

THE BORDERS OF A FUTURE INDEPENDENT QUEBEC: DOES THE PRINCIPLE OF *UTI POSSIDETIS JURIS* APPLY?

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Quebec's secession from Canada has to date been principally debated as to its legality. This is reflected in the Canadian government's current Reference to the Supreme Court of Canada which seeks the Court's ruling on whether a unilateral secession of Quebec is valid either under Canadian constitutional law or pursuant to principles of international law, especially that of the right of peoples to self-determination.¹ Until recently the question of the borders of a future independent Quebec has not been the subject of extensive debate. The indigenous nations of Quebec have for some time declared their desire to remain within Canada and that the present provincial borders of Quebec cannot be future international borders.² More recently a number of municipalities within Quebec, dominated by English speaking Canadians, have passed resolutions calling on federal authorities to protect their constitutional right to remain part of Canada.³ On the other hand, in May 1992, at the request of the government of Quebec, a group of five prominent international lawyers stated their opinion that if Quebec achieved independence her provincial borders would automatically become international borders ("the Pellet Report").⁴

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¹ The case before the Supreme Court has its origins in litigation against the province of Quebec initiated by Guy Bertrand, a former Quebec separatist, but now federalist, seeking orders as to the constitutionality of a draft bill before the Quebec legislature providing for the secession of Quebec following a successful referendum: *Bertrand v Quebec* (1995) 127 *Dominion Law Reports* (4th) 408; *Bertrand v Quebec* (1996) 138 *Dominion Law Reports* (4th) 481. The case is not expected to be heard by the Supreme Court before February 1998. For a view on one of the legal issues before the Supreme Court see Webber, "The legality of a unilateral declaration of independence under Canadian law" (1997) 42 *McGill Law Journal* 281.

² Sanders, "If Quebec secedes from Canada can the Cree secede from Quebec?" (1995) 29 *University of British Columbia Law Review* 143, 154; Editorial, "Separation: Aboriginal issues are proving to be weak links in Quebec's argument", *Calgary Herald*, 26 May 1994; "Separatist fervour spreads to native tribes in Quebec", *International Herald Tribune*, 7 February 1995; "Separation would be 'totally unacceptable' to Quebec Mohawks", *The Financial Post*, 10 August 1996.

³ "Separatists panicking as Quebec federalists go on offensive", *The Financial Post*, 5 September 1997.

⁴ The five experts were Thomas Franck (United States of America), Rosalyn Higgins

independence movement in Spanish America were determined to free themselves from colonial rule and to prevent a return of European control over any part of Spanish America.¹⁵ The fear of European attempts to re-colonise South and Central America was real, as independence from Spain came in the wake of Spain's acceptance that it no longer had a monopoly over settlement and trade in the Americas. Other European maritime powers increasingly had the force to compel a Spanish retreat in this respect.¹⁶ The Americas were thus open to Spain's imperial rivals. It was by no means certain that Spain's rivals would not seek to fill the vacuum created by its withdrawal from South and Central America. *Uti possidetis* was thus, at first, much less legal than political in its implications.¹⁷

The development of the principle of *uti possidetis* as the basis of preventing further colonisation of Latin America meant the exclusion of any further application of the doctrine of *terra nullius* to the Americas. Because former colonial borders served as new state borders, the new Latin American states claimed to be legally entitled to all the territory within these borders irrespective of whether they had been explored or inhabited by the former colonial power. Indeed much of Central and South America was unexplored or uninhabited by the colonial powers and remained inhabited only by the native Indian peoples. Native Indian occupation of land did not preclude the operation of the *terra nullius* doctrine.¹⁸ Nor did

¹⁵ van Wynen TA and anor, *Non-Intervention, The Law and its Import in the Americas* (1956, Southern Methodist University Press, Dallas) 55-56.

¹⁶ Parry JH, *The Age of Reconnaissance* (1963, Weidenfeld & Nicolson, London) 318-319.

¹⁷ "This doctrine [of *uti possidetis*] - possibly, at least at first, a political tenet rather than a true rule of law - is peculiar to the field of the Spanish-American states whose territories were formerly under the rule of the Spanish Crown": *The Beagle Channel Arbitration* (1977) 52 *International Legal Materials* 634 para 9. See Alvarez, "Latin America and international law" (1903) 3 *American Journal of International Law* 269, 275.

