Chapter 10  The Kosovo Question and *Uti Possidetis*: The Potential for a Negotiated Settlement

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1  Introduction

The issue of Kosovo’s status in international law remains an enduring problem for the international community. Its mixed reaction to Kosovo’s 2008 Declaration of Independence and tensions within the doctrines of self-determination, recognition and statehood appear to have rendered the ‘Kosovo Question’ intractable. In cases of secession the consent (or at least the acquiescence) of the parent State is invariably required for the fledgling entity to become a full participant in the inter-State system (irrespective of satisfying the criteria for the creation of States in international law). Serbia shows no signs of recognising Kosovo and it is highly unlikely that Russia will allow Kosovo to become a UN member, which is often seen as the ‘birth certificate’ of new States. It is unlikely that the impasse will be resolved by the ICJ’s Advisory Opinion. In these circumstances, another means of breaking the deadlock must be found otherwise this state of affairs will have a negative impact on the development of both countries and will ensure that regional peace and security remains fragile.

This chapter asks whether there are principles of international law that are not currently being considered that could assist with the resolution of the ongoing dispute between Kosovo and Serbia over Kosovo’s claim to statehood. To this end, it examines the Kosovo Question through the lens of the ongoing ethnic tensions

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3 It is apparent that the successor States are beginning to develop closer commercial and social ties, see “Entering the Yugosphere,” *The Economist*, 22 August 2009, 29.
between the Kosovo Albanians and the Kosovo Serbs in those areas of Northern Kosovo where the latter group predominates. These tensions have resulted in a governance problem for the Pristina administration which could provide a context for discussions between the parties. Against this background, this essay considers whether the principle of *uti possidetis* could offer a legal criterion to inform a process of negotiation to break the current deadlock, which might contribute to the resolution of the Kosovo Question.

To address this possibility, this essay initially sets out the governance problem in Northern Kosovo by undertaking a factual examination of some of the difficulties experienced in this region and how these issues might permit discussions between Kosovo and Serbia. Consideration is then given to the principle of *uti possidetis*, including its previous application in the dissolution of Yugoslavia. The essay then turns more specifically to the position of Kosovo during the time of the dissolution of Yugoslavia and examines why *uti possidetis* was not considered in relation to Kosovo at this time. It then is argued that, in the current circumstances, the presumptive nature of *uti possidetis* could provide a starting point for Kosovo and Serbia to resolve their differences. To determine whether this is feasible, the application of *uti possidetis* in various contexts is discussed to see if the principle’s traditional presumptive nature has been retained, or whether practice has rendered it to be prescriptive in nature. The essay then sets out the principles that could be utilised in the application of *uti possidetis* to the Kosovo/Serbia boundary before concluding as to the role that *uti possidetis* might play in the resolution of this long standing problem.

2 The Governance Problem in Northern Kosovo

To determine the viability of using alternative principles of international law (such as *uti possidetis*) to resolve the ongoing dispute between Kosovo and Serbia regarding Kosovo’s claim to statehood, it is first necessary to identify where there may be scope for a form of negotiated settlement. The difficulties experienced by the Kosovo administration in governing some of the Northern municipalities of Kosovo, particularly Zubin Potok, Mitrovica, Leposaviq and Zveçan, may provide this opportunity.

In many sectors in Northern Kosovo, assistance from KFOR, UNMIK and EU-LEX has been required to re-establish and maintain functions that are essential to civil society. Many of the difficulties encountered stem from the majority Kosovo Serb populations in these municipalities who are resistant to the Kosovo administration and are instead supporting Serbia’s calls to prevent the recognition of Kosovo as an independent State. However, the Kosovo administration has also experienced more general difficulties establishing basic services required in Northern Kosovo and, in addition, has to deal with the consequences of recent ethnically driven conflict. This section of the essay will outline some of the specific issues that the Kosovo administration has had to address in Northern Kosovo.

The resistance of Kosovo Serbs to the Kosovo administration’s claims of statehood has been manifested in several forms, including political resistance to the Kosovo administration’s attempts at decentralisation. In June 2006, the municipalities of Zubin Potok, Leposaviq and Zveçan, ceased to co-operate with the Kosovo