the treaty law. In that period several international documents were adopted that traced the path for its implementation (Walter & Ungern-Sternberg, 2014). Within the doctrine of self-determination, initially *the peoples* – as a legitimate right holder, were considered to be colonial peoples and peoples under foreign domination and occupation. The right was proclaimed and granted under the Charter and other international legal instruments such as the General Assembly Declaration on the Granting of Independence to Colonial Countries

and Peoples (1966) and alike. In this context, at the beginning, the right of self – determination was narrowly set within the frame of the “saltwater” thesis, or it was applied only to the colonized peoples that lived in geographically separated territories from the imperial country. The right was applied only to the external colonies, while the internal ones were excluded from its application (Tully, 2000). Apart from it, there was another restriction – the right to self-determination to colonial peoples was applied within *uti possidetis* boundaries or within the boundaries established by the colonial powers (Weller, 2009).

Accordingly, the crucial formation of the right was after the World War II, but its initial application still affects the current self – determination demands. First - the challenges and the consequences can be seen within the counties that were previous colonies (such as for example in Eritrea; Somaliland; Kashmir; Southern Sudan etc...). In particular cases, the exercise of the right did not overcome the past effects of colonialism, but arguably reshaped the pre-existing colonial situation. Additionally, the right got singular application - as soon as the colony became a state, it started to defend its territorial integrity, preventing any further exercise of the external self – determination, while its internal aspect (such as representation, political rights and alike) often was out of reach. To add to this, in many cases it is argued that the doctrine of *uti possidetis* was wrongly applied, or a particular entity was wrongfully incorporated into the newly independent state. Apparently, those inequalities and shortcomings lead to practical consequences (Weller, 2009). Second - apart from the colonial context, it needs to be considered how the practice of decolonization affected the further application of the right to self-determination. Within those frames, we examine the tendency within the international law to transmit the principle of *uti possidetis juris* from its formerly purely colonial application in the determination of the borders, towards cases of dissolution of complex multi-layered federal structures (as it happened in the cases of dissolution of former the Soviet Union and the former Yugoslavia, (Walter & Ungern-Sternberg, 2014). Furthermore, one of the most questioned international instruments related to the decolonization and colonial people self - determination, Resolution 2625 (1970), that stresses the need for the government to represent the whole people belonging to the territory without distinction to the race, creed, or color, is interpreted as it is arguably opening a door for a “legitimate secession”. As the previous and later application of the principle of *uti possidetis juris* in many cases did not address the ethnic and cultural divisions, it is argued that the Resolution 2625, laid a fertile ground for secessionism, irredentism, and interstate conflicts all around the world. Though the legal practice acknowledges the wrongdoing of the colonization, especially through denying of the extended doctrine of *terra nullius*, expressed for example through the view of the High Court of Australia in the case of Mabo (1992);<sup>1</sup> the ruling of the Supreme Court of Canada in the case of Calder (1973); the International Court of Justice’s Advisory Opinion on Western Sahara (1975) (Ivson, Patton & Sander, 2000), etc., the legal controversies of the decolonization processes are numerous and its loose end appears to be present up to now. Despite the abovementioned inconsistencies, though many constructs accepted in the past already disappeared (such as colonialism, protectorates, mandates, UN trusteeships... etc), there are new developments (such as the European Union; UN system; failed states, etc.) that have brought additional hypocrisy into the contemporary world (Kalmo & Skinner, 2010). This contributes toward creating a grey zone in international law related to the abovementioned questions.

Characteristically, self-determination has been defined as the right of peoples freely to determine their political status and pursue their economic, social, and cultural development. Though colonialism practically no longer exists, the doctrine of self – determination for many is stuck in the colonial bottle, whereas in practice, the application of the right is severely contextually reduced

<sup>1</sup> the Court has ruled out the concept of *terra nullius* in respect of domestic law and consequences of colonization. In Mabo v. Queensland (No.2) case, High Court recognized the continued existence of the indigenous title within Australian Law and change the Australian legal history of denying the indigenous title, see more at Jeremy Webber “Beyond Regret: Mabo’s Implications for Australian Constitutionalism” in Duncan Ivson, Paul Patton and Will Sanders (eds.), Political theory and the rights of indigenous peoples.

(Weller, 2009). Despite the clarification related to the content of the right, it is still a matter of dispute: who is entitled to self-determination? i.e. what constitutes a people? Is the right, due to its historical origins, solely applicable in situations of decolonization and of military occupation, as it was acknowledged by the International Court of Justice in 2004 (Walter & Ungern-Sternberg, 2014), or it is applicable in other situations, for example as a last resort when the people within the state borders are exposed to cruel treatment and their political rights are denied? Consequently, does the implementation of the people's right to self-determination stops with decolonization?