¹⁸ The rights of indigenous populations were, in accordance with the times, not legally recognised and they became part of the populations of the relevant states. However, such a view of the rights of indigenous peoples is no longer accepted: *Advisory Opinion of the International Court of Justice on the Western Sahara* [1975] *International Court of Justice Reports* 12, 39 paras 79-81. On the other hand there was at the time of decolonisation a political recognition of the rights of the indigenous populations. Referring to the Creole population, Simon Bolivar wrote in 1815: "[W]e are...neither Indian nor European, but a species midway between the *legitimate proprietors of this country* and the Spanish usurpers. In short, though Americans by birth we derive our rights from Europe, and we have to assert those rights against the

initially the territorial limitations of native Indian communities, established by Spanish colonial authorities, affect territorial delimitation in accordance with the principle of *uti possidetis*.¹⁹ This was so because these grants “[were] not Spanish colonial law documents concerning the definition of the administrative borders of the colonial provinces or intendancies.”²⁰ However, in 1992 the International Court of Justice did rule that “grants to Indian communities...might indicate where the borders were thought to be or ought to be.”²¹

In effect the principle of *uti possidetis* declared that no territory in former Spanish America was without an owner and thus no territory was open to further European colonisation on the basis of territory being *terra nullius*. In the *Colombia-Venezuela Arbitral Award*,²² the Federal Council of Switzerland observed that the principle of *uti possidetis* meant that although territories were not occupied in fact, they were deemed to be occupied in law by the new states at the very moment of independence. By this legal fiction of constructive possession, in the words of the Federal Council, “no territory of old Spanish America was without an owner” and the principle of *uti possidetis* served to “put an end to the designs of the colonizing states of Europe against lands which otherwise they could have sought to proclaim as *res nullius*”.²³

rights of the natives, and at the same time we must defend ourselves against the invaders” (emphasis added): “The Jamaica Letter”, 6 September 1815 in Bierck Jr HA (ed), *Selected Writings of Bolivar*, Volume One, 1810-1822 (1951, 2nd edition, Colonial Press Inc, New York) 103, 110.

¹⁹ Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) [1992] International Court of Justice Reports 383 per Torres Bernardez J at 636, 644-649 paras 12, 28-37.

²⁰ Ibid per Torres Bernardez J at 648 para 36.

²¹ Ibid at 394 para 54.

²² *Colombia-Venezuela Arbitral Award* (1922) 1 Reports of International Arbitral Awards 223-305.

²³ Ibid at 228. For the English translation from the French original see quote in Scott, “The Swiss decision in the boundary dispute between Colombia and Venezuela” (1922) 16 *American Journal of International Law* 428, 429. See also *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* [1960] International Court of Justice Reports 192 per Urrutia Holguin J at 226-227 (dissenting opinion); *The Beagle Channel Arbitration* (1977) 52 *International Legal Materials* 634 para 10; *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* [1992] International Court of Justice Reports 383, 387 para 42.

In Africa, during the wave of decolonisation after World War II, the principle of *uti possidetis juris* was applied to settle border disputes. The acceptance of the principle was more widespread than in Latin America due to a resolution of the Organisation of African Unity ("OAU"), adopted in July 1964, which stipulated that all member states "pledge themselves to respect the borders existing on their achieving national independence".²⁴ It was because of this approach by the OAU that the International Court of Justice, in the *Frontier Dispute Case*, ruled that the principle of *uti possidetis juris* was a "firmly established principle of international law where decolonization is concerned".²⁵

This ruling was strictly *obiter dictum* as the Chamber acknowledged, because the Chamber was bound to apply the principle of *uti possidetis juris* by virtue of the Preamble of a Special Agreement of 16 September 1983 between Burkina Faso and Mali.²⁶ However, in *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, the view of the Chamber in the *Frontier Dispute Case* as to the generality of applying *uti possidetis juris* in cases of decolonisation appears to have been endorsed.²⁷

The effect of this ruling is that if a treaty stipulated that a border dispute was to be determined by principles of international law, that meant the application of *uti possidetis juris* in the first instance, as indeed occurred in *El Salvador/Honduras*. To this extent the ruling changes the position as it existed in Latin America before 1986. However, the ruling does not mean that *uti possidetis juris* must apply in all cases of border disputes. It would ultimately depend on the treaty provisions between the relevant states. The treaty could always stipulate, as was occasionally the case in Latin America before 1986, that other principles, such as equity, would apply. Such treaty provisions would exclude the application of *uti possidetis juris*.

²⁴ Naldi GJ, Documents of the Organization of African Unity (1992, Mansell, London) 49.

²⁵ [1986] International Court of Justice Reports 554, 565 para 20. In *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* Arbitrator Bedjaoui implicitly raised doubts as to the *obiter dictum* in the *Frontier Dispute Case*: (1989) 83 International Law Reports 1, 56 para 15.

