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Unresolved border issues between Serbia and successor states of the Former Yugoslavia

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Abstract

In this study, the author analyzes the consequences of the principle of *uti possidetis* in relation to the delimitation between Serbia and successor States of Former Yugoslavia. The author believes that the unresolved border issues mainly caused by the opinion of the so called Badinter Arbitration Commission, according to which the internal administrative borders between the Yugoslav republics, despite its obvious legal inconsistencies, declared for international borders on the basis of principle *uti possidetis.* The justification for such an opinion of the Arbitration Commission is found in the broader interpretation of the judgment of the International Court of Justice regarding the delimitation of Burkina Faso and Mali. However, this case cannot be compared with the "Yugoslav case", because the "Yugoslav case" caused far more complex consequences in relation to the consequences that arose during the emergence of new independent African States in the process of decolonization. This conclusion is also indicated by the author himself, who is investigating the possibilities of international legal regulation of all outstanding border issues.

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У овој студији анализиране су последице принципа *uti possidetis* у односу на разграничење између Србије и држава наследница бивше Југославије. Аутор сматра да су нерешена гранична питања углавном проузрокована мишљењем тзв. Бадинтерове арбитражне комисије према којој су унутрашње административне границе између југословенских република, упркос својим очигледним правним недостацима, проглашене за међународне границе на основу принципа *uti possidetis*. Оправдање за такво мишљење Арбитражне комисије налази се у широком тумачењу пресуде Међународног суда правде у случају разграничења Буркине Фасо и Републике Мали. Међутим, овај случај не може се поредити са „југословенским случајем" будући да је „југословенски случај" изазвао много сложеније последице у односу на последице које су настале током настанка нових независних афричких држава у процесу деколонизације. На овакав закључак указује и аутор овога рада који истражује могућности међународног правног регулисања свих отворених граничних питања.

Introduction

By applying the rule resulting from the international practice, the entry into force of succession of States does not itself bring into question the internationally recognized borders [1]. Moreover, it is a general international rule that as for the international borders of the Predecessor State, new States are obliged to respect them on the basis of continuity in exercising authorities within the territorially recognized borders and not on the basis of succession of treaty relationships [2]. It is through the process of border delimitation that international law establishes an objective situation, which imposes an imperative obligation to successor States in case of succession.[1] Exceptions to the rule are possible only if a consensus is reached [3].

Rising of the question of borders can be significant for functioning of successor States in case they have been drawn according to the administrative and territorial divisions of the former State. For such cases traditional international law declines to apply the general rule regarding them as internal boundaries that up to the succession were subject to the regime of the public law of the former State. With cessation of the internal legal order and its effectiveness on the territory affected by succession, its administrative boundaries also cease to exist. The contemporary development of international law and the law of succession of States that regulates legal consequences of transition of States in space and time have brought about substantial changes to such a conception. Indicative of this is just an example of succession of the Socialist Federal Republic of Yugoslavia, which represents a fundamental shift in terms of application of the principle of inviolability of the existing administrative boundaries at the time of the independence of the new States. Therefore, I believe that before the concrete analysis of unresolved border issues between Serbia and the successor States of the former Yugoslavia it is necessary to give a few notes.

Revolutionary proclaimed Yugoslav federation of equal nations and ethnicities within republics and autonomous provinces after WW2 served, due to opportunist reasons, as an ideal political mechanism for territorial revisionism and sanctification of administratively

1 As provided by Article 62, paragraph 2, item a of 1969 Vienna Convention on the Law of Treaties a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty.

set borders towards the end of 20th century. Based on the model of the Soviet theory of "fluctuating territory", the Yugoslav constitutional praxis has consistently developed into two directions. First, in accordance with the proclaimed right to self-determination, Yugoslav constitutions had declared the right to secession, and subsequently the laws on decentralization of the Yugoslav State made the constitutional norms on territorial integrity relative. For the Second Yugoslavia the beginning of the process of realization of the right to self-determination, as part of general international public law, meant the disintegration of its State territory. The absence of compromise and dialogue on "peaceful secession" that had been caused by previous confederate abstinence in the internal policy encouraged the Yugoslav republics to transform their interests into historic desire of majority nations for independence. In the Yugoslav case, the independence that was proclaimed in the early nineties of the 20th century, in a voluntary, unilateral manner brought about the international recognition of the new States, and subsequently led to the justification of borders between the republics. But, not fully precise internal borders between former Yugoslav republics, led in the post Yugoslav period, to certain disagreements between the successor States. This was significantly contributed by the principle of *uti possidetis,* which was widely interpreted by the Yugoslav Arbitration Commission that was constituted as a consultative body of the EC Conference on the former Yugoslavia [4]. Acting inside the framework of rules and principles of international public law, the Yugoslav Arbitration Commission also known as the Badinter Commission, 'redefined' the factual situation pertaining to the territorial status and status of borders of the republics of the Socialist Federal Republic of Yugoslavia in a novel manner [5]. Relying on the decision of the International Court of Justice in the case of the border dispute between Burkina Faso and Mali in 1986, the Arbitration Commission accepted the universal significance of the principle *uti possidetis* in relation to the limited significance of that principle in the period of decolonization, especially in the second half of the 20th century.[2] The basis for the application of principle in the case of dissolution of the former Yugoslavia hence remained legally questionable [6].[3]