The aim of this paper is not to analyse the western and liberal political theory concepts of the colonialism, neither to acknowledge the central unfairness of the colonial history, despite the moral wrongs that are in the essence of the historical legacy of colonialism.<sup>2</sup> The main idea of the paper is centered around an analysis of the legal concepts and legal instruments upon which the decolonization process was done and its latter implications. Within this theoretical frame, the paper provides conceptual clarification and legal analysis of the essence and the development of the established legal postulates.

## RIGHT TO SELF - DETERMINATION - HISTORICAL DEVELOPMENT AND ITS CONTROVERSIES

The idea of self-determination is rooted in liberal democratic principles. It is proclaimed during the French Bourgeois Revolution; it is mentioned in the French Declaration from 1789 and in the American Declaration of Independence from 1776 (Watson, 1992).<sup>3</sup> The main notion evolves around the belief that the government can be considered legitimate if formed by the consent of the ones that are governed. Therefore, the abovementioned documents are underlining the legitimate way upon which the government draws its power, stressing its accountability and its responsiveness. On that way the government is securing its equal position within the community of nations (Frank, 1992). Though, different ideas about self-determination were rooted a time ago, the modern understanding of self-determination is directly linked to the Versailles Peace Conference (1919). On its auspices, the political principle of self-determination became a driving force for the revision of Europe (Hannum, 1990). However, over the ashes of the Austro-Hungarian; Ottoman, and the German Empire, a ghost of nationalism, combined with the belief in the power of the principle of self-determination, betrayed the expectations of newly liberated populations for the establishment of peaceful post-war settlements. The proposal for a post-war peace, based on US President Wilson's 14 Points, and adopted as part of the Treaty of Versailles did not give the expected results. Europe was not a *tabula rasa* and boundaries couldn't be drawn only under the principle of self-determination of peoples. Consequently, they generally reflected the interests of the great powers and the success of some national groups in lobbying for their own states. Hence, apart from the proclamation of self-determination of peoples as a political principle, its application received a realistic dimension, according to which all members of a nation could not always live in a so-called country of origin within the Versailles system, or within the established regime of the League of Nations.<sup>4</sup> During this period a nationality as precondition for aspiring an independence, was replaced with the term "self-conscious community subjected to foreign subordination." That meant,

<sup>2</sup> In the legal theory, colonialism was arguably consistent with sovereignty rules of the colonial powers, see more at Hent Kalmo and Quentin Skinner, *Sovereignty in Fragments*, 2010; additionally, within the venerable legal theory of 16 and 17 century, slavery was justified, see more at J.M. Kelly, *Western Legal Theory*, 1992.

<sup>3</sup> This concept does not begin here and there are clear indicators of the roots of "legitimacy" in the ancient empires, see more at Adam Watson, *The Evolving of International Society: a Comparative and Historical Analysis*, 1992.

<sup>4</sup> After the Versailles conference, at the hearing in 1919 before the Foreign Affairs Committee of the US Senate, in desperate tone, Wilson explained the circumstances of this inconsistency because of the lost hope of the millions of people, Text of a meeting between President Wilson, Frank P. Walsh, and Edward F. Dunne, Paris, June 11, 1919, submitted for the record by Frank P. Walsh in testimony before the Senate Committee on Foreign Relations, 66th Cong., 1st Sess., Treaty of Peace.

in acquiring self – determination, the nation not only needed to show objective homogeneity and subjective political will, but as well as an existing subordination that prevents it from acquiring self-government (on which has a right). As a result, and because the related controversies, the principle was not incorporated into the Covenant of the League of Nations (1924). Additionally, the Organization arguably failed in ensuring the integrity of the new entities created by the principle of self – determination, and it was blamed for creating small, weak states unable to defend themselves against Nazi Germany aggression (Acimovic, 2001).

