

Peoples, Territorialism and Boundaries

*Malcolm N. Shaw**

I. Introduction

Territorial change is often a painful process. It impacts not only upon the international community and the states concerned, both old and new, but also upon the individuals and groups that inhabit the areas involved. This is especially so where an existing independent state is dismantled in whole or in part. How such interests may be acceptably accommodated within the framework of international law is a crucial question in an era of rapid and dramatic international political change. The major elements to be considered in situations of change of sovereignty include, apart from human rights generally, the rights of self-determination and of groups, and the law relating to territory. The latter would embrace the rules governing the acquisition of title and the principles of stability of boundaries and territorial integrity. In particular, the problem is raised of the legal basis of the transformation of internal or administrative borders into international boundaries upon independence in the light of territorial and human rights concerns.

In looking at these elements, the essential focus needs to be upon the instant in time, or the bridge of time, at which, or during which, a new political entity emerges upon the international scene. This is the vantage point from which one must survey the interplay of relevant principles as the international community seeks to come to terms with a new member in a way which is acceptable to it, to states generally, to the states especially involved and to the individuals, peoples and groups particularly concerned. While considering the range of applicable principles, one must keep in mind that what is in question for present purposes is the basis of legitimation of the new entity in law and not in politics or morality, for these raise different issues.

A new state may seek the source of its legitimacy within the framework of international law either in the territorialist conception, whereby it claims that it is entitled to come to independence within a particular and accepted territorial framework, or as a consequence of the exercise of self-determination, with its focus upon the peo-

* Barrister, Sir Robert Jennings Professor of International Law, University of Leicester, University Road, Leicester, LE1 7RH, England. This article is based on a paper delivered at Liverpool University in May 1997. It has been considerably rewritten and enlarged.

ple in question. This essential distinction has been the source of much confusion in the decolonization context. One other possibility relates to the application of the principle of effectiveness coupled with recognition, whereby the very fact of the establishment of effective control over the territory is deemed to be sufficient when accompanied by clear international acceptance. In practice, the international community will regard the third ground as an exceptional circumstance for obvious policy reasons, not least because it is invariably linked with the use of force.¹ The basic choice, therefore, is between self-determination, or other possible variant of human rights, and territorialism as the founding principle governing the positioning of boundaries in the case of newly emerging states. Although the question of the basis of legitimacy of a new state in international law is different from the establishment of its boundaries, in reality there is a close relationship between the two. This is particularly the case of newly independent states emerging out of existing states where there were established administrative borders. Self-determination concentrates upon the relevant 'people', whose pattern of habitation will dictate the appropriate international boundaries. Territorialism, on the other hand, puts the emphasis upon the fact that existing borders of whatever provenance will continue, by virtue of changing their status from internal to international lines.

II. Self-Determination and the 'People' Approach: Individuals, Groups and the Territorial Dimension

The principle of self-determination has risen in importance to become one of the key political and legal concepts of modern international law.² One must, of course, distinguish between the legal right to self-determination and the political expression of the doctrine. The latter will have a far greater application than the former, since it is of the essence that a legal norm connotes a binding obligation and must be carefully defined in the light of related principles. Political principles, in contrast, tend to be broadly based and wide-ranging. Founded upon the concepts of nationality and democracy current in nineteenth-century Europe, self-determination manifested itself

- 1 See, for example, the case of British-mandated Palestine and the emergence of the boundaries of Israel as a consequence of the use of force against it; see generally, J.N. Moore (ed.), *The Arab-Israeli Conflict*, 4 vols. (1974-1994).
- 2 See in general Ofuatey-Kodjoe, 'Self Determination', in O. Schachter and C. Joyner (eds.), *United Nations Legal Order*, vol. 1 (1995) 349; U.O. Umzurike, *Self-Determination in International Law* (1972); R.A. Sureda, *The Evolution of the Right of Self-Determination* (1973); M. Shukri, *The Concept of Self-Determination in the United Nations* (1967); M. Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (1982); H. Hannum, *Autonomy, Sovereignty and Self-Determination* (1990); M.N. Shaw, *Title to Territory in Africa: International Legal Issues* (1986) 59-144 (hereinafter Shaw 1986); M.N. Shaw, *International Law* (4th ed., 1997) 177 *et seq.* and 215 *et seq.* (hereinafter Shaw 1997); C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993); A. Cassese, *Self-Determination of Peoples* (1995); T.M. Franck, *Fairness in International Law and Institutions* (1995) ch. 5; R. Higgins, *Problems and Process: International Law and How We Use It* (1994) ch. 7; C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (1993); Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* (1994) 241.

after the First World War both in the context of the minority protection regime established by the peace treaties³ and with regard to the mandates system created at the same time.⁴ It was not at that time accepted as a free-standing legal principle.⁵

The principle of self-determination was first mentioned as such in Articles 1(2) and 55 of the UN Charter as one of the bases for the development of friendly relations between states. In later instruments, the principle was defined as the right of all peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'.⁶ Self-determination became the legal principle that fuelled the decolonization process, both obligating the colonial powers to grant independence (or other acceptable political status) and endowing the territory in question with a special status and, thus, international legitimation. Numerous UN resolutions called for the application of the principle with regard to specific territories.⁷ The principle also received judicial approval in the *Namibia*,⁸ *Western Sahara*⁹ and *East Timor* cases.¹⁰ In this last case, the *erga omnes* character of the principle was proclaimed and it was stated that self-determination was indeed 'one of the essential principles of contemporary international law'.¹¹

Once having clearly established that self-determination exists as a right under international law, the key was to define it. Here the process developed with little real hindrance to cover all colonial situations, based on the distinction established by the UN between colonial territories and their metropolitan sovereigns.¹² Self-determination, therefore, came to mean that the people of the colonially defined territorial units would have the right in law to determine freely their political status. This could result in complete independence, integration with a neighbouring state, free association with another state or any other status decided upon by that people.¹³

3 See e.g. I.L. Claude, *National Minorities* (1955); J.J. Lador-Lederer, *International Group Protection. Aims and Methods in Human Rights* (1968); and P. Thornberry, *International Law and the Rights of Minorities* (1991).

4 See e.g. H.D. Hall, *Mandates, Dependencies and Trusteeships* (1948); Q. Wright, *Mandates under the League of Nations* (1930).

5 See the *Åland Islands* case, LNOJ Supp. No. 3 (1920), at 5–6 and Doc. B7/21/68/106 [VII], at 22–3. See also J. Barros, *The Åland Islands Question: Its Settlement by the League of Nations* (1968).

6 See GA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960; GA Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations, 1970; and common article 1 of the International Covenant on Civil and Political Rights, 1966, and of the International Covenant on Economic, Social and Cultural Rights, 1966.

7 See e.g. GA Res. 1755 (XVII), 1962; 2138 (XXI), 1966; 2151 (XXI), 1966; 2379 (XXIII), 1968; 2383 (XXIII), 1968; and SC Res. 183 (1963); 301 (1971); 377 (1975) and 384 (1975).

8 ICJ Reports (1971) 16, at 31, where the International Court of Justice declared that 'the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them'.

9 ICJ Reports (1975) 12, at 31. See also the *Burkina Faso/Mali* case, ICJ Reports (1986) 554, at 567 and *Guinea-Bissau v. Senegal*, 83 ILR 1, at 24 *et seq.*

10 ICJ Reports (1995) 90, at 102.

11 Although one subject to the usual jurisdictional requirements of the Court, *ibid.*, 105–6.

12 See the 1970 Declaration on Principles of International Law. See also GA Res. 1541 (XV), 1960.

13 See e.g. the *Western Sahara* case, ICJ Reports (1975) 12, at 33 and 68. See also Judge Dillard, *ibid.*, at 122; 59 ILR 30, at 50, 85, 138. See also GA Res. 1541 (XV), 1960 and the 1970 Declaration on Principles of International Law.

Peoples, Territorialism and Boundaries

In other words, the principle of self-determination of peoples was territorially defined. It is important to reiterate this point. The territorial dimension of a state is guaranteed by international law and this, until relatively recently, included colonial possessions. The gradual evolution of the international law of self-determination resulted in a breaking of the link between overseas colony and metropolitan power in so far as the principle of territorial integrity was concerned. But this was accomplished in a way that preserved the now separate territorial integrity of the colonial unit. Self-determination, therefore, ensured the distinct identity of the colony and its decolonization, but on the basis of accepting the existence of a discrete territorial unit in international law. It did not operate as a general rule as a means whereby each group within the territory had the right in international law to determine its own political future up to and including separate statehood. The crucial policy need to preserve as far as possible the stability of territorial relationships was evident and emphasized. As the Chamber of the International Court in the *Burkina Faso/Mali* case¹⁴ noted, the essential requirement of stability of boundaries had induced newly independent states to consent to the respecting of colonial borders 'and to take account of it in the interpretation of the principle of self-determination of peoples'.

Inevitably, the question arose as to whether this principle applied outside of the colonial context. The 1970 Declaration on Principles of International Law referred to self-determination as arising, in addition to the colonial context, in situations of 'subjection of peoples to alien subjugation, domination and exploitation', while Article 1(4) of Additional Protocol I, 1977, to the Geneva Red Cross Conventions of 1949, refers to 'peoples fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination'.¹⁵ Cassese concludes correctly that this phraseology has been interpreted cautiously in state practice to mean situations where one power dominates the people of a foreign territory by recourse to force, so that the right to external self-determination is consequently the counterpart of the prohibition on the use of force in international relations.¹⁶ In this case, there are no territorial implications since the application of the right to self-determination in order to reverse the existing illegality takes place within the pre-existing territorial limits, examples being Afghanistan and Cambodia under foreign Soviet and Vietnamese occupations. The Israeli-occupied territories is a slightly different situation in that the sovereignty of the area was in dispute prior to the Israeli occupation. The final settlement between Israel and the Palestinians will no doubt resolve, on the basis of mutual consent, the issue as to borders, although the starting-point would inevitably be the area as occupied in 1967.