The case of the emergence of new independent States in the process of decolonization and new States formed through the succession of former Yugoslavia that was the old subject of international law and one of the founding States of the United Nations, cannot be legally comparable. Since the effectiveness of State power during and after independence is evaluated in the light of real events, which would, among other things, confirm the existence of the law, it is clear that the case of succession of the former Yugoslavia caused far more complex consequences in relation to the consequences that have arisen during the withdrawal of the colonial powers in Latin America, Africa and Asia. These consequences included solving the multitude of problems related to the exercise of the right to self-determination of peoples, but also with ensuring the territorial integrity and political stability of the new States by regulating the fate of the "old" and "new" minorities with the application of the rule on the inviolability of State borders inherited by the old neighbors and with defining the new border between the successor States

2 The principle of *uti possidetis* was originally initiated in the instances of decolonization of States in Latin America and Africa. The well-known principle of retaining the territorial possession – *uti possidetis, ita posideatis*, that sanctified the territorial divisions that had been imposed by the colonial powers in the mentioned continents, has considerably contributed to the changes in regulation of delimitation of borders in the second half of the 20th century. While in Latin America the principle had solely been applied on basis of "historically based rights" to territories or on basis of establishing a "constructive sovereignty", to the territories of the legally heterogeneous Africa, this principle anticipated a formal request for effective occupation. The principle of *uti possidetis* had played a positive historic role in the field of State succession in the function of maintaining a territorial *status quo*. The principle provided legitimacy to the anti-colonial struggle for independence and then provided a basis for stabilization of the newly established States in the fields of internal and external policies.

3 Professor Milan Šahović maintains that, "even though the principle *uti possidetis juris* is nowadays universally recognized as a rule of general international public law, no detailed explanation of the rule is provided. The Arbitration Commission and the EC failed to provide an elaborate legal argumentation explaining the basis for accepting the hypothesis on transformation of internal administrative borders into international ones".

of the SFRY. This observation is confirmed by the fact that most of these issues were the subject of consideration of the Yugoslav Arbitration Commission which intervened directly in the case of succession of Yugoslavia in finding concrete ways to overcome legal and political problems. At this point it is worth to remind that in connection with the dissolution process of former Yugoslavia and on the basis of the principle of protection of the territorial integrity of the new State, the Arbitration Commission adopted Opinion n° 2, and strictly limited the scope of the right to self-determination in the context of unstable and unclear situation. It noted that international law as it currently stood, did not spell out all the implications of the right to self-determination. The Commission stressed that self-determination could not be carried out in such a way as to change borders existing immediately prior to independence. In accordance with this, in its Opinion n° 3 the Arbitration Commission insisted on the recognition of internal administrative borders as international borders. The principle of preservation of borders that had existed at the moment when the new States gained independence thus became a general ground for demarcation between the new States (*uti possidetis juris*) [7]. The arrangement for the above mentioned borders was derived from the fact that they represented "lines of demarcation that may be altered on the basis of free and mutual agreement", and, *a contrario*, those borders thus became international frontiers "protected by the international public law". Merely, the effect of the principle *uti possidetis* is to "freeze" the legal title for possession of the territory at the moment when a new State has achieved independence. This interpretation may have been substantiated by the idea that the principle of respecting the territorial *status quo* may have also derived from the 1974 Constitution of SFRY (paragraph 2 and 4 of Article 5). The above mentioned Constitutional clauses prescribed irreversibility of borders of the Yugoslav Republics, unless the consent for change of borders was freely expressed. Thus, the formerly recognized principle of delimitation of the new States after the decolonization in Latin America and Africa, *uti possidetis juris qui*, has become a universal legal principle on the territorial delimitation that may be applicable to the former Yugoslavia, too. Accepting the *de facto* situation, the Arbitration Commission stressed the security function of this principle under the circumstances that might lead to "fratricidal fights and endanger the stability and recently acquired independence of the new States" [8].

In regards to international borders of former Yugoslavia that have become external borders of the new States, the Arbitration Commission maintained that those borders should enjoy the protection of international public law, in accordance with the principle embodied in the UN Charter. The protection of the above-mentioned borders can also be derived from the Declaration on the Principles of International Public Law Pertaining to Friendly Relations and Cooperation Amongst States in Accordance with UN Charter (Resolution 2625/XXV of UN General Assembly). Finally, the international protection of the borders of the new States can be derived from the Helsinki Final Act that had inspired the article 11 of Vienna Convention on Succession of States in Respect to Treaties (August 23rd 1978) [9].

When analyzing this part of Commission's opinion, one should concentrate on the concrete research of the rules of international public law that Badinter stated as the basis for the opinion on immutability of international borders of Socialist Federative Republic of Yugoslavia after succession. Namely, the article 11 of Vienna Convention on State Succession Pertaining to the Treaties, which sanctified the principle of international public law, prescribes that the succession of States does not encompass the issues of borders that had been determined by treaties, nor the rights and duties pertaining to border regime that had been determined by treaties [10]. This principle is derived from legal practice and the theory of international public law, and it is essentially based on the principle of sovereign equality of States that also prescribes for States' obligation to refrain from threats and use of force in their relationship (article 2 of UN Charter).