Considering the contemporary international law, the principle of self-determination was fully integrated into the UN system, and it was recognized and guaranteed as a collective right to all *peoples*. It is part of the UN Charter and secured with many international instruments. According to the prominent scholarship, existing legal documents, and related preparatory works, the right to self - determination is without a doubt a collective right, set into individual rights instruments. The right is a complex one and encompasses many elements and connected rights. In that sense, the right involves the right of peoples to freely define their political status; civil and political rights; the right of peoples to freely exercise their economic development; permanent sovereignty over natural resources; the right of peoples to freely practice their social development; the right of peoples to freely determine their cultural development (Cristescu, 1981). Nevertheless, there are numerous controversies related to the right of self – determination of the peoples, due to its contextual inconsistency and related implementation (Castellino, 2014). Among the open questions are “Who are the legitimate right holders?”, and “How the right to self – determination can be exercised”? The same as the right, the right holder – a legitimate title – *peoples* with the right to self- determination, is as well as a subject to historical and contextual change (Castellino, 2000). However, within the UN system, initially the peoples with the right to self – determination were considered to be colonial countries and peoples, as well as the *peoples* under foreign domination or occupation. That was actual during the period of the decolonization when under the frames of this right the colonial peoples freed themselves from the colonial chains. Still, it is important to mention, since the end of the colonialism, the right holder – the title continued to change. Though, the colonialism practically is not existing, more or less the same postulates related to self – determination applied to the latter right holders. As for today’s understanding, it is generally accepted (by the most theoretic of the international law), that the people are considered to be the whole peoples, the entirety of a nation. Meaning, in today’s legal consideration, the title is vested in the aggregate population of the existing state, not in the substitute groups (Heraclides, 1991; Higgins 2003). This affects as well the former colonial countries, protecting their territorial integrity, as well as the territorial integrity of the countries with no colonial past. As an addition to this, with recent extension of the self – determination right holder – the indigenous people, or the peoples, whose territory was occupied by outside settlers and lived as quasi-colonial subjects on their lands (Cobo, 1986), the right to self – determination formally got new expression and can be practiced as internal self – determination - or within the borders of the exiting state.<sup>5</sup> On that way, it seems that states tend to minimize the impact of the right of self-determination by declaring it to be a right that only exists in its ‘internal’ appearances (Castelino, 2014). That occurrences are in line with the prevalent state – centric rule of the international law whose main subjects are the states (Shaw, 2017). International law is keen to guarantee order and to rejects any norm that could potentially violate such order. Self – determination is accepted if practiced in a way that accommodate differing national identities within the state borders, rather than the creation and/or dismembering of older states (Castelino, 2014). Thus, creation of new independent statehood without consent of the previous sovereign is no generally accepted, and tough not strictly prohibited (neither allowed) in the international law, in general, a unilateral secession is not welcomed, nor accepted by the international community.

<sup>5</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007.

However, in order to understand the development of the right to self-determination and possibly the current inconsistencies, it is important to understand the position of self-determination within the context of the decolonization, the related legal instruments and different interpretations, that without doubts still have an effect on up-to-date application of the right.

## SELF – DETERMINATION AND DECOLONIZATION

The Second World War, like First World War, increased the number of newly independent states. With the adoption of the UN Charter (1945), the principle of self-determination of the peoples became a political principle of contemporary international relations, generally accepted as an international norm. Hoping that possible border disputes will be frozen, that can eventually arise from the extensive realization of the right, UN had limited the application of the principle only to the people belonging to the mandated and non-self-governed territories (Castellino, 2000). Thus, the right was applied to the peoples living in geographically separated territories - that in practice meant separated by the ocean from the its colonial patron, and that condition that was accepted as "saltwater thesis". That restrictive application of the right to self-determination of the peoples arose from the disapproval and fear of possible secessions that threatened to disturb the territorial integrity of the existing states. Thus, it was set in a way that was prohibiting any attempts, force or threat of use force, aimed towards changes of the existing territorial borders.<sup>6</sup> Therefore, the principle that evolved from narrow Wilsonian understanding for self-governance to a broader norm that changed the history of the 20th century, freeing the annexed entities of Asia and Africa, got restrictive meaning and consequent application. Within the UN system and customary international law, the *peoples*, entitled for the right to self-determination were no longer ethnic or racial constructs, but only the communities subjected to colonial rule, and later those who were subject to foreign domination or occupation (Castellino, 2000).

For the theorists, the colonial population became "peoples" by developing a collective awareness of its subordination and exploitation by the imperial powers, as well as through its common struggle for liberation. Hence, the identification marker became whether the territory was under strife or not, and had an identity other than the administrative one. The population of the colonial territory was normatively united as "peoples" by the fact that collectively suffered from the injury inflicted by the colonialism (Knop, 2002: 56). Because of the historical suffering, practicing self-determination for them was way to obtain a corrective justice (Bhalla, 1991; Brilmayer, 1991; Duursma, 1996). Hence, in the period of decolonization, the right to self-determination of peoples was defined exclusively on a territorial basis (only the inhabitants of non-self-governing territories had the right). Consequently, from a legal point of view, ethnicity, culture and other social characteristics weren't considered as ground or the basis for practicing the right to self-determination. Only the connection with the territory in the context of decolonization was able to contribute towards enjoying the guaranteed right to self-determination (Hanauer, 1995).