²⁶ [1986] International Court of Justice Reports 554, 565 para 20.

²⁷ [1992] International Court of Justice Reports 383, 386-387 para 42. See also *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] International Court of Justice Reports 6, 89 per Ajibola J at para 127 (separate opinion).

Thus, ultimately the question of whether *uti possidetis juris* applies to settle border disputes arising in the wake of decolonisation, be it in Africa or elsewhere, is a matter for the relevant states to determine.

The rationale for adopting *uti possidetis juris* in Africa was expressed by the Chamber in the *Frontier Dispute Case* when it said:

Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles following the withdrawal of the administering power.²⁸

Later the Chamber said:

[T]he maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers.²⁹

As noted above, the Badinter Commission cited the principle of *uti possidetis juris* and the *Frontier Dispute Case* as legal justification for the preservation of internal federal borders as international borders in the case of the secession of the various Yugoslav republics in 1991. Similar claims are made by the Pellet Report in the case of Quebec. The decision of the Badinter Commission can, however, be questioned. First, as noted above, the application of *uti possidetis juris* was conditional upon the prior agreement of the disputant states that the principle should apply. This was not the case in Yugoslavia. The seceding republics sought maintenance of their federal borders, but Serbia contested these claims, asserting that Yugoslavia's internal borders were merely administrative and never drawn with the possibility in mind that they could become international borders.³⁰

²⁸ [1986] International Court of Justice Reports 554, 565 para 20. See similar sentiments in *The Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v Pakistan)* (1968) 50 International Law Reports 2, 408.

²⁹ [1986] International Court of Justice Reports 554, 567 para 24.

³⁰ On the differences between internal borders and international borders see Ratner, "Drawing a better line: *uti possidetis* and the borders of new states" (1996) 90

In the case of Quebec, as noted above, the Canadian Federal government is taking a similar view.

Secondly, the *Frontier Dispute Case* was one which specifically referred to the application of *uti possidetis juris* in cases of decolonisation. There is nothing in the decision of the Chamber which suggests that the principle should apply in cases of secession from internationally recognised states.³¹ In its Opinion No 3 the Badinter Commission explicitly deletes references to the context of decolonisation when it quotes from the *Frontier Dispute Case* in support of the proposition that *uti possidetis juris* applies to cases of secession. The Pellet Report similarly misquotes the *Frontier Dispute Case*, but does recognise that there are “numerous allusions made by the Court [in the *Frontier Dispute Case*] to the specific problem of decolonization”. The report then asserts that, because of the decision of the Badinter Commission, the principle is not confined to cases of decolonisation.³² This bold assertion is questionable given the poorly reasoned argument of the Badinter Commission decision.³³ Given that the

American Journal of International Law 590, 601-607. Ratner also notes that internal administrative borders of a state are functionally different from colonial borders, even in cases where the colonial border separated colonies of the same colonial power: *ibid* at 609.

³¹ *Ibid* at 614; Craven, “The European Community Arbitration Commission on Yugoslavia” (1995) 66 *British Year Book of International Law* 333, 388.

³² Pellet Report para 2.46.

³³ “Overall, the generally very brief opinions of the Commission are likely to attract considerable and probably hostile scholarly interest. They are underpinned by the shallowest legal reasoning and do not appear destined to assist the international community greatly when addressing the potentially dangerous problem of secession in the future”: Weller, “International law and chaos” [1993] *Cambridge Law Journal* 6, 8. According to some scholars the Badinter Commission opinions and the decision in the *Frontier Dispute Case* do not establish the application of *uti possidetis juris* in the context of the breakup of states as an established norm of international law: Sanders note 2 at 157; Tamzarian, “Nagorno-Karabagh’s right to political independence under international law: an application of the principle of self determination” (1994) 24 *Southwestern University Law Review* 183, 197-198; Ratner note 30. Others have interpreted the Arbitration Commission statements on *uti possidetis juris* as part of a process of redefinition of the principle, so that it can apply where there is secession from a non-colonial state: Frank, “Postmodern tribalism and the right to secession” in Brozman C and anor (eds), *Peoples and Minorities in International Law* (1993, Martinus Nijhoff Publishers, Dordrecht) 3, 20. For a similar approach see Kritsiotis, “*Uti possidetis* in the Sudan: an African crisis in perspective” in Kritsiotis D (ed), *Self-Determination: Cases of Crisis - A Collection of Essays* (1994, Hull University Law School Studies in Law Series) 71-91. Pellet is of the view

application of *uti possidetis juris* is confined to determination of border disputes between states in the wake of decolonisation, it should not have been applied in the case of Yugoslavia, nor should it be relevant to the case of Quebec. In former Yugoslavia and in Canada the circumstance of colonisation, as understood in international law, was not and is not present.³⁴