The 1975 Helsinki Final Act and the Declaration o CESC also sanctified the principle of immutability of borders. Since the international community is based on the prohibition of interventionism aimed against territorial integrity of States, it is prescribed that internationally recognized borders may be altered exclusively in a peaceful manner, on the basis of mutual consent of the interested parties. The Declaration of Principles of International Public Law Pertaining to Friendly Relations and Cooperation Amongst States from October 24th 1970 repeated the same principle pertaining to the "lines of demarcation" [11]. The 1990 Paris Charter for New Europe confirmed the rule on immutability of borders. Furthermore, it coincided with the collective consensus on recognition of new States that have been formed on the territory of the Socialist Federative Republic of Yugoslavia. EC adopted "Guidelines on Criteria for Recognition of States in Eastern Europe and Soviet Union" and Declaration of Yugoslavia on December 16th 1991, conditioning recognition of new States with their acceptance of basic principles of international public law, amongst others obligation to respect territorial integrity and inviolability of State borders [12]. In accordance with the valid provisions of the international public law that had been subjected to a particular political test in case of Yugoslavia one may assume that all former republics of the 2nd Yugoslavia acquired internationally recognized borders, once they had gained independence. *Via facti*, the internal administrative borders were transformed into international frontiers, while the international borders remained preserved, in accordance with the provisions of international public law on immutability of international borders. However, the first case basically represents a particular legal presumption that may be generally applicable to the situations at the moment when new States gained independence. Still, this presumption does not have an absolute effect *ratione temporis,* as, in itself; In fact, it functionally suspends the effect of legal title until the moment the title has been confirmed. The confirmation of the legal title, on the other hand, always depends on concrete capability of particular party to prove the validity of the facts it had based its claims on. On the basis of historic and legal facts that will be shown in further presentation, one may conclude that in particular cases the principle of *uti possidetis* cannot be fully applicable legal title for the delimitation between the successor States of former Yugoslavia.

Delimitation of the border between Serbia and Macedonia

Not fully precise definition of Yugoslav internal borders led to particular differences between the successor States of the Socialist Federative Republic of Yugoslavia after the succession took place. Thus, Yugoslav-Macedonian border that remained as the legacy of previous State community became an issue immediately after Macedonia had gained independence.[4] Due to indistinctness of former administrative border, that subsequently led to claims, counter-claims and taking possession of particular border regions, in December 1992 UN peacekeeping forces had to be deployed along the slopes of mountain Šara.[5] That mountain used to mark former district borders within Vardarska banovina of the Kingdom of Yugoslavia. The borders were inherited in the 2nd Yugoslavia as well [13]. This has officially marked the beginning of the process of redefining of former inter-republic borders. Almost immediately after it had gained independence, Macedonia took unilateral action and marked the frontier line from the region of Šerup on the border with Albania, then Southwards to Popova Šapka, along the valley of the Crnkamen river up to Vraca and Rudoka [14]. Thus, Macedonia has usurped a region well-known for grazing grounds along the Serbo-Macedonian border

4 Parliament of Macedonia had on September 28th 1990, even before Macedonia gained independence, adopted a document entitled "Some Aspects of Territorial Delimitation between the Socialist Republic of Macedonia and the Socialist Republic of Serbia", expressing aspirations for revision of administrative borders. In some places the envisaged corrections of border would go up to 30 km inside Serbian territory.

5 Thus, UNPROFOR troops have taken control over the municipalities of Gora and Restalica. UNRPOFOR has subsequently been replaced by UNPREDEP, and in 1998 military forces of NATO were deployed for safety reasons.

on the mountain Šara, whose length is 115 km, starting at Đeneral Janković in Lepenac valley, along Šara, with slight corrections at Korab in the West.[6] The region, which Macedonia had usurped furthermore, spreads southwards up to the region of Belandža, which goes along the slopes of South-West of Štirovica in the municipality of Gora, in the length of 31 km and on the area of 7,607 acres [15]. The Yugoslav authorities presented legal arguments for possession on the grounds of former official charts and data from the real-estates and land records from 1928, and further substantiated Yugoslav claims by provisions of 1945 Law on the Establishment and Organization of Kosovo and Metohija Region.[7] Still, the Macedonian side showed no understanding for Yugoslav claims and its arguments. The dispute continued, even new territorial claims were submitted. New dispute arose over the border between the municipality of Vitina in Serbia and the municipality of Kumanovo in Macedonia, encompassing the forest region of Kopiljače with an area of 2184 acres. These borders were defined as early as 1928, and were confirmed by cadastral survey measurements in 1952 and measurement involving aerial photographs in 1970 [16]. Thus, the Yugoslav side maintained that the above-mentioned borders were definite [17]. However, the Macedonian side disputed this without providing valid legal arguments. Claims and counter-claims have been submitted in relation to regions around the Kačanik cement factory General Janković, the medieval Serbian monastery of St. Prohor Pčinjski with 13 villages and strategically significant heights "Čupino brdo", located between Trgovište and Kriva Palanka. In order to settle the issues of delimitation of Yugoslav–Macedonian border on April 8th 1996 Federative Republic of Yugoslavia and Republic of Macedonia signed the Treaty on Regulation of Relations and Enhancement of Relations between FRY and the Republic of Macedonia [18]. At the same time, the two States formed a joint commission of experts that was supposed to prepare a draft of agreement on description and extension of the inter-state border. After NATO had intervened against FR Yugoslavia, the UN Security Council adopted the resolution No. 1244 on July 10th 1999. The Kumanovo Military-Technical Agreement was signed and the UN peace enforcement force KFOR was deployed on Kosovo and Metohija side of the Yugoslav-Macedonian border in the conditions of territorial instability. After the political changes in FR Yugoslavia in October 2000, the negotiations on border between the 2 States continued successfully. Thus, FR Yugoslavia and Macedonia signed the Treaty on Extension and Description of State Border in Skopje on February 23rd 2001 [19]. The treaty provided legal title; i.e. it described the State border and stated that the State border represents a plane that vertically cuts the surface of Earth, the space beneath it and the aerial space between FR Yugoslavia and Macedonia. The border extends along the topographic border line "between boundary marks, watershed, cliffs or walls", from "the point of intersection of the Yugoslav, Macedonian and Albanian borders in the South up to the point of intersection of Yugoslav, Macedonian and Bulgarian borders in the North-East". Demarcation of the borderlines in the field was postponed for a two-year term that shall commence once the Treaty enters into force. Thus, the border dispute between FR Yugoslavia and Macedonia had to be solved *de iure* and *de facto.* However, on 9 October 2008 Macedonia recognized Kosovo after its declaration of independence from Serbia on 17 February in spite of the Serbian protest. On 16 October 2009, Macedonia and Kosovo signed the Agreement on the physical demarcation of the borderline by exchanging some lands [20]. Serbia reacted strongly against the Agreement considering that act as an infringement of the Treaty on Extension and Description of State Border and as violation of international law.[8]