## RELATED LEGAL INSTRUMENTS

If we consider the related legal instruments, we need to understand that self-determination is part of the customary and the treaty international law, and most of the instruments are developed in the period of decolonization. However, the most important UN document, *The Charter* affirms the right of all people to choose the form of government under which they will live. Still, the self-determination is not among the principles of the UN stipulated under Article 2 of the Charter, but within

<sup>6</sup> *n.b.* The exception of this rule was the secession of East Pakistan from Pakistan in 1971 when the UN Security Council accepted the formation of the Republic of Bangladesh.

Article 1 (paragraph 2) which sets out the purposes of this organization, namely: "(...) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". Article 55 of the UN Charter also states that one of the purposes of the UN is to develop friendly relations between nations, based on the principle of equal rights and self-determination of peoples, defining the areas of special interest in achieving the goals.

Addressing the issues of self-determination, in the consequent years, UN General Assembly adopted several resolutions generally meant to support the process of decolonization. The resolutions were the following:

a) *Resolution 1514 (XV)- Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960) was guarantying the independence of the colonial countries and peoples. It declared that:

"(...) all people have the right to self-determination; by virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development".

Resolution 1514 undoubtedly initiated the dynamics of colonization, but it also had an unfortunate consequence, because the right to self-determination proclaimed in it, was equated exclusively with the achievement of sovereign independence, i.e the formation of a separate state. With this instrument, the right to self-determination of the peoples began to be seen as an absolute norm (*jus cogens*), and a right – a basis for all other rights. But although in the Paragraph 2 of this Resolution it is proclaiming that the right to self-determination applies to all peoples, the Preamble specifies that the principle of self-determination of peoples applies only to the peoples who are under colonial domination. (Henrard, 2000).

b) *Resolution 1541 titled Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter-* was adopted by the UN General Assembly (1960), one day after the adoption of the Resolution 1514. Similar to Resolution 1514, the Resolution 1541 focuses on decolonization. Resolution 1541 relies on the idea that the implementation of the right to self-determination is not just about achieving a sovereign independence. In Principle VI, the Resolution identifies three ways of exercising self-government, namely through:

- "(...) a) Emergence as a sovereign independent state;
- b) Free association with an independent state, or
- c) Integration with an independent state..."

However, in the Resolution is exclusively refering to the realization of the external self-determination and the internal self – determination as possible way of practicing a right to self – determination is not mentioned.

c) *Resolution 2625, known as 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), extended the right to self – determination to the peoples living under foreign occupation. The Resolution 2625 is considered to be a controversial instrument, and is usually considered from two aspects. Firstly, from the point that it is formulating an additional method for implementing of the right to self-determination; and secondly by stressing the possible implications if the government does not represent the entire nation in a territory in question. Arguably this has two effects – first it is opening the door for an internal dimension of the right to self-determination within selection and pursuing of appropriate institutional and state structures; and the second it is opening the doors for a "legitimate secession". However, the Resolution is affirming that all nations have the right to self-determination, and hence have the right to determine their political status without external influences, and to achieve economic, social and cultural development. The Resolution further states that "(...) Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any



action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour (...)”, and with this it gives additional importance on the territorial integrity of the states.

As for the treaty international law, apart from the UN Charter, the joint Article 1 of the *International Covenant for Civil and Political Rights* (ICCPR) (1966) and *International Covenant for Economic, Social and Cultural Rights* (ICESCR) (1966) is also very relevant in terms of the exercise of the right to self-determination (though not for clarification) since it proclaims that all peoples have the right of self-determination. Using the same wording as in previously explained Resolution 1514, it stresses that by virtue of that right the peoples can freely determine their political status and freely pursue their economic, social and cultural development.<sup>7</sup>