Whether self-determination applies in a far more general sense to states that have already attained independence, thus enabling any 'people' to secede if it so wishes, constitutes the real conundrum. Having acted as the legal tool for the dismantling of

14 ICJ Reports (1986) 554, at 566-7.

15 See e.g. Cassese, *supra* note 2, at 90 *et seq.*

16 *Ibid.*, at 99. See e.g. the resolutions adopted by the UN with regard to Hungary, Tibet, the Israeli-occupied territories, Afghanistan, Cambodia, East Timor and Kuwait, *ibid.*, at 94-8.

colonial empires, could self-determination be the lever to dismember states? The answer to this lies in the essential meaning of self-determination and its relationship with the principle of territorial integrity. In practice, this relationship has been clearly marked out. The very UN instruments that proclaimed the foundation of self-determination also clearly prohibited the partial or total disruption of the national unity and territorial integrity of existing independent states.¹⁷

Regional instruments also emphasized the importance of the territorial integrity of states in this context. Principle VIII of the Helsinki Final Act, 1975, for instance, noted that, 'the participating states will respect the equal rights of peoples and their right to self-determination, acting at all times 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'.¹⁸ In addition, the Charter of Paris for a New Europe adopted by the Heads of State and Government of the Conference on Security and Co-operation in Europe in 1990 declared that the participating states 'reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of states'.¹⁹ This approach, that self-determination must be seen as subject to the principle of the territorial integrity of independent states, is reaffirmed by other practice. In particular, the Arbitration Commission of the European Conference on Yugoslavia in an influential pronouncement declared 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*)²⁰ except where the states concerned agree otherwise'.²¹

One needs at this stage, however, to refer to the famous clause in the 1970 Declaration on Principles of International Law Concerning Friendly Relations,²² which states that nothing in the section on self-determination shall be construed as authorizing or encouraging the dismembering or impairing of the territorial integrity of states conducting themselves in compliance with the principle of self-determination 'and thus possessed of a government representing the whole people belonging to the

17 See e.g. para. 6 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law. Note also that the UN has adopted resolutions reaffirming the territorial integrity of states and criticizing secessionist activities; see, e.g., SC Res. S/5002 (1961); 716 (1991) and SC Res. 822 (1993); 853 (1993); 876 (1993); 884 (1993) and 896 (1994) concerning the Caucasian states.

18 Principle IV on the Territorial Integrity of States underlined respect for this principle, noting that 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'.

19 See also article III [3] of the Charter of the Organisation of African Unity 1963, which emphasized the principle of respect for the sovereignty and territorial integrity of each state; see also articles 1, 12 and 20 of the Charter of the Organisation of American States 1948.

20 See *infra*, Section IV.

21 Opinion No. 2, 92 *ILR* 167, at 168.

22 See e.g. Cassese, *supra* note 2, at 109 *et. seq.*; Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', 65 *AJIL* (1971) 732.

territory without distinction as to race, creed or colour'.²³ The implication here is that, by reversing the proposition, states that do not so conduct themselves are not protected by the principle of territorial integrity. This, however, is hardly acceptable. Such a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed before the qualifying clause in the provision in question. It seems that upon reflection the following points may legitimately be made. First, the inevitable and unavoidable starting point remains that of the primacy of the principle of territorial integrity. This continues to be a determining principle of overwhelming importance in international law. Secondly, the clause in question authoritatively reaffirms the actual content of self-determination, that is the non-discriminatory participation in government of the whole people, within the territory in question. Whether it can also be seen as offering legitimacy to secession from an independent state in exceptional circumstances is the subject of much debate. Cassese, for example, concludes that

a racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreme and unremitting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate. A racial or religious group may secede – thus exercising the most radical form of external self-determination – once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail.²⁴

This posits a very high threshold and one assumes that some form of external validation of the failure of the efforts to attain internal self-determination would be necessary. Nevertheless, it would appear that practice demonstrating the successful application of even this modest proposition is lacking. Thirdly, it may well be the case that the attitudes adopted by third states and the international community as a whole, most likely expressed through the United Nations, in deciding whether or not to recognize the independence of a seceding entity will be affected by circumstances factually precipitating the secession, so that recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights. Thus, the content of the clause should perhaps best be seen in this light, that is as a relevant factor in determining the views taken by the international community generally, and states particularly, as to recognition.

In fact, the principle of self-determination as it operates with regard to sovereign, independent states outside the colonial and foreign occupation framework has been reworked to concentrate upon human rights matters within the territory of each state.

23 Note that this clause is reaffirmed in the Vienna Declaration and Programme of Action of the World Conference on Human Rights 1993 in section I(2), although without the qualifying phrase relating to 'race, creed or colour'; see *AJ49/668* and *32 ILM* (1993) 1661. Note also that section I(7) of the Vienna Declaration emphasizes that 'the processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law'.

24 *Supra* note 2, at 120. See also Rosenstock, *supra* note 22, at 713, 732; and R. Müllerson, *Human Rights Diplomacy* (1997), at 52–3.

As Brownlie has noted, the principle has a core of reasonable certainty and this consists in 'the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives'.²⁵ Self-determination constitutes a collective assertion or manifestation of a bundle of human rights. In its General Comment on Self-Determination adopted in 1984,²⁶ the Human Rights Committee, established under the International Covenant on Civil and Political Rights, emphasized that the realization of the right was 'an essential condition for the effective guarantee and observance of individual human rights'.²⁷ In the context of the significance of this principle within independent states, the Committee has encouraged states parties to provide details in their reports about participation in social and political structures.²⁸ So too, in engaging in dialogue with representatives of states parties, questions are regularly posed as to how political institutions operate and how the people of the state concerned participate in the governance of their state.²⁹ This necessarily links in with consideration of other articles of the Covenant concerning, for example, freedom of expression (Article 19), freedom of assembly (Article 21), freedom of association (Article 22) and the right to take part in the conduct of public affairs and to vote (Article 25). The right of self-determination provides the overall framework for the consideration of the principles relating to democratic governance.³⁰ Thus, the principle of self-determination acts as a legal mechanism to achieve a range of relevant human rights within the territorial framework of independent states, and not as a tool legally justifying the dismantling of such states. Quite which rights might fall within the principle of self-determination is perhaps unsettled, and as the Yugoslav Arbitration Commission noted in Opinion No. 2, 'international law as it currently stands does not spell out all the implications of the right to self-determination'.³¹

Within the context of the above discussion, self-determination takes effect as the right of peoples. But there is another collective right that may be relevant to the territorial question: that is, the right of minorities or, more correctly, the rights of persons belonging to minorities.³² The post First World War settlement sought to

25 'The Rights of Peoples in International Law', in J. Crawford (ed.), *The Rights of Peoples* (1988) 1, at 5. See also Cassese, *supra* note 2, at 302 *et seq.*

26 General Comment 12, see HRI/GEN/1/Rev.1 (1994), at 12.

27 The principle is seen as a collective one and not one that individuals could seek to enforce through the individual petition procedures provided in the First Optional Protocol to the Covenant. See the *Kitok* case, Report of the Human Rights Committee, A/43/40, at 221, 228; the *Lubicon Lake Band* case, A/45/40, vol. II, at 1, 27; *EP v. Colombia*, A/45/40, vol. II, at 184, 187; and *RL v. Canada* A/47/40, at 358, 365.

28 See e.g. the Report of Colombia, CCPR/C/64/Add.3 (1991), at 9 *et seq.* See also Higgins, 'Post-modern Tribalism and the Right to Secession', in Brölmann *et al.*, *supra* note 2, at 31.

29 See e.g. with regard to Canada, A/46/40, at 12. See also A/45/40, at 120-1, with regard to Zaire.

30 See also Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46; Thornberry, 'The Democratic or Internal Aspect of Self-Determination', in Tomuschat, *supra* note 2, at 101; R. Müllerson, *International Law, Rights and Politics* (1994), ch. 2; Müllerson, *supra* note 24, at 52.

31 92 *ILR*, at 168.

32 See e.g. R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed., 1992) 972 *et seq.*; Thornberry, *supra* note 3; Higgins, 'Minority Rights: Discrepancies and Divergencies Be-

buttress the new order in Central and Eastern Europe with an international system for the protection of minorities for those groups that for whatever reason were unable or not permitted to create their own national states. This system, however, did not function particularly well for a number of reasons, ranging from the sensitivities of the newly independent states to the overt exploitation of minority issues by Nazi Germany. After the Second World War, attention moved to the international protection of individual human rights.³³ It was not, however, until the adoption of the International Covenant on Civil and Political Rights in 1966 that the question of minority rights came back onto the international agenda. Article 27 of this Covenant provides that 'in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

This modest and rather negative provision as formulated centres upon 'persons belonging' to minorities rather than upon minorities as such and does not define the concept of minorities.³⁴ Nevertheless, the UN Human Rights Committee has taken the opportunity to consider the issue in discussing states' reports, individual petitions and in a General Comment.³⁵ In its General Comment,³⁶ the Committee emphasized that the rights under Article 27 did not prejudice the sovereignty and territorial integrity of states, although certain minority rights, particularly those relating to indigenous communities, might consist of a way of life closely associated with territory and use of its resources. This approach, treating minority rights within a defined territorial framework and clearly subject to it even if such rights impact upon land or territorial issues, was also adopted by the UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in December 1992.³⁷ Article 8(4) of the Declaration provides

tween the International Covenant and the Council of Europe System', in *Liber Amicorum for Henry Schermers* (1994) 193; Shaw, 'The Definition of Minorities in International Law', in Y. Dinstein and M. Tabory (eds.), *Protection of Minorities and Human Rights* (1992) 1; Thornberry, 'Self-Determination, Minorities and Human Rights', 38 *ICLQ* (1989) 867; Ermacora, 'The Protection of Minorities before the United Nations', 182 *RdC* (1983, IV) 251; Alfredsson, 'Minority Rights and a New World Order', in D. Gomien (ed.) *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjörn Eide* (1993); J. Packer and K. Myntti (eds.), *The Protection of Ethnic and Linguistic Minorities in Europe* (1993); Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments', 17 *HRQ* (1995) 48. See also F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1 (1979).

