

Peter Radan, *The Break-up of Yugoslavia and International Law*. London: Routledge, 2002. Pp. ix, 278.

For centuries, the attribution of territory and the determination of boundaries has been one of the major threats to world peace and stability. These thorny and divisive issues, with their potential for violence, are of critical importance in the context of the dissolution of a state or secession by a group within a state. In *The Break-up of Yugoslavia and International Law*, Peter Radan, a senior lecturer at Macquarie University in New South Wales Australia, tackles the difficult question of boundary determination through a critical analysis of a recent precedent, namely the break-up of the former Yugoslavia.

At the heart of Radan's study lies the question of why claims to statehood by four of Yugoslavia's constituent republics were recognized by the international community while similar claims advanced by national groups within those republics were categorically rejected. On what grounds were the internal federal borders of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia deemed sacrosanct, effectively trumping any claim to revision from within, when these same republics had themselves, by their actions, called into question and radically transformed the borders of the Socialist Federal Republic of Yugoslavia ("SFRY")?

According to Radan, historical events (e.g., the Enlightenment, the French and American Revolutions) bequeathed to international law not one but two theoretical versions of the right of self-determination—the "classical" and "romantic" theories—deriving from a differing understanding of the term "the people", those endowed with the right of self-determination.

Radan insists that the implications of these two distinct theories of self-determination are highly significant for state creation. If an individual's identity is tied to the state or territorial unit (the "classical theory"), self-determination will take place within the territorial confines of that state or unit. The classical theory therefore supports the principles of territorial integrity and the inviolability of state borders. But if an individual's loyalty is to the cultural group or nation (the "romantic" theory)—the two expressions being synonymous in much of the literature on the topic (11)—self-determination will take place when that nation obtains its own state. Consequently, the romantic theory admits the alteration of existing state borders and clearly contemplates secession as well as irredentism.

Radan claims that "most of the recent and current claims to self-determination are based on the romantic theory of self-determination, including those relating to the former Yugoslavia" (15). He rejects the widely held view that "a people" must be defined as the total population of a political unit, such as a colonial entity or an independent state. Radan argues, rather, that UN and other international documents, as well as international practice, support the view that a nation or national groups are included within the meaning of "a people". The conclusion that a nation is "a people" leads Radan to argue that secession from an internationally recognized state pursuant

to the right of self-determination of peoples is legally and practically possible. He does, however, concede that this right to secede is limited by the strict condition that it can only occur when a state discriminates against, and thereby denies self-determination to, a group within that state.¹

Having insisted that a right to secession flows from the right of self-determination of peoples, Radan then tackles the critical issue of the determination of the precise territorial parameters of the seceding entity. Confronted with the break-up of the former Yugoslavia, the international community held that in the context of secession from a federal state, secession must occur within the confines of existing federal borders. The legal justification for this conclusion was the principle of *uti possidetis*.²

Radan begins by presenting an historical analysis of the development of the *uti possidetis* principle from its Roman law origins to its transformation as a principle of international law.³ He turns to the principle's modern genesis with the independence movement in Latin America and the concomitant tension and friction over boundaries among the newly independent republics, as well as the role of the principle in the decolonization of Africa and, to a lesser extent, Asia.

Radan draws a number of conclusions from this analysis regarding the application of the *uti possidetis* principle in the colonial context. First, the principle of *uti possidetis* only applied in cases of disputed boundaries between those states that had succeeded in gaining independence from a former colonial power. Second, the principle applied only if the disputant states agreed that it would—consent was an absolute pre-requisite. On this question, Radan expresses doubt as to the correctness of the International Court of Justice's ruling in the *Frontier Dispute Case* in which it declared that *uti possidetis* was a "firmly established principle of international law where decolonization is concerned ..."⁴ According to Radan, by this ruling, the Court declared *uti possidetis* to be an obligatory rule of international law. However, as Radan argues, even if the Court's interpretation is valid, it simply means that *uti possidetis* applied in colonial boundary cases if, and only if, the disputant parties did not stipulate, as they were free to do, that other principles would apply. This caveat is

¹ The reference here is to the limit imposed by the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, UN Doc. A/8082 (1970) 121.

² *Uti possidetis, ita possideatis*: as you possess, so may you continue to possess.

³ Radan's account, however, is brief and focuses mainly on the role played by the *uti possidetis* principle in resolving border disputes following the decolonization of the Spanish and Portuguese colonies of Latin America. For more information on the principle's Roman law origins, see Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal: McGill-Queen's University Press, 2002); John Bassett Moore, "Memorandum on Uti Possidetis" in *The Collected Papers of John Bassett Moore*, vol. 3 (New Haven: Yale University Press, 1944)

⁴ *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, [1986] I.C.J. Rep. 554 at 565.

of fundamental importance for Radan's subsequent criticism of the territorial resolution imposed on all concerned parties following the break-up of Yugoslavia.