The Pellet Report argues that, apart from the judicial interpretation contained in the Badinter Commission opinion, international reaction to cases of secession supports the view that pre-existing administrative borders must be maintained, and proceeds to cite various statements and declarations by the European Community ("EC") made in the wake of the secession of Yugoslav republics. The most significant of these was the EC statement of 16 December 1991 setting guidelines for the recognition of new states emerging from the former Soviet Union and Yugoslavia.³⁵ However, the Pellet Report fails to note that the EC issued a statement on 31 December 1991 in the context of former Soviet republics becoming independent states which, *inter alia*, stipulated:

Recognition shall not be taken to imply acceptance by the European Community and its Member States of the position of any of the republics concerning territory which is the subject of a dispute between two or more republics.³⁶

This statement clearly indicates that internal federal borders are not automatically to be taken as international borders following secession or the dissolution of an internationally recognised state.

It can also be noted that following the recognition of former Yugoslav republics as independent states there has been considerable condemnation of the approach taken by the EC. Thus, former Co-chairman of the Steering

that *uti possidetis juris* "has today acquired the character of a universal, and peremptory norm": Pellet note 8 at 180.

³⁴ It is submitted that some commentators have argued unconvincingly that Yugoslavia did represent a form of colonisation by Serbia vis-à-vis the seceding republics: Hill, "What the principle of self-determination means today" (1995) *ILSA Journal of International and Comparative Law* 120, 131.

³⁵ Pellet Report para 2.47.

³⁶ "Recognition of former Soviet Republics" [1991] *Bulletin of the European Communities Commission*, No 12, 121 para 1.4.13.

Committee of the International Conference on the Former Yugoslavia Lord David Owen has expressed the view that sticking “unyieldingly” to internal borders as future international borders was a “folly” and that the EC’s rejection of a Belgian proposal to redraw borders was incomprehensible.³⁷ France’s President at the time, Francois Mitterand, also expressed criticism of the decision to recognise the seceding Yugoslav republics before the questions of borders had been resolved.³⁸

What these statements evidence is that the international practice referred to in the Pellet Report amounted to bad practice. The insistence on maintaining internal federal borders, not only failed to preclude or minimise violence after the secessions of at first Slovenia and Croatia, and later Bosnia-Herzegovina and Macedonia, but only served to prolong it. If a similar practice is adopted in the case of Quebec the possibility of violence cannot be excluded. Leaders of Canada’s indigenous groups have warned that violence could result if Quebec attempts to secede and claim its present federal borders as international borders.³⁹ Dion’s letter of 11 August 1997 is indicative that Canada will not willingly concede Quebec’s independence within its present borders. The effect of Quebec’s secession would be to split Canada into two non-contiguous parts, and could very well reawaken secessionist sentiments in some its other provinces which, in turn, could lead to the complete dismemberment of Canada.⁴⁰

In the light of the above comments it is suggested that the application of the principle of *uti possidetis juris* to cases of unilateral secession of federal units from independent states is not a legitimate development of

³⁷ Owen D, *Balkan Odyssey* (1995, Victor Gollancz, London) 33.

³⁸ Roberts, “The tragedy in Yugoslavia could have been averted” in Thomas RGC and anor (eds), *The South Slav Conflict, History, Religion, Ethnicity, and Nationalism* (1996, Garland Publishing, New York) 363, 370. Craven, whilst giving qualified support to the approach of the Badinter Commission, nevertheless doubts “whether in the long term it is a technique which will provide a permanent and pacific settlement to the underlying territorial disputes”: Craven note 31 at 388.

³⁹ Sanders note 2 at 154.

⁴⁰ In late July 1997, in a report prepared for the government of British Columbia, the latter’s secession from Canada was seen as a possibility in the event of Quebec’s secession: Mair, “BC must be prepared in the event Canada breaks up: going it alone is one option”, *The Financial Post*, 15 August 1997. See also Whitaker, “Life After Separation” in Drache D and anor (eds), *Negotiating with a Sovereign Quebec* (1992, James Lorimer & Co, Toronto) 71; Segal, “Wrong to assume Canada will remain intact after separation”, *The Financial Post*, 23 August 1997.

principle. This is so because the basis upon which the principle rests in cases of decolonisation is not present. The principle of *uti possidetis juris* presumes agreement between the disputant states that the principle applies. In effect it presumes agreement as to what the borders of states are, that is, pre-existing colonial borders. The role of *uti possidetis juris* is to provide a mechanism to determine the exact line of such colonial borders. In cases of secession such as occurred in Yugoslavia, and that threatens to occur in Canada, there was and is no issue as to what and where the borders of the relevant federal units are. What is in dispute is the question of whether those borders should be future international borders.