- 33 Although several instruments did refer to minority protection, see e.g. Annex IV of the Treaty of Peace with Italy 1947; the Indian-Pakistan Treaty 1950 and article 7 of the Austrian State Treaty 1955. See also the provisions in the documents concerning the independence of Cyprus, Cmnd. 1093 (1960).
- 34 See e.g. Shaw, *supra* note 32; Capotorti, *supra* note 32, at 96. See also Council of Europe Assembly Recommendation 1255 (1955), H/Inf (95) 3, at 88 and the views of the Human Rights Committee in the *Ballantyne* case, *HRLJ* (1993) 171, at 176.
- 35 See also the *Lovelace* case, I *Selected Decisions of the Human Rights Committee* (1985), at 83; the *Kitok* case, *AJ43/40*, at 221, and the *Lubicon Lake Band* case, *AJ45/40*, vol. II, at 1.
- 36 General Comment No. 23, HRI/GEN/1/Rev.1 (1994), at 38.
- 37 GA Res. 47/135. See e.g. A. Phillips and A. Rosas (eds.), *The UN Minority Rights Declaration* (1993).

that 'nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of states'.³⁸

However, there may in certain circumstances be a territorial dimension to minority rights. The Copenhagen Declaration of the Conference on Security and Co-operation in Europe 1990 provides in paragraph 35 that the participating states 'note the efforts undertaken to protect and create conditions for the promotion of the . . . identity of certain national minorities by establishing, as one of the possible means to achieve these aims, specific local or autonomous administrations corresponding to the specific historical and territorial circumstances of these minorities, in accordance with the policies of the state concerned'.³⁹ Article 10(2) of the Council of Europe's Framework Convention for the Protection of National Minorities 1995 provides that, 'in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the parties shall endeavour to ensure, as far as possible, the condition which would make it possible to use the minority language in relations between those persons and the administrative authorities'. Article 11(3) also provides that in areas inhabited by substantial numbers of members of a national minority, the parties shall endeavour, where there is sufficient demand, to display traditional local names, street names and other topographical indications intended for the public also in the minority language. Article 14(2) provides that in such situations, parties should also seek to ensure as far as possible and within the framework of their educational systems that persons belonging to minorities should have adequate opportunities for learning and for learning in their own language.⁴⁰ Although extremely cautiously formulated and accompanied by significant provisos, it is possible to conclude that there can be a territorial dimension to relevant minority rights within the territorial framework of independent states.⁴¹ But this will depend in specific instances upon, for example, bilateral action together with domestic legislation.⁴²

38 See also article 5 of the European Charter for Regional or Minority Languages 1992, and the preamble and article 21 of the Council of Europe Framework Convention for the Protection of National Minorities 1995.

39 See also Malinverni, 'Local Self-Government, Territorial Integrity and Protection of Minorities: Final Report', in European Commission for Democracy through Law, *Local Self-Government, Territorial Integrity and Protection of Minorities* (1996), at 313.

40 See also articles 7 to 12 of the European Charter for Regional or Minority Languages 1992.

41 Note that the approach taken in the Proposal for an Additional Protocol to the European Convention on Human Rights, Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, was rather stronger. Article 11 of this Recommendation provides that 'in the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state'.

42 See e.g. with regard to the Trentino-Alto Adige region, the Italian-Austrian agreement incorporated in the Treaty of Peace with Italy of 1947, Malinverni, *supra* note 39, at 317 and H. Hannum (ed.) *Documents on Autonomy and Minority Rights* (1993), at 460. See also with regard to the Åland Islands, Malinverni, at 317 and Hannum, at 141.

Peoples, Territorialism and Boundaries

Of particular interest in this context is the Hungary-Romania Treaty on Understanding, Co-operation and Good Neighbourliness of 1996.⁴³ Much of the treaty concerns the rights of persons belonging to national minorities, specifically the Hungarian minority in Romania and the Romanian minority in Hungary.⁴⁴ Article 15 provides for a range of such rights, including the rights to establish and maintain educational, cultural and religious institutions and organizations; to use their respective mother tongues in private and in public; to participate in political, economic, social and cultural life, and to maintain contact among themselves and across frontiers. Article 15(3) provides that 'in areas where persons belonging to the minority concerned live in a substantial number, both parties shall allow the display, also in the language of the minorities, the traditional local denominations, street names and other topographical indications intended for the public'. In addition, Article 15(9) provides that the parties will refrain from measures which, by altering the proportions of the population in areas inhabited by persons belonging to national minorities, are aimed at restricting the rights and freedoms flowing from the Council of Europe's Framework Convention for the Protection of National Minorities, the Copenhagen Declaration of the CSCE, the UN Declaration on Minorities and Recommendation 1201 (1993) of the Council of Europe's Parliamentary Assembly.⁴⁵

However, these rights are to apply within the territories of the states concerned. Article 4 emphasizes that the parties 'shall respect the inviolability of their common border and the territorial integrity of the other party. They further confirm that they have no territorial claims on each other and that they shall not raise any such claims in the future'. Article 15(12) provides that

neither [sic] of the obligations contained in the present article shall be interpreted as implying any right to engage in any activity of [sic] perform any act contrary to the purposes and principles of the Charter of the United Nations, other obligations of international law or the Helsinki Final Act and the Paris Charter of the Conference on Security and Co-operation in Europe, including the principle of the territorial integrity of states.

In addition, it is expressly provided⁴⁶ that 'the contracting parties agree that Recommendation 1201 does not refer to collective rights, nor does it impose upon them the obligation to grant to the concerned persons any right to a special status of territorial autonomy based on ethnic criteria'.

43 See 36 *ILM* (1997) 340.

44 Note that there are estimated to be some 2 million ethnic Hungarians in Romania and a few thousand ethnic Romanians in Hungary, *ibid.*

45 The express incorporation of the three non-legally binding documents, viz. the Copenhagen Declaration, the UN Declaration and Recommendation 1201 into this legally binding treaty is particularly interesting, see article 15(1)b and *infra* text at note 46. The parties also specifically agreed, in article 15(1)a, to apply the Council of Europe's Framework Convention, if more favourable provisions do not exist in their domestic legislation. Further, the parties agreed in article 15(11) that 'they will apply as part of this Treaty the provisions relating to further developing the rights of persons belonging to national minorities contained in those international documents to which they will subscribe in the future'.

46 In the Annex listing the Copenhagen Declaration, UN Declaration and Recommendation 1201 as the documents referred to in article 15(1)b.

However, those minorities that are accepted as having the clearest territorial manifestation are indigenous peoples. Such peoples are identified and characterized by the particularly close relationship maintained with the territory they inhabit.⁴⁷ Article 14 of International Labour Organisation Convention No. 169 of 1989, for example, provides that the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.⁴⁸ The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted a Draft Declaration on the Rights of Indigenous Peoples in 1994,⁴⁹ which emphasizes a range of individual and collective rights, including the right to self-determination, freedom from genocide, the right to maintain their cultural traditions, and rights to language, education, establishment of media facilities and participation at all levels of decision-making affecting their interests. In particular, various rights connected with the ownership, control and use of land are proposed.⁵⁰ In addition, the Draft provides in Article 31 that 'indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs'. Quite what this means in practice is unclear and it is, of course, by no means certain that this Draft Declaration will be adopted as such by the UN. Even if that were to happen, the normative impact would be minimal in that UN declarations are recommendatory only. Nevertheless, the fact that the notion of some form of autonomy rights has been proposed with regard to indigenous peoples constitutes an interesting step.

The fact remains that however extensive the list of individual and collective rights may turn out to be in international law relative to indigenous peoples, these would only be exercisable within the existing territorial definition of the particular state. One cannot confuse internal territorial rights with territorial sovereignty. This point was emphasized in particular in the 1995 Draft Inter-American Declaration on the Rights of Indigenous Peoples,⁵¹ which, while laying down a wide range of provisions with regard to such rights, concludes in Article XXIV by stating that 'nothing in this instrument shall be construed as granting any right to ignore boundaries between states'.

It cannot, therefore, be maintained that the current conception of minority rights in international law includes the right as such to territorial autonomy. Whatever the rights afforded under international law to individuals, groups, minorities or peoples,

47 See e.g. Marquardt, 'International Law and Indigenous Peoples', 3 *International Journal on Group Rights* (1995) 47; Berger and Hunt, 'Towards the International Protection of Indigenous Peoples' Rights', 12 *NQHR* (1994) 405; Barsh, 'Indigenous Peoples: An Emerging Object of International Law', 80 *AJIL* (1986) 369; S.J. Anaya, *Indigenous Peoples in International Law* (1996); G. Bennett, *Aboriginal Rights in International Law* (1978).

48 This partially revised ILO Convention No. 107 of 1957, which possessed a markedly assimilationist approach. Note that under Convention No. 169 self-identification as indigenous or tribal is to constitute the fundamental criterion for determining such groups.

49 See resolution 1994/45, E/CN.4/Sub.2/1994/56, at 103. See also Coulter, 'The Draft UN Declaration on the Rights of Indigenous Peoples: What Is It? What Does It Mean?', 13 *NQHR* (1995) 123.

50 See articles 25–28 of the UN Draft.

51 See OEA/Ser/L/V/II.90, Doc. 9 rev. 1.

these cannot be interpreted to include rights either to territorial autonomy or sovereignty, without the express consent of the relevant state. Of course, there may be territorial implications with regard to some of these rights, but one cannot infer from these anything more substantial than has been clearly granted. International law is quite clear with regard to the predominance of the need to respect international boundaries.