## PRESERVING OF THE BOUNDARIES - APPLICATION OF UTI POSSIDETIS JURIS

By incorporating into the International Covenants on Human Rights, the principle of self-determination undoubtedly acquired international legal status. Upon these covenants and the previously mentioned General Assembly instruments, the right to self-determination finally brought some justice to the colonial peoples (Galbreath, 2005). Some, because despite the pointed focus towards them, the realization of the right was further restricted with the application of the principle *uti possidetis juris*. Namely, the new post-colonial states gained independence within the past colonial administrative boundaries. Consequently, the decolonization process in addition to the principle of self – determination, was highly influenced by the principle that originated from the Roman law as a procedural principle under which the burden of proof is on the party that does not own the item. The application of *uti possidetis juris* was enshrined within the founding document of the Organization of African Unity (OAU) (1963) and additionally with the International Court of Justice (ICJ) ruling. Namely, the principle gained strong significance in the case of *Burkina Faso v Mali*. In this dispute about the frontier, ICJ stood in defense of the existing polity and its boundaries although it was evident that there was an entity that was not corresponding with them. In dealing with this case, ICJ superficially took this fact into account and gave preference to the stability of the existing borders. Seemingly, the principle of *uti possidetis juris* legally gained preference over the people’s right to self-determination (Summers, 2007).<sup>8</sup> The problematic aspect was that ICJ in its ruling equalized the right of *peoples* with the right of states, overseeing the fact that that state *territory* in question and its boundaries were previously artificially determined by the colonial powers. The identity of the peoples was connected with the territory, and at the same time the other identity markers, such as ethnicity, community, and language were completely neglected (Ratner, 1996; Summers 2007).

The strict application of *uti possidetis juris* created an assumption that colonial states began their history with the advent of the colonial powers. Consequently, instead of changing the past situations, the principle only preserved the artificiality of the previous administrative boundaries. The colonial peoples had the right to self – determination, but they could shape their new states alongside the administrative lines of their previous colonial units – a rule that resulted in many territorial conflicts. Furthermore, in practice, self-determination became a process in which colonialists transferred power to the forces that appeared as the most useful to them, or as the most

<sup>7</sup> General Comment of the Human Rights Committee on Article 1 of the ICCPR does not give any other instructions for the interpretation of the concept of peoples. However, its paragraph 7 refers to Resolution 2625 and takes into account the requirements for a representative government and other remarks made in this context, Human Rights Committee, CCPR General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples, <https://www.refworld.org/docid/453883f822.html>.

<sup>8</sup> See *Burkina Faso/ Mali Frontier Dispute Case*, judgment of 22 December 1986, [1986] ICJ Rep. 566, para. 25.

deserving. Practically, there was little or no concern about the people living under the new authorities, that in most of the cases didn't have any democratic institutions in place or any institutions that we're able to secure the representativeness of their governments (Ratner, 1996). That in many cases generated dissatisfaction and laid a fertile ground for secessionism, irredentism and inter-state conflicts (Ylönen, 2017). The application of the doctrine of *uti possidetis*, froze the inviolability of colonial boundaries. However, it allows their change with the consent, but the consent was and still is required between existing sovereign states – excluding all non-state actors. These actors have no explicit right to demand territorial adjustment, even in the cases when their basic human rights, granted with two international covenants of human rights from 1966, are violated (Castellino, 2014).

## IMPLICATIONS/ DISCUSSION

Apart from the well-known and established international instruments that guarantee the right of peoples to self-determination, the right to self – determination is also guaranteed by other instruments, such as African Charter on Human and Peoples' Rights (1981) (African Charter);<sup>9</sup> UN Fiftieth Anniversary Declaration (1995) (Anniversary Declaration),<sup>10</sup> and Declaration on the Rights of Indigenous Peoples (2007).<sup>11</sup>

The broad interpretation of the African Charter suggests that it applies not only to the colonial peoples but also to the peoples living in repressive African republics under repressive governments. In a situation where there are attempts for physical extermination of a particular group, the nations may secede – exercising the right to self-determination, especially if that is the only practical method of ensuring their survival. A state that denies peoples' access to government violates the principle of equality set out in Article 19 of the African Charter, and in these circumstances, the right to self-determination can be exercised through secession. In that case, the state can not legitimately invoke the principle of sovereignty and territorial integrity to ban secession, because the state has lost the power to govern those peoples (Okoronkwo, 2002).

The Anniversary Declaration (1995) continues to reaffirm the right of all peoples to self-determination, taking into account the special circumstances of peoples under colonial or other forms of foreign domination or occupation and recognizes the right of peoples to take legitimate action in accordance with the UN Charter to realize the inalienable right to self-determination which cannot be derogated. The latest UN instrument Declaration on the Rights of Indigenous Peoples (2007), affirm the principle of self-determination for indigenous peoples, but it restricts the form, allowing practicing the right but only as the internal self-determination – within the state's territorial borders.<sup>12</sup>

All these envisaged instruments have clear implication, not only to the post- colonial countries and destiny of their people, but as well in the countries without exact colonial legacy. Considering the post – colonial countries, the historical and colonial borders that have failed to take into account ethnic and historical realities can be seen as a cause both for the collapse of states and the continuation of conflict in many states (Dugard, 2003). Despite the controversies the use of the principle of *uti possidetis juris* continued and was endorsed by the African Union which succeeded the Organization of African Unity in 2002, as the main African regional organization.

