

*The Break-Up of Yugoslavia and International Law* by Peter Radan (New York: Routledge, 2002) pages i–ix, 1–278. Price US\$95.00 (hardcover). ISBN 0415253527.

This first book-length study of the international legal aspects of the dissolution of the Social Federal Republic of Yugoslavia offers more than its title promises. In the first chapter, Radan distinguishes what he calls the ‘classical theory’ of self-determination from the ‘romantic theory’: the former defines the subject of self-determination in terms of the territory which a group inhabits, while the latter defines it, roughly speaking, in terms of a group’s cultural and ethnic traits.<sup>1</sup> For the latter, the group that should ‘determine itself’ is a national one, defined in terms of its ethnicity and culture. Having drawn this distinction, Radan proceeds, in chapter 2, to examine the use of the term ‘people’ in various international legal — mostly United Nations — documents regarding the self-determination of peoples. He concludes that in these documents the term ‘people’ is not restricted to the use prescribed by the classical theory of self-determination: the reference of the term ‘people’, in the frequently recurring phrase ‘the self-determination of peoples’, is not and cannot be restricted to ‘the total population of a political unit.’<sup>2</sup> The term ‘people’, Radan argues, can — and in practice, does — encompass nations or national groups. While noting that neither the texts of various UN documents nor their *travaux préparatoires* can offer a conclusive interpretation of this term, he lists a large number of instances in which these documents refer to a number of ‘peoples’ inhabiting a single territory. He points out that in the great majority of these, the term can be, without any difficulty, understood to refer to nations. The rival interpretation, propounded by Antonio Cassese,<sup>3</sup> according to which ‘people’ refers to the entire population of a single state or colonial territory, Radan claims, is not only unsubstantiated but also inconsistent.<sup>4</sup> The rival interpretation grants the right of secession to ‘a people’ but denies the status of ‘people’ to any group within a particular state. From this it follows that a people would have only the right to secede from itself. The contrary view, that ‘peoples’ include national groups within a single state, does not, however, imply that any national group within a single territorial unit or state would have the right to secession. Citing a variety of UN documents, Radan argues that a national group has the right to secede only when it is denied the right of internal self-determination in the state which it inhabits. The romantic theory of self-determination, at least its international law version, does not countenance an uncontrolled proliferation of states.

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<sup>1</sup> Peter Radan, *The Break-Up of Yugoslavia and International Law* (2002) 8.

<sup>2</sup> *Ibid* 66.

<sup>3</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995).

<sup>4</sup> Radan, above n 1, 46–50.

Although Radan here offers a consistent and systematic interpretation of a series of UN and Conference on Security and Cooperation in Europe ('CSCE'),<sup>5</sup> declarations as well as International Court of Justice ('ICJ') judgments, his argument is open to dispute. Perhaps the most obvious question one would ask is why, if the term 'people' were meant to include (or at least not to exclude) various national groups within a state, do none of the documents which Radan cites explicitly say so? Why has it been left to legal scholars to haggle over the actual meaning of 'people' when that meaning is central to the legal interpretation of one of the most important principles of international law?

Chapters 3 and 4 deal with the application of the *uti possidetis* principle in Latin America, Africa and Asia. Here the author offers a systematic account of the historical development of the principle of *uti possidetis* from its origins as a principle in Roman law, to its adaptation as a principle of international law determining territorial changes upon the termination of war, and finally as a principle relevant to resolving boundary disputes following decolonisation, initially in Latin America and later in post-World War II Africa. Radan notes that the application of this principle to boundary dispute resolution in Latin America depended upon the agreement of all parties to the dispute. In Latin America, Radan also points out, it became quite clear that the meaning and application of *uti possidetis juris* differs considerably from that of the *uti possidetis de facto*, although both of these had been applied in the resolution of boundary disputes.<sup>6</sup> In the *Case Concerning the Frontier Dispute*,<sup>7</sup> concerning the borders between two former colonies in Africa, the ICJ established *uti possidetis juris* as being an obligatory rule of international law in judicial and arbitral proceedings concerning boundary disputes following decolonisation. Radan points out that the ICJ failed to substantiate this ruling, which was, soon after, also disputed by the President of the Chamber which made it.<sup>8</sup> However, Radan admits that the ruling, restricted as it originally was to disputes between states gaining independence from the same colonial power, appears to have gained general acceptance.<sup>9</sup>

The restricted application of *uti possidetis juris* to post-decolonisation boundary disputes provides Radan with a key premise of his argument against the rulings of the Arbitration Commission of the Conference on Yugoslavia, established in August 1991 by the European Community.<sup>10</sup> Commonly referred to as the 'Badinter Commission', in honour of its head, the French constitutional lawyer Robert Badinter, the Commission was originally set up to arbitrate among

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<sup>5</sup> The CSCE changed its name to the Organisation of Security and Cooperation in Europe ('OSCE') in January 1995: Radan, above n 1, 64.

<sup>6</sup> Radan, above n 1, 195–9.

<sup>7</sup> (*Burkina Faso v Mali*) [1986] ICJ Rep 554 ('*Frontier Dispute Case*').

<sup>8</sup> See *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 (Arbiter Bedjaoui).

<sup>9</sup> Radan, above n 1, 133.