III. Boundaries: Internal and International

Autonomy within a state may, of course, have a purely territorial manifestation, not being dependent upon the habitation of particular minorities. Internal or administrative borders may be established by domestic law for a variety of purely domestic purposes, and they may alter widely over time.⁵² Both within colonial territories⁵³ and within non-colonial independent states⁵⁴ changes to administrative lines are neither unknown nor particularly rare. Such borders are deeply tied to domestic considerations and are not intended to constitute permanent boundaries nor are they protected as such under international law. They may be of varying origin⁵⁵ and consequence nationally. In some cases, such divisions are of relatively little importance; in others, such as is the case with federal states, they are of considerable significance. In many instances, such administrative borders have been changed by central government in a deliberate attempt to strengthen central control and weaken the growth of local power centres. In other cases, borders may have been shifted for more general reasons of promoting national unity or simply as a result of local pressures. In some states, such administrative borders can only be changed with the consent of the local province or state (in the subordinate sense) or unit.⁵⁶ In some cases, internal lines are clear and of long standing. In others, they may be confused, of varying types and inconsistent. The International Court, in the colonial context of the *El Salvador/Honduras* case,⁵⁷ made mention of provinces, *Alcaldias*, *Mayores*, *Corregimientos*, *Intendencias*, the territorial jurisdiction of the higher courts (*Audencias*), Captaincies-General and Vice-Royalties. It was noted that the jurisdictions of general administrative bodies did not always coincide with those of particular or special jurisdictions, such as military commands, while there were also ecclesiastical jurisdictions to be considered.⁵⁸

52 See in particular M. Anderson, *Frontiers: Territory and State Formation in the Modern World* (1996), ch. 4.

53 See e.g. Shaw 1986, *supra* note 2, at 50 *et seq.*

54 See e.g. with regard to the UK, S.A. De Smith and R. Brazier, *Constitutional and Administrative Law* (6th ed., 1989), at 397 *et seq.*

55 See e.g. the *El Salvador/Honduras* case, ICJ Reports (1992) 351, at 387.

56 E.g., the US, Canada, Australia, Germany and Switzerland, see Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90 *AJIL* (1996) 590, at 604.

57 ICJ Reports (1992) 351, at 387-8.

58 *Ibid.*

The essential difference between internal borders and international boundaries, of course, lies in the fact that the latter are established in order to mark the limits of sovereignty and territorial jurisdiction as between different international persons. International boundaries fix permanent lines, both geographically and legally, with full effect within the international system, and can only be changed through the consent of the relevant states. Such boundaries have important consequences with regard to international responsibility and jurisdiction. Internal borders possess none of these characteristics. However, the process of independence may involve the transformation of internal lines into international boundaries. In the case of those boundaries of the new state that were international boundaries before independence, for example the boundaries between colonies of different colonial sovereigns or the boundaries with another independent state of a seceding part of an independent state, then the established status of such lines continues. No matter what the provenance of the international boundary, it remains as such unaffected by the independence of the newly established state whether by way of decolonization or secession or dismemberment.

In the case of international boundaries established by treaty, the rule is particularly clear and incontrovertible. The International Court in the *Libya/Chad* case⁵⁹ concluded that the relevant Franco-Libyan Treaty of 1955 determined a permanent frontier (*inter alia* as between colonial Chad and Libya) and it therefore followed that 'the establishment of this boundary is a fact which, from the outset, had had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands.' This is irrespective of the nature and status of the treaty itself. As the Court emphasized, 'a boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary'.⁶⁰ This approach is supported by the relevant application of the principle of *rebus sic stantibus*, according to which the rule relating to the termination of a treaty on the grounds of a fundamental change of circumstances does not apply where the treaty establishes a boundary.⁶¹ It is also underlined by Article 11 of the Vienna Convention on Succession of States in Respect of Treaties 1978, which provides that 'a succession of states does not as such affect: (a) a boundary established by a treaty. . .'.⁶²

The same rule positing the continuance of an international boundary notwithstanding the independence of an entity territorially defined in whole or in part by such boundary applies also where the boundary has become established otherwise

59 ICJ Reports (1994) 6, at 37.

60 *Ibid.*

61 See article 62 of the Vienna Convention on the Law of Treaties 1969. See also Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 *BYbIL* (1996) 75, at 88 *et seq.*

62 *Ibid.*, at 89 *et seq.* See also the *Tunisia/Libya* case, ICJ Reports (1982) 18, at 66; the *Burkina Faso/Mali* case, ICJ Reports (1986) 554, at 563 and Judge Ajibola's Separate Opinion in the *Libya/Chad* case, ICJ Reports (1994) 6, at 64. See also Opinion No. 3 of the Yugoslav Arbitration Commission, 92 *ILR* 170, at 171.

than by treaty, for example by way of recognition or acquiescence. As the Court made clear in the *Burkina Faso/Mali* case,⁶³ 'there is no doubt that the obligation to respect pre-existing international boundaries in the event of a state succession derives from a general rule of international law'.⁶⁴

However, the real question is whether on the same or analogous basis it can be argued that internal or administrative borders become transformed automatically or presumptively into international boundaries upon the independence of the new entity. At first sight, this seems incongruous. International boundaries, after all, are invariably created or accepted as lines dividing sovereign entities with all that that implies. Internal borders are clearly not so established. As the International Court wryly noted in the *El Salvador/Honduras* case,⁶⁵ after detailing the range of different administrative lines that were established in South America in colonial times, 'it has to be remembered that no question of international boundaries could even have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries'.⁶⁶

IV. The Transformation of Internal into International Boundaries: The Principle of *Utī Possidetis*

A. *Utī Possidetis* and Statehood

The principle of *uti possidetis* is concerned with the territorial aspect of the move to independence. It is therefore one aspect of the process of creation of statehood. Whether and how a new state emerges is a major issue of fundamental importance to the international community and it is a phenomenon much studied.⁶⁷ The two processes are therefore not identical, although connected to the same phenomenon of the establishment of a new international legal person. A new state will come into existence once it is clear that a new entity complying with the criteria of statehood has emerged. Article 1 of the Montevideo Convention on Rights and Duties of States 1933 lays down the most widely accepted formulation of the criteria of statehood in international law, noting that the state as an international person should possess a permanent population, a defined territory, government, and capacity to enter into relations with other states. The Yugoslav Arbitration Commission in Opinion

63 ICJ Reports (1986) 554, at 566.

64 See also the *Tunisia/Libya* case, ICJ Reports (1982) 18, at 65–6.

65 ICJ Reports (1992) 351, at 387–8.

66 See also the *Dubai/Sharjah* case, 91 ILR 543, at 579.

67 See e.g. Crawford, *The Creation of States in International Law* (1979); R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), at 11–57; K. Marek, *Identity and Continuity of States in Public International Law* (2nd ed., 1968); M.M. Whiteman, *Digest of International Law*, vol. I (1968), at 221–33, 283–476; and Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public* (5th ed. 1994), at 397. See also *Société Française pour le Droit International, L'État Souverain* (1994) and L. Henkin, *International Law: Politics and Values* (1995), ch. 1.

No. 1⁶⁸ declared that 'the existence or disappearance of a state was a question of fact' and that 'the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority'. Conformity with the criteria would, absent special factors, be sufficient to establish statehood and this would be reinforced and evidenced by international recognition.⁶⁹ It is also clear that a new state may be created even if there is some uncertainty or dispute over its boundaries.⁷⁰ By way of contrast, *uti possidetis* is not essentially a factual question, although dependent upon the same factual background, but a presumption of law concerning one aspect of the transmission of sovereignty from an existing state to a new state.

B. The Principle of *Uti Possidetis*⁷¹

It is not unusual for legal concepts over time to alter their meaning or emphasis as new circumstances arise, and this has undoubtedly happened with regard to the doctrine of *uti possidetis*. This first arose in Roman law as a means of preserving the *status quo* of a situation, however that situation arose.⁷² In the early period of colonization, it appeared as a principle endorsing actual possession in the context of resolving disputes between expanding powers. Ultimately, it emerged in Latin America as a concept reinforcing the control of the local authorities as against claimants on the basis of constructive or fictional, rather than actual, possession. It involved a change in orientation from effective occupation of areas to sanctification of the colonial administrative line. It was intended in Latin America to forestall any renewal of European colonization upon the basis that parts of the continent constituted *terra nullius* and were thus open to acquisition by effective occupation. It was necessarily an assertion of constructive possession since many areas of the continent remained uninhabited or unexplored. The second role of *uti possidetis* was to seek to prevent boundary conflicts as between the successor states of the Spanish Empire.⁷³

68 92 *ILR* 165.

69 See generally Shaw 1997, *supra* note 2, at ch. 5.

70 See e.g. I. Brownlie, *Principles of International Law* (1980), at 73; H. Lauterpacht, *Recognition in International Law* (1948), at 30. See also the *North Sea Continental Shelf* cases, ICJ Reports (1969) 3, at 32; UK Materials on International Law, 62 *BYbIL* (1991) 557.

71 See, e.g., Bardonnat, 'Les Frontières terrestres et la relativité de leur tracé', 153 *RdC* (1976-V) 13, at 54 *et seq*; Moore, 'Memorandum on *Uti Possidetis*: Costa Rica-Panama Arbitration 1911', *The Collected Papers of John Bassett Moore*, vol. III (1944) 328; Tran Van Minh, 'Remarques sur le principe de l'intangibilité des frontières', in A. Fenet (ed.) *Peuples et états du tiers-monde face à l'ordre international* (1976) 51; Y. Blum, *Historic Titles in International Law* (1965) 341; Whiteman, *supra* note 67, at 1086; Pinho Campinos, 'L'Actualité de l'*uti possidetis*', in *Société française pour le droit international, La Frontière* (1980) 95; Jennings and Watts, *supra* note 32, at 669 *et seq*; Nguyen Quoc Dinh, Daillier and Pellet, *supra* note 67, at 461; A.O. Cukwurah, *The Settlement of Boundary Disputes in International Law* (1967), at 114; Sorel and Mehdi, 'L'*Uti possidetis* entre la consécration juridique et la pratique: essai de réactualisation', *Annuaire français de droit international* (1994), at 11 and Ratner, *supra* note 56. See in particular the discussion in Shaw, *supra* note 61.