6 Once the district administration had been abolished, the disputed territory remained with the municipality of Dragaš in Kosovo and Metohija.

7 The Ministry of Finance of the Kingdom of Serbs, Croats and Slovenians described the border in its Minutes no. 39027 from October 9th 1928.

8 With the said Agreement, which refers to the Treaty on the demarcation of the 2001 Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2007, the Protocol of April 2008 on the joint technical committee and "valid principles of international law", Macedonia accepted the change of the boundary line on the stretch Debelde/Kodra Fura, Restelica/Lukovo Polje and Stančić /Topan.

According to the applicable rules of international law, such an act is not binding for the Republic of Serbia, according to the principle – *pacta tertiis nec nocet, nec prosunt*.[9] Such an act constitutes for it – *res inter alios acta* [21].

Delimitation of the border between Serbia and Montenegro

With the dissolution of SFRY, Serbia and Montenegro constituted the Federal Republic of Yugoslavia (FRY) on 27 April 1992. Shortly after, on 4 February 2003, the FRY was renamed in the State Union of Serbia and Montenegro [22]. The question of mutual demarcation did not arise until Montenegro used the right to withdraw from the State Union of Serbia and Montenegro on the basis of the Law on the Implementation of the Constitutional Charter. In paragraph 5 of Article 60 of the Law prescribed that: "A Member State which shall not inherit the right to international legal personality and all outstanding issues shall be regulated separately between the successor and the newly independent State". Withdrawal from the State Union of 21 May 2006, Montenegro meant independence *de jure* and *de facto*. From the perspective of international law on State succession Montenegro became the Successor State, and on the other hand, Serbia maintained the continuity of the Statehood of international legal personality of the Predecessor State [23]. After the independence of Montenegro in 2006, delimitation has become one of the current issues between the two countries. The administrative boundary between Serbia and Montenegro within former Yugoslav federation mostly followed the line of demarcation defined by the London Agreement between the Kingdom of Serbia and Montenegro in 1913. The said agreement has been found that the boundary follows the watershed between the Ćehotina and Lima, and then cut route between shippers and Bijelo Polje, where it runs through Sandžak to the east, cutting off the Ibar River still in its upper course and ending on the border with Kosovo and Metohija district on Mokra Gora. In 2008, Serbia and Montenegro established a joint commission for delimitation, whose work was soon interrupted due to the fact that Montenegro, from opportunistic reasons, recognized the Republic of Kosovo. The unilaterally proclaimed independence of Kosovo from 17 February 2008, and the international recognition by Montenegro, is treated as a hostile act since the southern Serbian province of Kosovo and Metohija, under the Constitution of the Republic of Serbia is its integral part.[10] Compared to other parts of the territory where it is necessary to determine the international border, there is some great controversy. Notwithstanding such open question can be considered a problem of determining the boundary line in the forest area located between the municipalities of Prijepolje and Pljevlja, which is under the administration of Serbia, i.e. public company "Srbijašume" [24]. With the normalization of political relations, negotiations regarding the delimitation resumed on 7 March 2011, when the inter-State Commission tasked with defining the border, prepared the ground for the regulation of cross-border traffic and border crossings. Thus, at the meeting of the representatives of Serbia and Montenegro agreed on the text of four border agreements. Three refer to the road transport (Gostun–Dobrakovo,

9 The above rules are related to the subject matter of the international treaties and shall apply without prejudice to any question of responsibility which may arise for a State or international organization, that is, a contracting party in connection with the conclusion or implementation of treaties whose provisions are not inconsistent with their obligations under another treaty or on the basis of an agreement which is subject to change in relations between certain contracting parties and the completion of the treaty or the suspension of its application, which was created as a result of the breach of treaty (paragraph 5 of Article 30, 41 and 60 of the Vienna Convention on the Law of Treaties form 1969 and the Vienna Convention on Law of Treaties between States and International Organizations or between International Organizations from 1986).

10 Montenegro and Kosovo have established a Commission for the demarcation and maintenance of the international border. The Commission after years ended its work. Serbia did not participate in the work of this Commission, which calls into question the international legal validity of the Agreement on the border between Montenegro and Kosovo which was signed in Vienna at the end of August 2015. According to the official statements of the two sides, the border will follow the administrative demarcation within the provisions of the Constitution of SFRY, the Kosovo Constitution and the Comprehensive Proposal for the Kosovo Status Settlement of former UN Special Envoy Martti Ahtisaari issued on 27 March 2007, which is not accepted by the Republic of Serbia.