<sup>9</sup> African Charter was adopted by the Assembly of Leaders of the Organization of African Unity. Articles 19 and 20 of the African Charter guarantee the right of all peoples to self-determination that is recognized as an inalienable right, Banjul Charter on Human and Peoples' Rights, 21 ILM (1982).

<sup>10</sup> Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 50/6, U.N. GAOR, 50th Sess., at 1, U.N. Doc. A/Res/50/6 (1995).

<sup>11</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007 <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>12</sup> This instrument is important since, for the first time since decolonization, the right to self -determination was granted to a sub-national group within an existing state, and that for many extended the boundaries of the international law.



As for the post – colonial world, the same principle was applied during the dissolution of the previous social federations USSR and SFR Yugoslavia. The principle was utilized in the process of the demarcation of their borders within opinions of the Arbitration Commission of the Conference on Yugoslavia (Badinter Arbitration Commission) in 1992. In Opinion No. 1,<sup>13</sup> the Arbitration Commission concluded that SFRY is in the process of dissolution. Regarding the regulation of the borders between the former Yugoslav republics, in Opinion no. 3, the Arbitration Commission relied on the principle *uti possidetis juris* and concluded that the four Yugoslav republics should become independent states within their existing, administrative, borders.<sup>14</sup> This was the first time the principle widely used during decolonization in Africa and Latin America to be applied directly to Europe. In fact, the European Communities and the international community have relied on the same principle with regard to the successors of the former Soviet Union and the break-up of Czechoslovakia. To argue the position taken, the Arbitration Commission used the case "Burkina Faso vs. Mali" before the ICJ (1986) and gave the principle a universal character. Some theorists were considering that such a solution was another source of benefits, since it dissociates the concept of "nationality" with the concept of "territory" (Pellet, 1992; Shaw, 1997). Through this application Arbitration Commission attached great importance to the observance of borders and pointed out that regardless of the circumstances, the right to self-determination must not involve changing the existing borders. Stability does not mean immutability, so although states are forbidden to change borders by force, they can do so peacefully - by agreement (Pellet, 1992).

Although the intention may have been contrary, the continued application of the principle has at times led to instability since the extended application of the doctrine not only ignores the critical difference between internal and external borders based on historical and other characteristics but also reinforces the assumption that internal administrative borders can be transformed into international boundaries. Hence, the simple application of the principle of *uti possidetis juris* does not always sufficiently address the problems related to current ethnic and cultural divisions (Hanum, 1993; Ratner, 1996; Knop; 2002 Jovanovic, 2002) as it can still be seen up to now with recent non paper – that shows that questions related to previous Yugoslavia borders are not closed 30 years after its dissolution,<sup>15</sup> and many open cases within CIS region (Castellino, 2014).

Similar controversies are related to the one of the decolonization key instruments – the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (UNGA Res. 2625, 1970). Resolution 22625 provides the opportunity for the exercise of the right to self-determination, but at the same time prohibits the violation of the state integrity. Under positive international law, the principle of the territorial integrity of an existing state is superior and involves the rejection of secession. This practice is not new, nor is it unknown.<sup>16</sup> But regardless of the superiority of the principle of territorial integrity, today the prevailing view is that under precisely defined but restrictive conditions, secession is acceptable. Many theorists find this to be precisely in Resolution 2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, seeing it as confirmation of evolution made since the League of Nations, aimed at the current, limited acceptance of the legitimacy of secession (Henrard, 2000: 306). For them, exactly in the paragraph 7 of the Resolution, for the first time, in an international document of this kind, the legitimacy of secession is recognized. For some theorists, the Resolution 2625 implicitly sets the conditions for practicing a "legitimate secession", but only if certain conditions are met – or if a sovereign and the independent state does not respect the rights of

<sup>13</sup> Conference on Yugoslavia, Arbitration Commission, Opinion No.1 (1991) 31 ILM 1497.

<sup>14</sup> Conference on Yugoslavia, Arbitration Commission, Opinion No.3 (1992) 31 ILM 1500.

<sup>15</sup> See more at <https://balkan.eu.com/slovenian-media-publish-non-existent-non-paper-on-redrawing-of-borders-in-western-balkans/>.