72 See e.g. Moore, *supra* note 71, at 328 and Shaw, *supra* note 61, at 98 *et seq*.

73 See e.g. the *Colombia v. Venezuela* case, *Reports of International Arbitral Awards*, vol. 1, at 223 and the *El Salvador/Honduras* case, ICJ Reports (1992) 251, at 387.

Eventually, this second, originally subsidiary, role evolved into the primary function of the principle.

It is beyond question that the principle of *uti possidetis* became established as a binding norm of international law with regard to Latin America. The rule appeared in many national constitutions⁷⁴ and in many inter-American treaties.⁷⁵ It has also been reaffirmed judicially.⁷⁶ In Latin America, the doctrine applied as between the successor states to the Spanish Empire and not as between those states and Brazil, the successor state to the Portuguese Empire on the continent. The Brazilian view of *uti possidetis* was to emphasize that it applied *de facto* rather than *de jure*, that is it applied to factual possession rather than to legal lines founded upon legal title.⁷⁷

From Latin America the doctrine moved to Africa,⁷⁸ where the political and historical situation was rather different. Whereas essentially one colonial power was involved in Latin America, in Africa some seven European colonial powers were engaged, each with more than one colony at varying times.⁷⁹ The mode of establishing boundaries was also different in that geometric lines predominated and, on the whole, there was little reference to local ethnic or economic considerations.⁸⁰ The process of decolonization proceeded upon the basis of the principle of self-determination, with its assertions first that the territory of a colony was separate and distinct from that of the colonial power and, secondly, that the people of each colony had the right to determine its own political status, up to and including independence.⁸¹ With the development of decolonization as a legal principle in the form of self-determination, the question arose as to the appropriate territorial framework. This was early established as that of the colonially defined territory, unless there were special circumstances requiring determinations by units within the colonial territory. Such exceptions were justified either on the basis of consent where the situation was deemed to require this⁸² or in the interests of peace and security.⁸³ Of

74 See, e.g., the two parties in the *Colombia-Venezuela case*, *Reports of International Arbitral Awards*, vol. 1, 223, at 278. See also Nelson, 'The Arbitration of Boundary Disputes in Latin America', 20 *Netherlands International Law Review* (1973) 267, at 268-71 and Ratner, *supra* note 56, at 594.

75 See for example, Moore, *supra* note 71, at 335 *et seq*; the *Beagle Channel case*, HMSO (1977), at 4 *et seq*; the *Colombia-Venezuela case*, *Reports of International Arbitral Awards*, 1, at 223; the *Honduras Borders case*, *Reports of International Arbitral Awards*, vol. 2, at 1307 and the *Arbitral Award of the King of Spain case*, ICJ Reports (1959) 191, at 199.

76 See e.g. the *El Salvador/Honduras case*, ICJ Reports (1992) 351, at 386. See also the *Rann of Kutch case*, 50 ILR 407 (Judge Bebler's Dissenting Opinion) and 470 (Chairman Lagergren); the *Dubai/Sharjah case*, 91 ILR 543, at 578; the *Burkina Faso/Mali case*, ICJ Reports (1986), at 565; the *Guinea-Bissau v. Senegal case*, 83 ILR, at 35; and the *Libya/Chad case*, ICJ Reports (1994), at 83 *et seq*. (Judge Ajibola).

77 See e.g. Shaw, *supra* note 61, at 100.

78 Note the essential application of the principle in Asia, see the *Temple case*, ICJ Reports (1962) 6, at 16.

79 Britain, France, Germany, Italy, Spain, Portugal and Belgium.

80 See e.g. Shaw, *supra* note 61, at 101.

81 See e.g. the Colonial Declaration and the Declaration on Principles of International Law, *supra* note 6.

82 See e.g. the situation with regard to the former British Cameroons which formed part of the Germany colony of Kamerun, the major part of which had gone to France as a mandate then trust ter-

course, changes to the international boundaries of colonies could take place by virtue of consent, for example by treaty or adjudication, or by acquiescence during the period of colonization.⁸⁴ Changes to the internal or administrative lines could also be introduced, although in this case by virtue of mere domestic action, including acquiescence, during the colonial period.⁸⁵

It was the adoption of Resolution 16(1) by the Organisation of African Unity at its Cairo meeting in 1964 which entrenched, or reaffirmed, the core principle. This stated that colonial frontiers existing at the moment of decolonization constituted a tangible reality which all member states pledged themselves to respect. This resolution was a key political statement and one with crucial legal overtones. It was discussed by the Chamber of the International Court in the *Burkina Faso/Mali* case⁸⁶ as an element in a wider situation. The Chamber declared that the 1964 resolution 'deliberately defined and stressed the principle of *uti possidetis juris*', rather than establishing it. It was emphasized that the fact that the new African states had agreed to respect the administrative boundaries and frontiers established by the colonial powers 'must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope'. The acceptance of the colonial borders by African political leaders and by the OAU itself neither created a new rule nor extended to Africa a rule previously applied only in another continent. Rather, it constituted the recognition and confirmation of an existing principle.

As the Chamber noted, the essence of the principle of *uti possidetis*

lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.⁸⁷

ritory. The British Cameroons were administered in two parts, the northern area together with Nigeria and the second part as a separate entity. It was decided, with UN approval, to permit separate determinations of the wishes of the inhabitants; eventually the northern part decided to join Nigeria and the southern part to join the Republic of Cameroun, the former French trust territory; see Shaw, *supra* note 61, at 141. This is to be contrasted with the situation regarding British Togoland where, despite initial calls for the union of this territory with the former French Togoland and plebiscite by area, the UN decided upon a plebiscite covering the whole of British Togoland as one unit. This resulted in a majority in favour of uniting with the Gold Coast (to form the independent state of Ghana), which is what happened in 1957, even though the votes in the southern part of the territory were against this union; see Shaw 1986, *supra* note 2, at 111-2.

83 See e.g. GA Res. 81(II), 1947, calling for the partition of the British-mandated territory of Palestine into Jewish and Arab states, and e.g. GA Res. 746 (XV), 1960, concerning the partition of the Belgian trust territory of Ruanda-Urundi into the two states of Rwanda and Burundi, Shaw, *supra* note 61, at 148.

84 See e.g. the *Temple* case, ICJ Reports (1962), at 6 and the *Taba* case, 80 ILR 297.

85 See e.g. the *El Salvador/Honduras* case, ICJ Reports (1992) 351, at 401 and the *Dubai/Sharjah* case, 91 ILR 585.

86 ICJ Reports (1986) 554, at 565-6.

87 *Ibid.*, at 566.

Peoples, Territorialism and Boundaries

This definition was reaffirmed in the *El Salvador/Honduras* case⁸⁸ and referred to as an authoritative statement. In the latter case, the Chamber emphasized that *uti possidetis* was essentially 'a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes'.⁸⁹ It was underlined in the *Burkina Faso/Mali* case⁹⁰ that 'the principle of *uti possidetis* freezes the territorial title; it stops the clock but does not put back the hands'. The law that is applicable to this process is essentially domestic law,⁹¹ although the principle itself is one of international law so that recourse to other matters may become necessary in order to determine, if possible, the *uti possidetis* line. Such other matters would include, for example, administrative practices, the actual exercise of authority and the conduct of the new states during the period immediately after independence.⁹² The appropriate time frame is clearly the moment of independence,⁹³ although in certain situations the matter may be rather more complex, for instance, where the date of independence simply marks the date of succession to boundaries established with binding force by earlier instruments, as in the *Libya/Chad* case⁹⁴ or where more than one party is concerned with different dates of independence. Of course, materials subsequent to independence may prove determinative of title, such as when relevant treaties have been entered into or an adjudicative award has taken place.

It is important to recognize *uti possidetis* for what it is, and not to overemphasize it. It is a transitional mechanism and process which concerns the transmission of sovereignty from a previous sovereign authority to the new state. It is, therefore, part of the larger principle relating to the stability of territorial relationships.⁹⁵ It provides the territorial delineation for the process of establishment of a new state by positing, absent special factors, the continuation of the pre-existing line, whatever provenance that line previously claimed. It is limited both temporally and conceptually to this situation. Once the new state is established, the principle of *uti possidetis* will give way to the principle of territorial integrity, which provides for the international protection of the new state so created. While it 'freezes' the territorial situation during the movement to independence, *uti possidetis* does not prescribe a territorial boundary which can never be changed. It is not intangible in this sense.

If the principle of *uti possidetis* has now been clearly recognized as a rule of international law applicable generally with regard to the phenomenon of decoloniza-

88 ICJ Reports (1992) 351, at 386.

89 *Ibid.*, at 388.

90 ICJ Reports (1986) 554, at 568.

91 See e.g. the *El Salvador/Honduras* case, ICJ Reports (1992) 351, at 559. But cf. the *Burkina Faso/Mali* case, ICJ Reports (1986) 554, at 568 where the role of the colonial law was characterized rather opaquely as 'one factual element among others'.

92 *Ibid.* See also the *Honduras Borders*, *Reports of International Arbitral Awards*, vol. 2, at 1325.