Špiljani–Dračenovac and Jabuka–Rače), and an agreement relating to the control of the railway traffic between Belgrade and Bar. Control of passengers will be, under this agreement, carried out without stopping passenger trains and cargo will be carried out in Bijelo Polje (Montenegro). The inter-State Commission after visiting the border area determined that there is the possibility of establishing a border crossing on the Pešter plateau, in order to maintain the link between the local populations on both sides of the border line. After the Commission insight into the area of the saddle Čemer, on the road between Pljevlja and Priboj and near Rožaje, Serbian side proposed the opening of border crossings in these locations, while the Montenegrin side emphasized the requirements for opening the international border crossing near Rožaje. In the area of the municipality Prijepolje, the Serbian side argues that there is no possibility of opening new border crossings, or in addition, to meet the needs of the local population should be to find an adequate solution regarding the regulation of the pass in places that would be jointly submitted by both parties [25].[11] Based on these facts, it is clear that the States did not engage deeper into the issues of delimitation, leaving the possibility that the Commission, by regulation of the border regime, comes to satisfactory solutions and with respect to the final determination of the State border.

Delimitation of the border between Serbia and Bosnia and Herzegovina

Soon after succession of the SFRY and mutual international recognition, the Bosnia and Herzegovina and Serbia have expressed their willingness to respect territorial *status quo*, and agreed on the provisions of Article 10 Dayton Peace Agreement of 21 November 1995 [26]. Official negotiations on the arrangement of the border between Serbia and Bosnia and Herzegovina began through intergovernmental Commission on 27 April 2001 [27]. The Commission worked in accordance with the delimitation that took place after WW2, which had been based on the demarcation of Mačva district in accordance with measurements taken between 1920 and 1923 and descriptions of joint commission of Austria-Hungarian and the Kingdom of Serbs, Croats and Slovenians. Further measurements were taken in 1967 and 1982, the border was made official and was included in maps, and delimitation of private property on land was recorded in minutes of borderline municipalities.[12] As it is described, the border line between Serbia and Bosnia and Herzegovina goes from the mouth of the Drina and Sava rivers near Bosanska Rača in the north, to the village Poblaće between Serbia, Montenegro and Bosnia and Herzegovina in the south. For the most part it is a natural border as the line of demarcation presented during the Drina River in the north, and old Walachia Mountains of Tara and Zvijezda to Javor and Kovača in the southern part. Due to the natural meander of the river Drina, there has been some movement of the boundary line so that the territory of Bosnia and Herzegovina took land belonging to the city Badovinci, cadastral municipality of Bogatić in Mačva district. In relations between Serbia and Bosnia and Herzegovina there is also the question of the Bosnian enclave of approximately 400 hectares on the part of the cadastral municipality Mioče, Međurečje village, municipality Rudo, which is departmental of cadastral municipality Međurečje, and which is drawn to the area of Priboj municipality in Serbia. In the historic sense this borderline had been transferred from the times of the Turkish rule over Novi Pazar Sandžak (district) [28]. The positions of Serbia and of Bosnia and Herzegovina how to resolve border issues substantially diverge. Serbia has a special interest in

11 According to the Law on the Protection of the State Border of the Republic of Serbia, border crossing is possible only through legal border crossings.

12 The text of the Agreement on the State border was agreed in December 2002, when the intergovernmental Commission adopted the proposal of the Agreement on the simplified transport of people and goods at border crossings Uvac-Uvac and Vagan-Ustibar. Also, on this occasion it was verified and Agreements determining the border crossings and border traffic. The Agreement on simplified transport of people and goods at border crossings Uvac–Uvac and Vagan–Ustibar was signed at the meeting of the International Council of the two countries in Sarajevo, on 24 February 2005.