<sup>10</sup> Commission of the European Communities, 'Declaration on Yugoslavia' (1991) 24 *Bulletin of the European Communities* 115.

the parties in conflict in Yugoslavia. In its opinions the Badinter Commission explicitly restricted the right of self-determination to the territories within each of the federal units of the Yugoslav federation, justifying this restriction by an appeal to the principle of *uti possidetis juris*. For this purpose, as Radan shows, the Badinter Commission selectively quoted the judgment in the *Frontier Dispute Case*, omitting the ICJ's restriction of the application of the principle to the process of decolonisation.<sup>11</sup> The Badinter Commission quoted from the ICJ's judgment a statement concerning the purpose of the *uti possidetis*; namely 'to prevent the independence and stability of new States being endangered by fratricidal struggles' but omitted the continuation of the statement 'provoked by the challenging of frontiers following the withdrawal of the administering power.'<sup>12</sup> Elsewhere in its judgment the ICJ asserted that the principle is 'a firmly established principle of international law where decolonization is concerned'.<sup>13</sup> In Radan's view these were not accidental omissions by the Badinter Commission. By extending the range of application of *uti possidetis juris*, he argues that the Commission was attempting to establish a principle of its own, which he dubs the 'Badinter Borders Principle'.<sup>14</sup> Pursuant to this principle, where there has been a successful secession from a state or where a state has dissolved, internal federal borders of such a state become protected international borders that cannot be changed by force. The Badinter Borders Principle was used to provide a legal basis for the international community's decision to recognise Yugoslavia's seceding republics as international states with borders that corresponded to previous internal boundaries in the Yugoslav federation. The case of the former Yugoslavia has since been cited as a precedent in relation to other secessionist movements, most importantly that of a possible secession of Quebec from Canada (which is likewise a federal state).<sup>15</sup>

As expected, Radan argues, in chapter 7, that the Badinter Borders Principle has no basis in international law, primarily for two reasons: the principle of *uti possidetis* is restricted to decolonisation; and the right of self-determination is not (and cannot be) restricted to entire populations of territorial or federal units. While Radan's argument in support of these claims is persuasive, it is far from conclusive. One can also argue that there is nothing in the principle itself to prevent its judicial extension to cases of border disputes other than those arising from decolonisation, and that the latter right has been, at times, successfully restricted to entire populations of territorial units. But his argument against the Badinter Commission rulings is not restricted to these two issues; it is a wide-ranging and complex argument that would be difficult to summarise adequately in a review of this kind.

It would be equally difficult to summarise Radan's account of the constitutional development of Yugoslavia from its inception in 1918 to its

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<sup>11</sup> Radan, above n 1, 228–9.

<sup>12</sup> *Frontier Dispute Case* [1986] ICJ Rep 554, 565. See also *Opinion No 3 of the Arbitration Commission of the Peace Conference on Yugoslavia* (1992) 31 ILM 1499.

<sup>13</sup> *Frontier Dispute Case* [1986] ICJ Rep 554, 565.

<sup>14</sup> Radan, above n 1, 222.

<sup>15</sup> See, eg, Thomas Franck et al, *Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty* (1992) [2.46]–[2.47], [3.20]–[3.21] <<http://www.uni.ca/5experts.html>> at 30 April 2002.

demise, and of the series of recursive successions which took place on its territory from 1991 to 1999, presented in chapters 5 and 6. His is an account of all the secessions; those that were internationally recognised and those that were not (such as the secessions of the Croat community of Herzeg-Bosna and of the [Muslim] Republic of Western Bosnia, both from Bosnia-Herzegovina). So far there have been nine secessions in the former Yugoslavia — four secessions of federal and five of sub-federal units — which have led to the establishment of separate states or state-like legal systems. There were also two proclaimed secessions from one federal unit, Macedonia, which appeared to have been purely declarative. In view of the diversity and complexity of these secessions, the Badinter Commission rulings — in effect recognising only the secessions of federal units — appear to have been motivated by a desire to find a simple legal solution to a highly complex political problem.

Whatever the motivations of the Badinter Commission may have been, Radan regards its rulings as ad hoc legal opinions without proper grounding in international law. A number of legal scholars, such as Matthew Craven<sup>16</sup> and Steven Ratner,<sup>17</sup> share this critical view of the Commission's legal reasoning.

In fact the Badinter Commission's appeal to the *uti possidetis* principle, I think, is a result of its rather desperate search for a principle of *international* law which would protect the *internal* borders of a state. For obvious reasons international law provides no protection of this sort. Radan, among others, does not see any reason why the internal borders of federal Yugoslavia necessarily had to be protected in any way, and argues that the transformation of these internal borders into international ones was a breach of international law; namely that of the equal right of self-determination of peoples. The peoples in this case were national groups, which, through a plebiscite, expressed their desire to secede from the federal units of the former Yugoslavia.

More importantly, I believe that the Badinter Commission was neither established, nor functioned, as an authoritative judicial body whose opinions were to be regarded as sources of international law. Rather, the Commission acted as an advisory body to the European Community and its institutions regarding the recognition of the newly emerging states in the Balkans. When it was politically expedient to do so, its advice on these matters was conveniently disregarded. For example, acting against the Commission's recommendations, the European Community (preceded, unilaterally, by Germany) recognised the independence of Croatia and refused to recognise that of Macedonia. In this way, the European Community demonstrated that it considered the opinions of its own Commission as neither legally binding nor authoritative.

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<sup>16</sup> Matthew Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Year Book of International Law* 333, 334.

<sup>17</sup> Steven Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 *American Journal of International Law* 590, 614–15.

In view of this, I read Radan's closing chapter on the Badinter Commission as a superb exposition and critique of a rather poor attempt at a legal obfuscation of a complex political problem by an ad hoc commission of the European Community. This particular obfuscation, however, contributed to prolonged bloodshed. This is, no doubt, an additional reason for its exposure.

But, as I have tried to indicate, the book goes much beyond the critique of this unfortunate Commission and its rulings. It is the best introduction to the principal legal issues arising from the disintegration of the Yugoslav federation published so far.

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