93 See e.g. the *Burkina Faso/Mali* case, ICJ Reports (1986) 554, at 568.

94 ICJ Reports (1994), at 6.

95 See e.g. Shaw, *supra* note 61, at 81; Kaikobad, 'Some Observations on the Doctrine of Continuity and Finality of Boundaries', 54 *BYBIL* (1983) 119 and Bardonnnet, *supra* note 71, at 9. See also the *Temple* case, ICJ Reports (1962) 6, at 34 and the *Beagle Channel* case, HMSO (1977), at 11.

tion,⁹⁶ it remains to be determined whether it is a principle applicable to all situations of independence, irrespective of the factual situation. This issue, as to whether *uti possidetis* applies beyond the decolonization context, has come to the fore only in recent years, but with some force, as the Yugoslav and USSR examples demonstrate.

The Yugoslav Arbitration Commission took a clear view on this question. In Opinion No. 2, it was stressed 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'.⁹⁷ More directly, the Commission held in Opinion No. 3 that

except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and in particular from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognised as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between *Burkina Faso and Mali (Frontier Dispute)*, (1986) ICJ Reports 554 at 565'.⁹⁸

C. *Uti Possidetis* as a General Principle

This acceptance of *uti possidetis* as a principle of general applicability going beyond the purely decolonization scenario has, however, been challenged.⁹⁹ Two arguments have been presented: first, that it is in law not correct, and secondly, that it would offend other principles of international law, particularly the right to self-determination and human rights generally.

1. The First Challenge

The first objection focuses upon the alleged extension by the Arbitration Commission of an ambiguous *obiter dicta* by the Chamber in the *Burkina Faso/Mali* case. The Chamber, of course, discussed the principle of *uti possidetis* within the context of the *compromis* which specifically referred to the principle of the intangibility of colonial frontiers.¹⁰⁰ But it is striking that the Chamber felt it important to deal with the principle.¹⁰¹ The Chamber sought to trace the origin of *uti possidetis* in Spanish America and to underline that the principle was not 'a special rule which pertains solely to one specific system of international law'.¹⁰² On the contrary,

96 See e.g. Torres Bernárdez, 'The "Uti Possidetis Juris Principle" in Historical Perspective', in K. Ginther et al (eds), *Festschrift für Karl Zemanek* (1994) 417, at 420.

97 92 *ILR* 168.

98 *Ibid.*, at 171.

99 See Craven, 'The European Community Arbitration Commission on Yugoslavia', 65 *BYbIL* (1995) 333, at 385 *et seq.* and Ratner, *supra* note 56, at 613 *et seq.*

100 ICJ Reports (1986) 554, at 557.

101 It was underlined that 'the Chamber nonetheless wishes to emphasise its general scope, in view of its exceptional importance for the African continent and for the two parties'. *Ibid.*, at 565.

102 *Ibid.*

Peoples, Territorialism and Boundaries

it is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.¹⁰³

The Chamber was, of course, dealing with *uti possidetis* in that case in the context of the decolonization process. However, the way in which it phrased its comment does suggest something more than a statement that *uti possidetis* applies in all situations of decolonization. It does seem that the Chamber was keen to make a general statement as to the situation with regard to 'the obtaining of independence, wherever it occurs'. The fact that the expressed justification for the principle – that is, the prevention of 'fratricidal struggles provoked by the challenging of frontiers' – is eminently applicable beyond the decolonization situation reinforces the perception that a generalized comment was being made. There was no need for the Chamber to do other than note that *uti possidetis* was applicable as between the parties as a result of its inclusion in the *compromis*. However, the Chamber moved beyond this. Clearly, the Chamber was underlining the fact that *uti possidetis* applied to all decolonization situations. But the way in which it worded this does give rise to the legitimate interpretation that in the Chamber's view the principle applied in all situations where there was a movement from one sovereign authority to another.

Such statements by the Court outside the strict *ratio decidendi* of a decision can constitute authoritative statements of the law. They may reflect existing customary law or may form part of the process leading to the creation of a new norm of customary law. In the latter case, one needs to take into account the extent to which the statement in question is consistent or inconsistent with pre-existing international law. It is indisputable that a new norm of customary law would require a lower level of evidential support where there is in existence no prior contradictory norm than would be the case where it is sought to overturn or seriously modify an existing norm.¹⁰⁴ Since there was in existence no norm of customary law expressly precluding the application of the *uti possidetis* principle to new states emerging from existing states, it is argued that the level of proof required to establish that the principle does now extend to such situations is not particularly high. Indeed, the logic of the basic justification for the existence of the principle, that is the avoidance of conflict upon a succession of sovereign authorities in the territorial context, applies equally to the post-colonial scenario.

The Yugoslav Arbitration Commission built upon this approach of the *Burkina Faso/Mali* judgment in order to make explicit what it felt was obviously implicit, thus concluding that 'the former boundaries become frontiers protected by international law'.¹⁰⁵ Some writers, however, have taken the view that the Commission

103 *Ibid.*

104 See e.g. Shaw 1997, *supra* note 2, at 61; A. D'Amato, *The Concept of Custom in International Law* (1971), at 60–61; and Akehurst, 'Custom as a Source of International Law', 47 *BYIL* (1974–5) 1, at 19. See also Judge Alvarez, the *Anglo-Norwegian Fisheries case*, ICJ Reports (1951) 116, at 152, and Judge Loder, the *Lotus case*, PCIJ, Series A, no. 10 (1927) 18, at 34.

105 92 *ILR* 171.

erred by its 'misinterpretation'¹⁰⁶ or 'misrepresentations'¹⁰⁷ of the Chamber's reasoning or judgment. This is based on the conclusion that the Chamber was referring only to the process of independence upon decolonization. In support of this position, elements from paragraph 23 of the judgment are cited.¹⁰⁸ A deeper look at this paragraph is therefore required. The paragraph commences with the meaning of *uti possidetis* in Spanish America and the reason for its existence, the first being the avoidance of renewed colonization by extra-continental powers. However, the Chamber went on to state that 'there is more to the principle of *uti possidetis* than this particular aspect'. Switching to a more abstract approach, the Chamber underlined that 'the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved'. One should note in particular the generality of the sentence and the use of the present tense. The Chamber continued by stating that 'such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term'. Having made these broad statements, the Chamber then referred specifically to the states of the former Spanish America and to the parties in the instant case emerging from French West Africa and concluded in this context that '*uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs'.

This approach to the Chamber's judgment notes the mixing of the general and the particular. The Chamber was inevitably bound to focus upon the particular facts of the case which found their source in the process of decolonization. Nevertheless, it does seem upon careful reading that the Chamber was seeking to underline that behind the application of *uti possidetis* to all decolonization situations lay a more general principle which relates to all independence processes. This is perhaps reinforced by looking at paragraph 20 of the judgment,¹⁰⁹ where the Chamber emphasizes that the principle of *uti possidetis* 'is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.

It is therefore felt that the Yugoslav Arbitration Commission, in so relying upon the *Burkina Faso/Mali* decision, was not acting in error.¹¹⁰ It is not unreasonable to argue that the Commission, faced with the implosion of Yugoslavia and the need to apply appropriate legal principles, relied upon a legitimate interpretation of the

106 See Ratner, *supra* note 56, at 614.

107 See Torres Bernárdez, *supra* note 96, at 435.

108 ICJ Reports (1986) 554, at 566.

109 *Ibid.*, at 565.

110 Ratner, *supra* note 56, at 614. Nor perhaps is it correct to say that the Commission's opinion marks 'a novel extension of the *uti possidetis* principle outside the context of decolonization', see Cra-ven, *supra* note 99, at 386.

Chamber's statement to conclude that *uti possidetis* was an abstract principle applicable to all independence situations. It is, indeed, quite a normal judicial process to move step by step from examining a set of facts, to inferring from them a legal principle expressed in generalizable form, to applying that principle to a set of facts deemed analogous to, but not identical with, the original scenario.

It is also true that the weight of state practice in recent years clearly supports the view that the principle of *uti possidetis* applies presumptively to post-colonial independence situations.

Article 5 of the Agreement Establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991¹¹¹ provided that 'the High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth'. This was reinforced by the Alma Ata Declaration of 21 December 1991, signed by eleven of the former Republics (i.e., excluding the Baltic States and Georgia),¹¹² which referred to the states 'recognising and respecting each other's territorial integrity and the inviolability of existing borders'. Although these instruments refer essentially to the principle of territorial integrity protecting international boundaries, it is clear that the intention was to assert and reinforce a *uti possidetis* doctrine, not least in order to provide international, regional and national legitimation for the new borders. This is so since the borders to be protected that had just come into being as international borders were those of the former Republics of the USSR and no other.¹¹³ Further, the European Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, adopted by the European Community and its Member States on 16 December 1991, provided for a common policy on recognition, which required *inter alia* 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement'.¹¹⁴ This reference was not restricted to international frontiers. The principle of *uti possidetis* derives additional support from subsequent state practice concerning the attempted secession of Abkhazia from the Republic of Georgia¹¹⁵ and the fighting between Azerbaijan and Armenia concerning the Armenian-populated Nagorny Karabakh area of Azerbaijan.¹¹⁶ Similarly, claims to alter the Ukraine-

111 Signed by the Republics of Belarus, the Russian Federation and the Ukraine, 31 *ILM* (1992) 138. The Protocol of Alma Ata, signed on 21 December 1991, added the Republics of Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan. *Ibid.*, at 147. The Republic of Georgia joined the CIS on 8 October 1993, see 34 *ILM* (1995) 1298. See also Yakemtchouk, 'Les Conflits de Territoires et de Frontières dans les Etats de l'ex-URSS', *Annuaire français de droit international* (1993) 393.

112 31 *ILM* (1992) 148.

113 Note also that article 6 of the Ukraine-Russian Federation Treaty of 19 November 1990 provided that both parties recognized and respected the territorial integrity of the former Russian and Ukrainian Republics of the USSR within the borders existing in the framework of the USSR.

114 92 *ILR* 174 (emphasis added).