the part of the railway Belgrade-Bar between the village of Jablanica in the municipality of Čajetina and Štrpce in Rudo (Bosnia and Herzegovina), a distance of about 12 km, as well as for part of the area around the hydro-reservoir complexes Bajina Bašta. Serbia does not consider it a viable boundary line on the part of the passage of the railway line through the territory of Bosnia and Herzegovina, even in areas where there are hydroelectric facilities, as well as in the municipalities of Priboj and Rudo. The boundary line should not intersect traffic communication or objects of vital economic importance that Serbia built from its own financial funds. Serbia has the right from the purchase of land on the left bank of the Drina River, in the Bosnian municipality of Zvornik, Bratunac, Srebrenica, Rogatica and Višegrad, which was, during the construction of hydroelectric power plants on the Drina river, flooded and turned into a reservoir. Hydro power plant "Zvornik" and "Bajina Bašta" are the property of Serbia i.e. its public company "Electric Power Industry of Serbia", and the fact that these power plants cut today the mid-channel of the Drina River, should not prejudice the acquired property rights. The problem is particularly acute at the hydroelectric power plant "Bajina Bašta", whose generators are located on the territory of the neighboring country. If Bosnia and Herzegovina accepted the proposal of Serbia, then the new boundary line would contribute to better neighborly cooperation, and communication of the local population in the border areas of Priboj and Rudo, which are, regarding the geographical, economic and cultural aspects – most closely related. In bilateral negotiations, Serbia has proposed to Bosnia and Herzegovina that instead of the boundary line on the mountain Beach, delimitation would be carried out on the central stream of the river Lim, from the mouth of the river Uvac to the village of Sjeverin, so that villages in the municipality of Rudo on the left side of the river Lim - Ustibar, Mioče and Mokronozi, belong to Priboj, to which they normally gravitate. With the adoption of the said proposal, Serbia would be given the Bosnian enclave in the Priboj local community Sastavci. In this way, the problem of traffic isolation for about two-thirds of the territory of the municipality of Priboj from the centre of the municipality would be solved to a large extent, as well as economic and administrative problems arising from the current situation. In the case of acceptance of the above proposal, Serbia is ready to offer Bosnia and Herzegovina adequate territorial compensation, according to the "meter per square meter of land of the same quality". Thus, using the way of compensation Bosnia and Herzegovina would be offered the forest land which is of the same quality as the land that Bosnia and Herzegovina would give to Serbia. There are not many people who live in the area which was assigned to Bosnia and Herzegovina, which in the end would have negative repercussions in terms of migration. Similarly, the exchange of territories and territorial waters could be solved and other territorial issues, which would end delimitation definitely. In the demarcation move regarding the hydropower plants "Zvornik" and "Bajina Bašta", Serbia has made a proposal to move the boundary line for about 300 meters down, on the left bank of the Drina River, and 200 meters upstream from these facilities, which they find on their territory. In return, Serbia has offered Bosnia and Herzegovina the corresponding surface of the Drina River, which now belongs to Serbia. With such proposal in certain sectors of the Drina River there would be limits change to the right bank, which would be beneficial for Bosnia and Herzegovina. In terms of regulating the work of the railway Belgrade-Bar railroad between Jablanica villages in the municipality of Čajetina and Štrpce in Rudo, Serbia has proposed that the boundary line is withdrawn along the railway, with territorial compensate for Bosnia and Herzegovina in another move that would be determined by agreement. The reason for this proposal was the fact that for Serbia the relocation of the railway line near the village of Štrpce on its territory was technically complicated and financially expensive project. In this regard, Serbia has four disputed border points, and therefore it proposed the exchange of land and water areas in the size of about

40 square kilometers. On the other hand, the Bosnian side insists that the border demarcation line established the existing boundary of the cadastral municipality, since it represents the administrative border that existed at the time of the international recognition of Bosnia and Herzegovina. Bosnia and Herzegovina has made a proposal that the delimitation could be effected by creating a narrow corridor through the territory of Serbia, whose enclave would receive a direct physical connection to the territory of the municipality of Rudo. Finally, Bosnia and Herzegovina has not ruled out a solution that after signing the agreement on extension and description of the state border, the two sides continue negotiations on possible corrections of the border and exchange and cession of certain parts of the territory [29].

Delimitation of the border between Serbia and Croatia

The border problem concerns drawing of international border between Croatia and Serbia – it had been institutionalized during the succession processes in the territory of the former SFRY when the international community accepted the Opinion no. 3 of the Arbitration Commission that inter-republic boundaries were international borders unless the parties concerned did not find some other compromise solution. In this way, the Danube River became a border between Croatia and Serbia. This is a conclusion that suggests the principle of respect for the territorial *status quo* and in particular the principle of *uti possidetis juris qui.* Since the agreement on the arrangement border between Serbia and Croatia the above mentioned principles have been applied, and the limit is caught by the line that follows inter-State demarcation executed in the period after the WW2. The basis of the said demarcation was determined primarily by the Law on the establishment and organization of the Autonomous Province of Vojvodina, which was adopted by the Assembly of the People's Republic of Serbia on 1 September 1945 [30]. The provisions of Article 1 of the Law prescribed that the border between Vojvodina and the federal Croatia was temporarily determined on the basis of the proposal of a special Commission of the Antifascist Council of National Liberation of Yugoslavia (AVNOJ) [31].[13] The border was drawn from the Hungarian border, along the Danube River, all the way to Ilok. The border line passes through the Danube leaving Croatia Ilok, Šarengrad and Mohovo and goes south where the villages of Šid District: Opatovac, Tovarnik, Podgrađe, Adaševci, Lipovac, Strošinci and Jamena are included in Croatia and Varoš Šid and villages Ilinci, Batrovci and Morović ceded to Vojvodina [32].[14] The demarcation between Croatia and Serbia indirectly confirmed the adoption of the Law on the administrative-territorial division of Vojvodina from 1946, in which it was stipulated that: "The area of the Autonomous Province of Vojvodina includes part of the People's Republic of Serbia, whose borders, starting from the Sava River west of town Sremska Rača to the north, the border People's Republic of Serbia to the People's Republic of Croatia to the state border with Hungary" [33]. Correction of the boundary line was made a little later in the Bapska Novak that was transferred to Croatia and at the Jamena that went to Serbia (the Autonomous Province of Vojvodina). In the nineties of the 20th century, Serbia adopted the Law on Territorial Organization and Local Self-Government, which follows previous solutions present in the Law on the establishment and organization of the Autonomous Province of Vojvodina from 1945. Based on the above mentioned regulations, parts of

13 Commission headed by Milovan Đilas was appointed by the Presidency of AVNOJ on 19 June 1945. The report of the Commission proposed that the demarcation goes, "temporary border between Vojvodina and Croatia starting from the Hungarian border, the Danube to the border between the villages of Bačko Novo Selo and Bukin (district Bačka Palanka); hence the Danube between the village Opatovac – Mohovo, Lovas – Bapska, Tovarnik – Šid town, Podgrađe – Ilinci, Adaševci – a small village, Lipovac – Batrovci, Strošinci – Morović. In this way, the villages of the current district Šid – Opatovac, Tovarnik, Podgrađe, Adaševci, Lipovac, Strošinci (and Jamena), together with its area – went to Croatia, while Mohovo, Bapska, Varoš Šid, Ilinci, a small village, Batrovci, Morović – together with its area belonged to Vojvodina. It goes without saying that all the territory west of the village and town should belong to Croatia, while those located east should belong to the province of Vojvodina".