<sup>16</sup> As early as 1921, the International Commission of Rapporteurs reviewed the request for the secession of the Aaland Islands from Finland and rejected it, see more A Report presented to the Council of the League of Nations by the Commission of Rapporteurs, <https://www.ilsa.org/Jessup/Jessup10/basicmats/aaland2.pdf>.

self-determination of the people of the colony or non-self-governing territory and does not have a government that is representative and represents all peoples living in the territory without distinction based on race, creed or color (Henrard, 2000; Buchheit, 1978; Cassese, 1995; Chernichenko & Kotlyar, 2003).

It is considered that the concluding clause of this Resolution is a direct reflection of John Locke, Jefferson, and Wilson's beliefs that the legitimacy of the governors derives from the consent of the governed, and moreover, that consent must be based on the consent of all segments of society. By these arguments, the used terminology is leading to an understanding that if the state government does not represent the whole nation, it violates the principle of self-determination. This illegitimacy goes in favor of "legitimate action" that seeks to disintegrate, in whole or in part, the territorial integrity and political unity of a sovereign and independent state. However, the document did not intend to offer a complete list of conditions and circumstances that would indicate where a state is not acting in accordance with the principle, yet the requirement for a representative government should be understood as a necessary condition for its complete satisfaction (Buchheit, 1978).

Literary reading of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, annotates a restrictive scope since it applies exclusively to religious and racial groups (Cassese, 1995). The related questions are whether these groups are carriers (under the conditions outlined in the Declaration) only to internal self-determination, or can they demand external self-determination even the right to secede from the repressive state? That is, does the Declaration's right to self-determination also include the right to dismember the territorial integrity and political unity of the state?

The political phenomenon of secession - observed as a creation of a new state through the withdrawal of the territory and the population, previously being part of an existing state (Pavkovic & Radan, 2007:5; Heraclides, 1991), is not regulated within the international law, but according to scholars it can be allowed only when very strict conditions are met (Buchheit, 1978; Birch, 1984; Cassese, 1995; Henrard, 2000; Summers, 2007). Hence, for them, secession is implicitly authorized by the Declaration when the central authorities of the sovereign state consistently refuse to guarantee the participation (in particular) rights of religious or racial groups. Denying of the participation should be accompanied with complete denial of people's fundamental rights and refusing any possibility for reaching a peace agreement within the state structure. In other words, the denial of a fundamental right of representativeness does not in itself invoke "a right to secession", but a complete violation of fundamental human rights and exclusion of any potential peaceful solution within the existing state structure. Therefore, in this context, racial or religious groups can seek external self-determination and legitimately secede when their internal self-determination is absolutely out of reach, and when all attempts to achieve it failed or tend to fail (Cassese, 1995:119).

The possibility of extensively reading the Declaration (its application not only to the certain type of people's subject towards certain type of discrimination), is a different theoretical option extending the people's "right to independent state" if the benefits of self-determination within the existing state are systematically denied (Gayim, 2006). The gross denial of political rights, and the nature and extent of the group's human rights abuses - is the only credible test for determining the reasonableness of secession (Nanda, 1980). That is to say, a state will not be condemned for its diversity in language, religion or origin, nor for its homogeneity, but the state can be condemned and the secession approved only if it does not protect and promote, in reasonable measures, the rights of individual citizens, including among them their interests as members of a national community (Cobban, 1969: 140).

However, at the end it is important to mention that there are scholars as well for whom self-determination and secession are two different concepts (the first one about peoples, and the second one about the territory) and should be analyzed separately (Van Der Vyver, 2000; Horowitz, 2003a). It is evident that the secession will continue to create challenges without any near outcome to be incorporated into international law, unlike the right to self - determination that is not against

the theories of constitutionalism.<sup>17</sup> Scholars and practitioners of international law are considering that at this stage International law neither grants the right to secession nor denies it (Dahlitz, 2003; Brilmayer, 1991; Orentlicher, 2003). In the light of these and similar opinions, secession is legally possible with the consent of all to whom it refers; in accordance with the law or the Constitution of the state; when the people are under colonial rule or under foreign domination whereas the decolonization should not be seen as secession. That is because the self-determination of the colonies does not violate the territorial integrity of the states, and international law gives the colonies separate and distinct status. UN General Assembly Resolution 2625 defines non-self-governing territories as territories that are geographically separate and have a different ethnicity or culture from the administrator country. According to these international instruments, the principle of territorial integrity prohibits secession, but not decolonization.<sup>18</sup>