Radan explains that to fully appreciate the historical, political, and legal repercussions of the break-up of the SFRY in 1991, it is important for the reader to grasp the essentials of Yugoslavia's political and constitutional history. Relying on valuable sources, often difficult to access in North America, Radan paints a detailed and fascinating picture of the efforts expended by Yugoslavia's political elites throughout most of the twentieth century to find a workable constitutional and territorial structure to accommodate the aspirations of its multinational population.

Radan deftly considers the rise of nationalist movements within Yugoslavia in the early 1980s and the question of why Yugoslavia's federal structure, in the end, failed. The simple answer, according to Radan, appears to be that federalism is ultimately an inadequate response to the forces of nationalism in multinational states. As he notes, "the territorial integrity of multi-national states is not a nationalistic goal" (157).

The analysis of the secessions and attempted secessions of Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, the Republic of Serb Krajina from Croatia, the Serb (*Republika Srpska*), as well as the Croat and Muslim autonomous communities, from Bosnia-Herzegovina, and the Republic of Kosovo from Serbia, from an historical, political, constitutional, and military perspective is without doubt one of the real strengths of Radan's book. He presents a very detailed and faithful account of the events that led to the various declarations of independence and the international reaction to them and does so by relying on official government sources and decisions rendered by Yugoslavia's Constitutional Court, in addition to a host of other official and doctrinal sources, normally inaccessible to the non-speaker of the former Yugoslavia's official languages.

Radan then concludes that, with the exception of Bosnia-Herzegovina, all the secessions of, and within Yugoslavia's republics were explicitly justified on the basis of the right of peoples to self-determination. Even in Bosnia-Herzegovina, he insists, though there was no dominant national group, self-determination was still a significant factor. Furthermore, all the demands for secession, based upon self-determination, involved the "romantic" theory of self-determination, defining "a people" in terms of a nation. Yet, the international community's response to those secessionist demands was to recognize the secessions of Yugoslavia's republics, but not those initiatives emanating from national groups within those republics. And, even more importantly, according to Radan, this selective recognition policy was explicitly defended on the grounds that it reflected existing international law regarding the exercise of the right of peoples to self-determination.

As Radan explains, the international community's position on the issue of recognition of the breakaway republics was, to a large extent, influenced by rulings of

the Yugoslavia Arbitration Commission⁵ established in the context of the International Conference for Peace in Yugoslavia. Radan scrutinizes three critical findings made by the Badinter Arbitration Commission, which had a tremendous impact on the final outcome of the crisis in Yugoslavia: (1) that Yugoslavia was in the process of dissolution rather than experiencing secession from a number of republics; (2) that the right of self-determination could only be exercised by particular territorial units, namely the constituent republics of the SFRY; (3) and that the principle of *uti possidetis* applied to cases outside the colonial context and, in fact, dictated a territorial outcome that could be imposed upon unwilling parties.

The opinions of the Badinter Commission have been the subject of much academic debate and scrutiny. Radan gives a full and comprehensive account of the main criticisms levelled at the Badinter Commission's principal findings. But in so doing, he offers a novel and particularly interesting analysis of the dissolution *versus* secession debate. He painstakingly assembles the evidence in support of his argument that the process unfolding in the SFRY in 1991 was one of secession and not dissolution. He addresses, one after the other, the legal arguments upon which the Badinter Commission justified its finding of dissolution and skillfully and convincingly refutes them. This persuasive analysis, in turn, supports his argument that the recognition extended to the republics in 1992 was in fact recognition of states born of secession. This conclusion, of course, leads Radan to the point at the heart of his thesis: there is "no justification for insisting that the borders of the republics of Croatia and Bosnia-Herzegovina remain sacrosanct while not extending that same right to the borders of the SFRY" (219).

Radan concludes this argument by emphatically rejecting the proposition according to which the *uti possidetis* principle could account for this selective and territorially based interpretation of the right of self-determination of peoples, rejecting also article 5 of the SFRY Constitution of 1974⁶ as a legal justification for the selective recognition policy. According to him, Yugoslavia was not a case of decolonization, nor did the disputant parties in the conflict agree that their respective borders would be determined by the principle of *uti possidetis*. Properly understood, *uti possidetis* is irrelevant in situations like Yugoslavia. The principle of *uti possidetis*, asserts Radan, is only useful in resolving disputes as to the precise location of an agreed upon border, not in deciding which lines should become international boundaries (247).

To insist that in cases of secession from a federal state, internal administrative borders should automatically become international borders amounts, according to Radan, to an unprincipled extension of the colonial principle. More fundamentally,

⁵ More commonly known as the Badinter Arbitration Commission after its president, Robert Badinter.