14 For Adaševac a technical error was obviously made after it discussed the Apševci in the county Vinkovci.

cadastral municipalities on the left bank of the Danube – Sombor, Beli Manastir (part of Batina, Draž, Zmajevac, Kneževi Vinogradi) Apatin, Bačka Palanka and part of Vukovar (part of Mohova and Šarengrad) were transferred to Serbia [34]. Basically, the accepted solution has no value of delimitation in the international sense, but indirectly derived administrative legal demarcation of internal borders between two federal units of former Yugoslavia [35]. For the purpose of identifying and determining the state border, in 2002, Serbia and Croatia have established a mixed Commission that was tasked to prepare a treaty with the description of the boundary line between the two neighboring countries. The Commission adopted the Protocol on Principles for Identification determining the boundary line and the preparation of the treaty on the state border. To date, the Commission released no official information on the results of delimitation. It should be noted that the development and stabilization of good neighborly relations between the Croatia and Serbia are directly dependent on the international legal regulation of the state border. Prior to the final delimitation, it would be necessary to review all the relevant legal arguments. In this sense, I will give in this place just a few observations regarding the mutual territorial claims, as well as facts that may be of importance for the international legal delimitation.

Since 1945, the Danube is determined to be a major part of the boundary between Serbia and Croatia. The river, however, in the period up to achieving the independence of the former Yugoslav republics successively changed its course, retreating more from the east, to the west, and thus, large areas of the river bed, fertile land, went to Vojvodina. Croatia today claimed thousands of hectares of land along the Vojvodina side which is due to evolutionary shift of Danube found in Serbia.[15] Croatia also claimed Vukovar and Šarengrad Islands (Ade) on the Danube. In doing so, Croatia refers to the so-called *historical borders* that existed before the emergence of the alleged Serbian state (the period of Ottoman occupation and the Austro-Hungarian rule of Yugoslav countries in the period from 1699 to 1718). Given that during this period Croatia had not been an independent state in the international legal sense, and that it did not later present arguments about the existence of demarcation lines between the Yugoslav administrative-territorial units that constitute the period after the First and the Second World War, cannot constitute a legally relevant title [36]. In addition, Croatia emphasizes that in the determination of the Croatian-Serbian border should be used also the Austro-Hungarian cadastral surveys of land in order to determine the boundary following the "Border Boundary cadastral municipalities", which deviates from the Danube River. According to the cadastral boundary, Croatia would receive parts of the territory on the left bank of the Danube (i.e., pockets), which are kept in the Croatian municipal cadastral records. Generally, highlighting some sort of "historical rights" has its *fons et origo* in the territorial aspirations. In international practice it is known that the withdrawal of "historical borders" belongs more to the political arena, rather than to the domain of law. There is no doubt that any recourse to the "historical borders" conceals requirements for unilateral expansion of territorial sovereignty. For such requirements in international law there is no adequate coverage or rational juridical response [37]. Croatian request for determination of the State border on the basis of cadastral surveying has not been internationally well-founded since the arguments of its kind in the world practice are evidence of possession of the acquired property rights, which *per se*, cannot be relevant in determining the state border. It would be legally consistent if the enjoyment of acquired property rights were secured through mutual consent regime regulating the use of property on both sides of the border line. On the other hand however, the determination of the boundary line must be made on the basis of rules and principles of international law. In this regard, "cadastral

15 It is estimated that the total area of land that is found on the left bank of the Danube around 9600 hectares. On the other hand, the land that, due to changes in the flow of the Danube, crossed to the right bank, is approximately 910 hectares.

boundaries" of the Austro-Hungarian Empire can have only secondary importance in terms of the definitive delimitation of the State border between Croatia and Serbia [38].[16] In its arguments regarding the delimitation with Croatia, Serbia is starting from the position in which the safety limits may follow only from valid legal basis constitutive nature. Hence, Serbia calls for the Law on the Establishment and Organization of the Autonomous Province of Vojvodina from 1945. However, as the mentioned legislative solution has no meaning in the international delimitation, the situation existing at the time of succession of former Yugoslavia could not fully compensate for the lack of a legal basis in international legal terms. In the absence of legal title, the international law takes into account the factual situation which constitutes a certain State practices based on real and unimpeded exercise of effective authority (*ex facto jus oritur*) [39].

However, the prescriptions of the existence of a legal title in relation to the State border on the Danube is not realized, because it is missing one subjective element – the legal consciousness of its obligation to respect (*opinion juris sive necessitatits*) [40].[17] Therefore, according to the Serbian position, it would be necessary to take advantage of the existing rules of general international law on delimitation on so-called *border waters*, in which falls the Danube in the part which flows through Serbia and Croatia. At first sight, it seems that it would be easy to draw a border along the Danube, since as a river it makes a natural border. However, in practice there are numerous and often very complex questions. For drawing borders on the rivers flowing through two or more States or on those that are the very borders between States, the international law set up the principle of the mid-channel (*Thalweg, fil de l'eau*). The mid-channel principle or Thalweg has been applied since the middle Ages. It had been elaborated at the Rastatt Congress in 1797. It was accepted as an international legal standard in the Treaty of Luneville of 9 February 1801 where it served as a means for the division of the Rhine between Germany and France. Thalweg has proved to be the best criterion concerning downstream traffic when the water level of a navigable river is at its lowest point [41].