115 See for example SC Res. 876 (1993); 896 (1994); 906 (1994); 937 (1994); 977 (1995); 993 (1995) and 1036 (1996) reaffirming respect for the sovereignty and territorial integrity of Georgia faced with the attempted Abkhazian secession. See also Yakemtchouk, *supra* note 111, at 426 *et seq.* See also *ibid.*, at 422 *et seq.* with regard to the conflict between Georgia and the South Ossetian region.

116 See SC Res. 822 (1993); 853 (1993); 874 (1994) and 884 (1993) reaffirming respect for the sovereignty and territorial integrity of all states in the region, including Azerbaijan, and reaffirming also

Russia boundary in order to place the ethnically Russian dominant Crimea within the Russian Federation have found no support,¹¹⁷ nor have those of the Russian minority in Moldova.¹¹⁸ In each case, the territorial integrity of the states concerned, successors of the Republics of the former USSR, was reaffirmed in circumstances demonstrating that the definition of the territory concerned was that of the former Republic.

This approach is also borne out by the practice relating to the demise of Czechoslovakia.¹¹⁹ The Czech and Slovak Federal Republic ceased to exist on 1 January 1993 to be succeeded by two new states, the Czech Republic and Slovakia. The frontiers of the former state had been established by the Peace Treaties of 1919. By the Treaty on the General Delimitation of the Common State Frontiers of 29 October 1992, the boundary between the two new states was to be the administrative border existing between the Czech and Slovak parts of the former state.

Again with regard to Yugoslavia, international practice is clear. Both the European Guidelines, with the reference to 'all frontiers', and Opinion Nos. 2 and 3 of the Yugoslav Arbitration Commission made it apparent that the new states emerging out of the Former Yugoslavia did so within the administrative borders of the former republics. No international recognition was given, for example, to the Krajina region of Croatia inhabited, until the fighting in 1995, by Serbs, nor was the Republika Srpska (the Serb-dominated part of Bosnia) recognized as the independent state it claimed to be. Indeed, Article X of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Peace Agreement of 21 November 1995) provided that 'the Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognise each other as sovereign independent states within their international borders', while Security Council Resolution 1038 (1996) reaffirmed the independence, sovereignty and territorial integrity of Croatia. Practice with regard to Eritrea underlines the same point. This state was internationally recognized upon its successful secession from Ethiopia and within the former administrative lines, although it should be noted in this case that these former administrative lines had originally been international boundaries as established between Eritrea and Ethiopia in the treaties of 10 July 1900 and 16 May 1908.¹²⁰

Thus, the conclusion with regard to state practice is manifest. Although the acceptance by the parties of former administrative lines as new international boundaries constitutes express consent to the new arrangements, nevertheless appropriate account must be taken of such examples in the context of the definition of *uti pos-*

the inviolability of international borders and the inadmissibility of the use of force for the acquisition of territory. See also Yakemitchouk, *supra* note 111, at 411 *et seq.*

117 See e.g. Yakemitchouk, *supra* note 111, at 398 *et seq.* and Lowe and Warbrick, 'Current Developments', 41 *ICLQ* (1991) 473, at 478.

118 See also SC Res. 822 (1993); 853 (1993); 876 (1993); 884 (1993) and 896 (1994).

119 See Malenovsky, 'Problèmes juridiques liées à la partition de la Tchécoslovaquie, y compris tracé de la frontière', *Annuaire français de droit international* (1993) 305.

120 See Goy, 'L'Indépendance de l'Erythrée', 39 *Annuaire français de droit international* (1993) 350; I. Brownlie, *African Boundaries* (1979), at 9.

sidetis. Where there was opposition to such a process, international practice similarly, and more importantly, supports the principle that the territorial framework of the transition to independence was that of the former unit within accepted administrative borders. The reaffirmation by international bodies of the territorial integrity of the states in question also marked acceptance of *uti possidetis*, since the principle of territorial integrity operates after independence and in order to safeguard the territorial framework of independence (i.e., *uti possidetis*).

2. The Second Challenge

The second objection to the entrenchment of *uti possidetis* as a general principle of international law relates to the interaction between that principle and the right to self-determination. It has been argued that as a result of the rise of this right, the traditional law relating to territorial sovereignty has been modified.¹²¹ The contention, however, has demonstrated a crucial shift across categories since the argument moves imperceptibly from internal self-determination questions to matters of external territorial sovereignty. While the principle of self-determination as it operates within independent states reflects and enhances a bundle of individual and collectively manifested rights, it is abundantly clear that this has no impact upon the distinct question of territorial sovereignty. Even the 'hard' minority rights relating to autonomy, where they exist, do not extend to challenging or changing the territorial title of the state in question. The furthest along this particular line are the indigenous peoples, but nowhere has it been suggested that the territorial rights that they may possess affect in any way the territorial definition of the state in which they live. Such rights do not include the right in international law to secession. Of course, if any particular group attempts secession and succeeds, then the question of territorial integrity and statehood will be regulated by effectiveness coupled with international reaction. But that is a different question. Self-determination cannot affect international borders as such.

Nevertheless, the argument has been put that where an existing state breaks up, either by way of secession or through complete dismemberment, the succeeding units may be territorially defined in a way that reflects human rights considerations.¹²² One example of this may be to safeguard peoples who would be in a minority in the new state and, fearful of their future, would thus wish to remain in the former state where that continues. This may be termed the Canada syndrome. Another example would be where members of the ethnic majority in one successor state are located within the borders of another, hostile one. This would be the Serb syndrome, operating within Croatia and Bosnia as defined via *uti possidetis*. In both cases, fears of human rights violations fuel sovereignty assertions. The question is how international law may best deal with such situations.

¹²¹ See Ratner, *supra* note 56, at 614-5.

¹²² *Ibid.*, at 612.

The territorial solution (*uti possidetis*) provides that presumptively the borders of the new state are those of the administrative unit that preceded it and that matters of self-determination and human rights must be dealt with within that new territorial framework. The enlarged self-determination thesis, which opposes the application of *uti possidetis*, argues that the new boundaries must as of right reflect in some way the views of the people concerned.¹²³ Of course, the new entities (plus the continuing state where there is one) may deal with this matter by a consensual re-arrangement of the former administrative borders. This is fully consistent with both international law in general and *uti possidetis* in particular. However, where no such consensual re-arrangement is possible for whatever reason, not to operate on the basis of *uti possidetis* is likely to cause immense problems. Any attempted ethnic reconfiguration of the Former Yugoslavia on a totally free-for-all basis, without the presumptive *uti possidetis* rule with regard to boundaries, would most likely have produced an even worse situation than that which did occur. In addition to the deeply destabilizing effects that such an approach would have internally, in terms of the international situation it would remove substantial restraints from states contemplating intervention when faced with a civil war involving ethnic kin in a neighbouring state.

The absence of a *uti possidetis* presumption would leave in place as the guiding principle only effective control or self-determination. To rely on effective control as the principal criterion for the creation of international boundaries would be to invite the use of force as the inexorable first step. It would be wholly counter to all notions of order, human rights and stability. Self-determination is a principle whose definition in this extended version is wholly unpredictable. Precisely which groups would be entitled in such situations to claim a share of the territory? The possibilities range from large indigenous groups and ethnic, religious and language groups to cultural or political groups. How would one tackle in such circumstances the possible claims of groups within groups, such as, for the sake of argument, religious groups within language groups in Canada? Or possibly, competing non-French language groups in Quebec, or possibly political groups within religious groups in Bosnia? If each group or set of individuals was able to make claims in this area, questions would arise as to how to rank such claims as between such groups. Would, for example, indigenous peoples and English-speaking minorities in Quebec rank equally? Indeed, the difficulties would become almost insurmountable where different ethnic groups were deeply intermingled. One might also have to find a way, it would seem, to factor in economic considerations, for example where the resources of an area inhabited by a particular group who wished to secede from the seceding entity were crucial to the future viability of the latter. Further, the issue would arise as to who would have the authority to make the final determinations. Or would the matter be left to considerations of pure or brute power? Bearing in mind that secessions and

123 Ratner argues that 'when a new state is formed, its territory ought not to be irretrievably predetermined but should form an element in the goal of maximal internal self-determination'. *Ibid.*, at 612.

dissolutions invariably take place in periods of stress and that the absence of a consensual arrangement which would be the precursor to such a situation would also heighten tension, it appears that a peaceful and ordered resolution of territorial issues might be rather unlikely. The example of the partition of British India, especially the division of the provinces of Punjab and Bengal between India and Pakistan upon a religious basis, is particularly instructive. Even those opposed to the principle of *uti possidetis* as generally applicable note that it is the preferable short-term approach for determining borders in troubled circumstances.¹²⁴ The argument of such writers tends to focus upon longer-term factors. However, if one accepts the short-term applicability of *uti possidetis*, it must be accepted that the risks of adopting a less preferable strategy may not indeed lead to greater legitimacy and justice but rather to greater instability and bloodshed.

V. *Uti Possidetis* and Self-Determination – Conclusions

The primary justification of the principle of *uti possidetis*, first in Latin America and then in Africa, has been to seek to minimize threats to peace and security, whether they be internal, regional or international. This is achieved by entrenching territorial stability at the critical moment of the transition to independence. Precisely the same impulse lies behind the recognition of the principle outside the purely colonial context where the same dangers resulting from the break-up of existing states are evident. There is little to suggest that the hazards resulting from the creation of new states out of parts or all of existing states and the perils of widespread disruption and ethnic violence are restricted to the traditional colonial situation or to the continents of Latin America and Africa. The same broad reasons impelling the establishment of the principle of *uti possidetis* as a specific regional norm led to its establishment as a general principle in international law.