⁶ Gisbert H. Flanz, *Constitution of the Socialist Federal Republic of Yugoslavia* in Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y.: Oceana Publications, 1974) 1.

Radan argues in the conclusion that, irrespective of legal rights or wrongs, the solution proposed by the Badinter Commission and espoused by the international community is, for a number of reasons both political and practical, too simplistic and inflexible to help the cause of international peace and stability. And, he argues, while in some situations, recognition of statehood within existing federal borders will be appropriate (he cites Slovenia with its homogeneous Slovene population as a case in point), in cases where the impulse for secession is driven by nationalist ideology and where federal borders cut across national lines, more sophisticated measures need to be undertaken to ascertain the international borders.

In applying this principle, Radan suggests that internationally supervised plebiscites in contested areas could be organized, although common sense limitations based upon geography would need to be taken into consideration. Radan even goes so far as to suggest that in some cases, it may be necessary to facilitate orderly and voluntary population transfers, a fairly controversial proposition. The problems of implementing such a policy can readily be envisaged, yet his arguments in favour of establishing borders in such a way that the maximum number of persons can find themselves on their preferred side of a new line, avoiding the turmoil and violence that engulfed the former Yugoslavia, are certainly persuasive.

Radan's book is both well written and extremely well researched. He provides a useful and lucid account of complex international situations and legal concepts. Through his use of sources, which for linguistic or other reasons are often unavailable to many scholars, the book is a veritable gold mine of little known and often fascinating factual information, offering new insights into the troubles in the former Yugoslavia. The analysis is thought provoking and, in some instances, is at odds with current accepted opinion which, of course, makes Radan's arguments all the more interesting. For example, he asserts that "[f]or the purposes of self-determination, the definition of a people should be the same, be it in the context of colonial territories or independent states" (62). Some jurists might argue that the legal definition of "a people" entitled to exercise the right of self-determination has evolved over time. States, always anxious to contain the potentially explosive impact of the right of self-determination, have only cautiously extended this right to new categories of peoples. During the decolonization period, for instance, no one can deny that most of the African colonies were comprised of many different peoples and nations, defined according to ethnic, cultural, religious, or linguistic criteria (39). However, for the exercise of the internationally recognized and controlled right of self-determination, and despite a few notable exceptions, the only "people" recognized as the legal holder of that particular right was the population of the colony as a whole. Of course, there can be little debate that, with the adoption of the Declaration on Friendly Relations⁷ and the two International Covenants,⁸ the right of self-determination was extended to

⁷ *Supra* note 1.

⁸ *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (entered into force 3 January 1976), GA Res. 2200A (XXI), 21 UN GAOR, Supp. No. 16, UN Doc. A/6313 (1966)

all peoples, including cultural or national groups but then the international community, through a restrictive interpretation of how that right could be exercised, severely curtailed the possible outcomes.

Radan also adopts a novel approach in analyzing the decisions rendered by the Badinter Commission. On the basis of arguments deriving from the Yugoslav Constitution as well as fundamental international legal principles, Radan skillfully demonstrates that the Badinter Commission's key finding in Opinion No. 1⁹ that Yugoslavia was in the process of dissolution was not founded either in fact or in law, and that consequently, its pronouncements concerned secession by four of the constituent republics.

As a result, Radan then argues, Yugoslavia is in fact a recent precedent recognizing a right of secession. And he makes a persuasive case. However, the Badinter Commission itself declared that its pronouncements flowed from its initial finding that the process unfolding in Yugoslavia was indeed one of disintegration of the state. And though this conclusion may be flawed, as Radan argues forcefully, this finding nevertheless formed the linchpin of the subsequent opinions rendered by the commission. It might also be argued that the international community only formally entertained the claims to independent statehood once the commission had characterized the situation as one of dissolution. For the international community, haunted by the fear of opening up Pandora's box and unleashing an unfettered right to secession, this legal determination was obviously of great comfort and reassurance.

But these considerations in no way detract from Radan's powerful analysis of the break-up of the former Yugoslavia. He suggests a novel approach to understanding a precedent that has profound implications for international law. Indeed the break-up of the former Yugoslavia remains a most compelling and fascinating study, involving, as it does, the collision of core principles of the international legal system: the right of self-determination of peoples, the right to territorial integrity, the sanctity of established borders, and the rights of minorities. And scholars and experts worldwide continue to debate the best possible reconciliation of these basic principles, which were clearly divisive and disastrous in Yugoslavia, in the hope that such a tragedy can be averted in the future. Radan's book makes an important contribution to this vital debate.

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49; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force 23 March 1976), GA Res. 2200A (XXI), 21 UN GAOR, Supp. No. 16, UN Doc. A/6316 (1966) 52.

⁹ [Disintegration of the SFRY] (1991), 92 I.L.R. 162 (Conference on Yugoslavia, Arbitration Commission).