Drawing of borders on rivers also includes some specific questions. In practice, the following one is always posed: How should one draw borders on Boundary Rivers that change their courses? A custom rule on the change of the border is applied for gradual changes in the riverbed that have been caused by the evolutionary performance of the nature. In international law, accession (*accessio*) is the phenomenon that characterizes the Danube case. An abrupt rolling off a part of the bank and its incorporation in the other bank (*appulsio*) produces a similar effect. Overflowing (*aluvio*) can also bring about alteration of borders. The artificially made accession makes one part have an advantage over the other one. For example, drainage or lifting of the embankment makes the level of the water risen, what inevitably requires reaching an agreement on the change of borders since customs rules have not been built. On the other hand, in most cases avulsions do not bring about the change of borders (*avulsio*). States can deviate from the above mentioned principle for the reasons of equity in using water flows of Border Rivers stipulating a treaty clause on non-changeability of borders. Regarding this argument, it seems that the mid-channel approach

16 In the Fisher Case between the United Kingdom and Norway, the International Court of Justice confirmed that the delimitation must have international legal aspect, and that cannot depend solely on the will of the coastal State and its law.

17 The lack of delimitation between Croatia and Serbia makes it difficult to demarcate the border line between the two neighbouring countries. Tacit consent to the actual situation is not enough evidence of the existence of legal awareness of the obligation to respect the demarcation line between Croatia and Serbia, and the acceptance of the principle of *uti possidetis juris,* is not enough to resolve all border issues. Hence, the existing demarcation line cannot constitute evidence that the boundaries are already accepted through prescriptions and consent, since there are territorial demands in certain areas. Moreover, in the nineties for 20th century, there were the obvious challenges to the administrative border between the two republics, now independent states. Due to factual change, parts of cadastral municipalities on the left bank of the Danube were ceded to Serbia. As to the formal recognition of the border has never been, a tacit statement of the existence of effectiveness of the authorities at the level of the former Yugoslav republics in relation to the internal demarcation line, is not enough for the consent of the other party.

(*Thalweg*) would be the most appropriate for delimitation on the Danube. This principle may be applied to the delimitation of border on the Danube, with possible correction on the basis of principle of equity pertaining to the use of Danube's water currents. The change of the Danube course westward or actually towards Croatia has occurred during a long historical period. In that sense, Croatia could not bring into question the application of the international rule mentioned above. As for the delimitation of river islands and river branches of the Danube, the border should be defined in accordance with its position to the mid-channel. Gradual changes of the mid-channel do not bring into question the border line. As for new river islands that have been created in the meantime, delimitation should be carried out according to their position to the mid-channel as well as according to the fact whether they have been created gradually or abruptly. If the mid-channel principle could not be applied in all cases then the principle of equity should be implemented, all of the above mentioned refer to the use of the Danube water flow and resources by applying the rules of the neighborhood law [42].

Hence, one should not lose sight of that versatile regional co-operation and good neighborly relations, which are priorities of Serbia's and Croatia's foreign as well as European Union integration policies. Serbia and Croatia have chance to improve their bilateral cooperation through integrated border management on the Danube. It presumes conclusion of an international treaty on delimitation or the adoption of a collective declaration on the recognition of the existing "demarcation boundary line". Two neighboring States with the existing dispute over Danube are less likely to engage in cooperative management of shared water resources. Occasional incidents between the parties do not deny the thesis on their *bona fide* acting. However, this makes impossible for each of them to be precluded in their claims by taking unilateral opposite positions on the current territorial situation in a possible judicial case of the Serbo-Croatian territorial dispute [43].[18]

Conclusion

The results of the previous analysis show that there are many open border issues between Serbia and other successor States of the former SFRY. This open border issues were mainly created as the result of opinions of the Arbitration Commission according to which internal administrative border between the former Yugoslav republics declared, for political rather than legal reasons, as international borders. This method is practically framed as the territorial *status quo* of new States, and in fact it is "frozen" in the current situation after the dissolution of the former Yugoslavia. However, this does not mean that the application of the principle of *uti possidetis* in the Yugoslav case reflects its universal application, because the application was not accompanied by the awareness of the legal obligation (*opinio juris*) between the successor States, but it is for safety reasons due to the conflict of interests of different ethnic communities in exercising their right to self-determination and for overcoming the crisis that could ensue after gaining independence, accepted as the so called "general principle" which applies to the new independent States and without retroactive effect to the date of independence, which has in some cases led to flagrant violations of the right to self-determination of peoples. Given the harmful consequences of its consistent implementation, it would be logical that Serbia and other successor States of the SFRY regulate their border disputes with the application of all relevant rules and principles of general international law to the determination of the facts and circumstances which might be of importance for the international delimitation.

18 In the absence of a valid agreement between the parties, States should seek solutions to ad hoc arbitration or the International Court of Justice in which case their decisions could replace the legal basis necessary for the final international legal regulation of the border on the Danube. According to the jurisprudence of the International Court of Justice, when the *uti possidetis* principle achieves the goal at the time of independence, converting administrative boundaries in international, the boundaries should not automatically become secure. In case of dispute, the Court takes into account other arguments, such as the principle of effectiveness, but also acts from which legal basis is derived, on which the *uti possidetis* principle is de facto based at the time of the State succession.

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