The legal basis of the doctrine is well established, its extent has recently been controverted. That *uti possidetis* governs colonial situations is evident, that it extends to all cases of transition to independence has, it is believed, become clear. This is based upon statements in the *Burkina Faso/Mali* case, which are legitimately generalizable and the explicit views of the Yugoslav Arbitration Commission. Neither of these assertions were *per se* legally determinative: the Chamber's comments were in strict terms *obiter dicta*, while the opinions of the Arbitration Commission need to be seen within the context of the fact that the Commission itself was constitutionally advisory only. Nevertheless, both sets of statements are authoritative, particularly bearing in mind that there was no prior rule of international law precluding the application of the *uti possidetis* principle to post-colonial situations. In addition, subsequent practice has been fully in conformity with the principle, while contradictory claims have met with international opposition. There would appear to

124 Ratner, *supra* note 56, at 623. See also Craven, *supra* note 99, at 388.

be little lying in the way of an acceptance in international law of *uti possidetis* as applying to all situations of transition to independence.

But what does the principle actually prescribe? It is clearly not an absolute rule that applies automatically. It is a presumption.¹²⁵ That is, unless there is evidence to the contrary, defined units within one sovereignty will come to independence within that territorially defined unit. It matters not what the provenance of such units may have been. They may have arisen on the basis of ethnic or historical ties, arbitrarily, or indeed as a result of the use of force subsequently accepted. This last occurred, for example, in the case of the Inter-Entity Boundary Line within the Republic of Bosnia and Herzegovina between the two entities of the Federation of Bosnia and Herzegovina and the Republika Srpska under the Dayton Peace Agreement of 1995.¹²⁶ The applicable law with regard to the establishment of the relevant administrative borders is the domestic law of the original state in question, coupled with administrative factors and other official actions.¹²⁷ The applicable time frame is the period of transition to independence, although particular factors in the case of existing international boundaries may lead to an earlier date. This means that the parties must deal with the actual situation as at the appropriate time, even if significant changes have taken place at other moments in history and in the light of the knowledge that such administrative lines were never intended to operate as international boundaries and might indeed have been differently drawn had this possibility been contemplated. The *uti possidetis* presumptive line can, of course, be modified by consent. The relevant parties may decide to rearrange the territorial situation so that the new state comes to independence within changed borders. Indeed, states after independence are free to consent, either expressly through a treaty or by virtue of an adjudicative award or other recognition or impliedly through acquiescence to alterations in their boundaries.

The weight of the presumption of *uti possidetis* is variable. It can indeed only operate where there is an internal border or administrative line. The more unitary the state, the weaker the presumption. On the other hand, the more entrenched a particular administrative line may be, the stronger the presumption. In the case of federal states where the component units have meaningful jurisdictional powers and indeed may even have the right of secession domestically proclaimed (as in the Former Yugoslavia¹²⁸ and the Former USSR¹²⁹), the presumption would be at its least assailable.

125 Note that Ratner, while opposed to the presumptive application of *uti possidetis*, concludes by asserting that 'perhaps the burden of proof should lie on those who seek to challenge them [i.e. the boundaries of new states on the basis of *uti possidetis*]', *supra* note 56, at 624. One wonders therefore what the precise difference is between on the one hand accepting the presumption of *uti possidetis* and on the other arguing that the burden of proof lies upon those who challenge this approach.

126 See also the Breko Arbitration Award, 36 *ILM* (1997) 396.

127 See e.g. Yugoslav Arbitration Commission, Opinion No. 3, 92 *ILR* 172.

128 See Yugoslav Constitution 1974, Basic Principles I, para. 1.

129 See article 17 of the Constitution of the USSR, in A.J. Peaslee, *Constitutions of Nations* (3rd ed., 1965), at 992.

Peoples, Territorialism and Boundaries

If neither self-determination outside the colonial context nor human rights generally possesses the competence to change sovereign territorial title, and it is believed that this is clearly the case, the question arises as to what role such rights may have within the sovereignty transitional process. It is felt that this role is in fact fourfold. In the first place, the original state, prior to dissolution or secession, is fully bound by applicable international human rights norms, including those relating to self-determination. The process which may ultimately lead to sovereignty rearrangement must be conducted in the light of such norms, as well as in accordance with pertinent domestic provisions, of course. Such international rules include individual human rights, the rights of groups and minorities¹³⁰ and the public participatory rights contained within the concept of self-determination.¹³¹ Any attempt to alter the territorial definition of the state that would violate such rights would attract the opprobrium of the international community, as for example the institution of the Bantustans by South Africa motivated by the apartheid ideology. However, the essential point is that such rights, including the right to self-determination, must be exercised within the territorial framework of the state in question. In addition, human rights considerations would be of relevance where part of one state was being ceded to another. This would, of necessity, constitute a consensual transaction and boundary problems would thus be non-existent or minimal. Although it is unclear in traditional international law whether the consent of the population being transferred from one sovereignty to another in this fashion had to be obtained,¹³² it does seem that the evolution of self-determination in terms of rights of participation in government implies that the population of areas will not be transferred into other sovereign states by cession of territory without consent. The same situation obtains where the whole state merges into another state, as for example the disappearance of the German Democratic Republic by way of its constituent *länder* joining the Federal Republic of Germany in 1990.¹³³

Secondly, the principle of self-determination may have a role to play with regard to the criteria of statehood in particular situations. It is arguable that the evolution of the principle has impacted upon the criterion of government so that a lower level of effectiveness may be required in decolonization episodes.¹³⁴ In addition, self-determination may also be relevant as an additional criterion of statehood in certain

130 Whether one can go as far as the Yugoslav Arbitration Commission in stating that the rights of minorities are part of *jus cogens* and include the 'right to recognition of their identity under international law' or the 'right to choose their nationality' is somewhat controversial, Opinion No. 2, 92 *ILR* 168-9.

131 It would thus be consistent with such principles for any rearrangement of sovereignty to be conducted upon the basis of the consent of the people as a whole of the area concerned. See e.g. the Anglo-Irish Agreement 1985 stating that 'any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland'. This was reaffirmed in the 1993 Downing Street Declaration between the UK and Ireland.

132 See e.g. Brownlie, *supra* note 70, at 170.

133 See the Preamble to the Treaty on the Final Settlement with respect to Germany, 1990, referring to German unity having been brought about by the free exercise by the German people of their right to self-determination, 29 *ILM* (1990) 1186.

134 See Shaw 1997, *supra* note 2, at 144.

circumstances, such as the Rhodesian unilateral declaration of independence which entrenched racial discrimination.¹³⁵ It is also to be noted that the Guidelines on Recognition of New States in Eastern Europe and in the USSR adopted on 16 December 1991 by the European Community¹³⁶ specifically referred to self-determination, underlining the need to respect the rule of law, democracy and human rights. Although the Guidelines deal with the issue of recognition and not as such the criteria of statehood, the two are interlinked and conditions required for recognition may in certain situations have an impact upon the criteria for statehood. Self-determination here is not a principle dictating particular boundaries, but one that refers to the internal constitution of the proposed new state, and is thus of relevance to the very issue of statehood.

Thirdly, self-determination and human rights may well be relevant with regard to the process of independence of a new state in the context of international recognition. It could well be argued that one of the reasons why Bangladesh was recognized relatively speedily by the international community was because it had become established consequent upon massive violations of human rights by Pakistan within its former eastern region. States, individually or collectively, are quite entitled to set conditions for the grant of recognition and these may include provisions relating to human rights. The 1991 European Guidelines on Recognition of New States in Eastern Europe and in the USSR expressed a common position on the process of recognition of the new states. It was noted in particular that recognition would require *inter alia* respect for the provisions of the Charter of the United Nations and CSCE commitments, especially with regard to the rule of law, democracy and human rights, together with guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE. On the same day that the Guidelines were adopted, the European Community also adopted a Declaration on Yugoslavia,¹³⁷ in which the Community and its Member States agreed to recognize the Yugoslav republics fulfilling certain conditions. These included the requirements that the commitments in the Guidelines were accepted and that provisions laid down in a draft convention under consideration by the Conference on Yugoslavia were accepted, particularly those dealing with human rights and the rights of national or ethnic groups. Such a concerted approach could also include calls for non-recognition of a particular new entity, where it was felt that human rights and other international law norms had been violated. Examples here would include Rhodesia,¹³⁸ the South African Bantustans,¹³⁹ and the 'Turkish Republic of Northern Cyprus'.¹⁴⁰

Finally, the relevant international law norms of self-determination and human rights would apply with regard to the new state once established. They may indeed

135 *Ibid.*, at 145.

136 See 92 *ILR*, at 173-4.

137 UK Materials on International Law, 62 *BYbIL* (1991), at 560-1.

138 SC Res. 216 (1965).

139 GA Res. 31/6A and Security Council statements of 21 September 1979 and 15 December 1981.

140 SC Res. 541 (1983).

Peoples, Territorialism and Boundaries

apply automatically by virtue of state succession to the human rights treaties binding upon the former sovereign.¹⁴¹ In any event, the provisions of relevant treaty law would apply upon succession or accession and the rules of customary international law would apply upon independence. Of course, it is also true that violations of human rights could be dealt with by the United Nations or regionally through a variety of mechanisms,¹⁴² including where necessary by the creation of special war crimes tribunals or by virtue of the operation of a future international criminal court.

Accordingly, self-determination and human rights questions are not irrelevant to the creation of a new state in international law. However, such issues are distinct from the question of the territorial framework of the transitional process to independence. To treat the two questions as interwoven would cause more problems than it could resolve.

141 See Shaw 1997, *supra* note 2, at 695 *et seq.* See also the Human Rights Committee, CCPR/C/SR.1178/Add.1, at 2-3, 4 and 9; UN Commission of Human Rights resolutions 1994/16 and 1995/18, and the *Genocide Convention (Bosnia v. Yugoslavia)* case, ICJ Reports (1996), Separate Opinions of Judge Shahabuddeen and Weeramantry at para. 23 and at 4-11 respectively.

142 See e.g. Shaw 1997, *supra* note 2, at Chs. 6-7.