## CONCLUSION

This article has sought an improved understanding of the complex concept of self-determination within the period of decolonization in comparison to its more recent manifestations. In modern international law, past injustices such as colonization are protected from legal scrutiny via the *inter-temporal rule of law* (*lex retro non agit* – the law doesn't work backward), especially when examining the questions of “territory” as one of the statehood features.<sup>19</sup> Though there is a need for the notions concerning territoriality as well as the manner of colonial conquests to be analyzed and discussed, that is not a subject to this paper analysis. The paper overviews the customary international law, the norms against conquest and territorial annexation, the international instruments that contributed to the colonial liberation, and juxtaposes them with newer appearances. The existing controversy is that the international instruments and applied principles during the decolonization and states – creations processes were considered as “holly” and frequently overruled the history and geography of the postcolonial entities.<sup>20</sup> Seemingly, the most simplistic decisions were taken into account to maintain the colonial boundaries. That caused severe and long-term implications resulting in existing ‘post-modern tribalism’ conflicts in which the artificially set colonial borders still tend to be replaced alongside the pre-colonial historical lines (Castellino, 2014).

As a latter outcome, following the decolonization, the principle of self-determination of the peoples was actualized with the dissolution of the socialist federations in the 1990s after the fall of the *Iron Curtain*. The same principle *uti possidetis juris* previously aimed to preserve the borders of the countries in Africa and Latin America during the decolonization, was a leading rule in transforming the administrative borders of the federation's constitutive republics into the international state borders. As in the previous decolonization setting, the same in the latter one, once the borders were established, the further implementation of the right to self – determination in its external form was forbidden. The right to self-determination was allowed to be practiced within its internal dimension, envisaging the constitutional system of public authority, the right of democratic participation in governance, and the rights to minorities.

An analysis of the historical and conceptual matrixes can give us an improved understanding of the contextual restriction of external self-determination, as well as possible modalities for

<sup>17</sup> However, most of the constitutions that recognize the right to self-determination do not have clear or applicable procedures for its implementation. Self-Determination and Secession in Constitutional Law, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)002-e).

<sup>18</sup> See more at Secession and International Law, Conflict Avoidance and Regional Appraisals, Edited by Julie Dahlitz, Asser Press, 2003.

<sup>19</sup> The Montevideo Convention on the Rights and Duties of States (1933), defines the elements that constitute statehood. One of those elements is *territory* and is primarily expressed through the *principle of territorial integrity*, which at the same time protects both state territory and its authority – the government, see more at Montevideo Convention on Rights and Duties of States, Dec.26, 1933, 165 L.N.T.S. 19, art.1.

<sup>20</sup> From 1919 and onwards, nearly all the states were created with the consent of the former sovereign, and this practice was particularly highlighted during the period of decolonization (before 1914, most of the states were created with an act of secession), see more at James Crawford, *The Creation of States in International Law*, 2007.

dissolving inconsistencies (Weller, 2009). One of the instruments that require in-depth understanding is Resolution 2625 (1970) that arguably authorizes the “legitimate” secession if the government is unrepresentative. Though there are a variety of interpretations and understanding of the instrument, the Resolution does not allow unilateral secession or restricts any application of the right to self-determination that goes against the unity of the territorial integrity of an existing state. Therefore, without a doubt, the international community disapprove of the secession attempts, and that is in line with the international law tendency for protection of the international order (Horowitz, 2003b). However, within the international law, the decolonization cases are not considered to be secession cases, and that is considered to be the same with the cases related to the dissolution of the socialist federations.<sup>21</sup>

In closing, it is important to stress, that despite similarities, each case that in essence has quests for self-determination is separate, unique, and contains a specific set of historical and legal arguments (Galbreath, 2005). The practice of the right of self-determination varies to a great degree since the right is proclaimed with international instruments, but its internal manifestations are settled within domestic mechanisms. That is one of the possible reasons why the entitlement to self-determination lacks legal certainty, apart from the prevailing facts of use of force and maintaining of the geostrategic relationships, over the legal notions (Castellino, 2014). That was apparent during the process of decolonization, but arguably had a direct impact on the latter occurrences, such as the processes of dissolution of the socialist federations in the 1990s. Understanding of the concepts and their manifestations in set historical frames will help in clarification of their today's application and eventually will get them closer to the legal rather to more political displays.

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<sup>21</sup> Although the Arbitration Commission in its first opinion noted that Yugoslavia was falling apart, not that the republics had committed secession (see at Arbitration Commission of the Conference on Yugoslavia 31 I.L.M. 1497 (1992), there are authors considering the opposite such as David O. Lloyd, Succession, Secession and State Membership in the United Nations, N.Y.U.J. Int'l L. & Pol., vol. 26, 1994; Halim Moris, Self-Determination: An affirmative Right or Mere Rhetoric? ILSA Journal of International & Comparative Law: Vol. 4- 1, 1997.

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