To insist that, in cases of secession from federal states, federal internal borders should automatically be transformed into international borders is to create a new rule of international law. To call this new rule *uti possidetis juris* is to confuse it with the principle of the same name that is applied in cases of determining border disputes following decolonisation. Such a new rule has no connection with, and cannot be justified on the basis that it is a logical or principled extension of, its alleged namesake.

More fundamentally, to adopt the position of the Badinter Commission and the Pellet Report that the borders of federal units automatically become international borders after secession is, in political and practical terms, too simplistic and inflexible. The political justification for insisting that the seceding Yugoslav republics could only be recognised within the bounds of former federal borders was that it was expected to bring an end to the fighting that broke out after the unilateral secessions of Slovenia and Croatia.⁴¹ This was a false expectation as is evidenced by the prolonged fighting that only ended with the imposition of an uneasy truce following the Dayton Accords signed in November 1995. Although the Dayton Accords maintained the territorial integrity of Bosnia-Herzegovina, the reality of the Accords is the *de facto* partition of that former Yugoslav republic. Her borders have been preserved, but in name only.

In dealing with cases of unilateral secession from federal states a more flexible approach is required. The over-riding concerns in dealing with such cases are two-fold. The first concern should be to minimise violence to the greatest possible extent. The second concern should be an insistence

⁴¹ Glenn M, *The Fall of Yugoslavia, The Third Balkan War* (1996, 3rd edition, Penguin Books, London) 190-191.

that no recognition will be granted to a seceding entity unless the latter has convinced the international community that it has in place, and will honour, international norms as to human and minority rights. In some situations the approach of the Badinter Commission and the Pellet Report may be appropriate. One such case could be the possible unilateral secession of Scotland from the United Kingdom. However, in cases where the impulse for secession is driven by ethnonationalist sentiment, and federal borders cut across ethnic lines, more sophisticated measures need to be undertaken to determine future international borders. The holding of internationally supervised plebiscites in contested areas is but one of the possible approaches to such cases.⁴² It may even be necessary to facilitate orderly and voluntary transfers of parts of the population. The aim of such measures would be to establish borders that would result in the maximum number of people being located on their preferred side of the line,⁴³ whilst at the same time achieving this end without the violence that led to the same result in the case of former Yugoslavia.

It may be suggested by some that the above approaches amount to condoning the creation of new ethnically homogenous states and legitimating a form of "ethnic cleansing". However, such criticisms are misguided. They assume that an ethnically homogenous state is in itself a bad thing. This article does not explore the merits of such an assumption beyond noting that the assumption has long attracted a spectrum of views amongst international lawyers, political scientists and philosophers centred on the question of competing interpretations of the so-called "romantic" and "classical" theories of self-determination.⁴⁴ However, even if the

⁴² Ratner note 30 at 622-623.

⁴³ It can be noted that in Latin America questions of ethnicity and nationality appear to have been decisive factors in some border disputes. In the Argentina-Chile border dispute over the Lake Titicaca region, in the words of Professor Robert Jennings, the fact that Chileans lived in the area awarded to Chile "was not without its effect on the mind of the Court": Jennings R, *The Argentine-Chile Boundary Dispute: a Case Study in International Disputes, the Legal Aspects* (1972, Europa Publications, London) 315, 324-325.

⁴⁴ See Koskenniemi, "National self-determination today: problems of legal theory and practice" (1994) 43 *International and Comparative Law Quarterly* 241; Binder, "The case for self-determination" (1993) 29 *Stanford Journal of International Law* 223; Miller D, *On Nationality* (1995, Clarendon Press, Oxford) especially at 81-118; Viroli M, *For Love of Country, An Essay on Patriotism and Nationalism* (1995, Clarendon Press, Oxford); Donnelly, "States and substates in a free world: a proposed general theory of national self-determination" (1996) 2 *Nationalism and Ethnic Politics* 286.

assumption is accepted, the approach of the Badinter Commission and Pellet Report does not necessarily mean that multi-ethnic states will emerge as the result of secession. If a seceding federal unit is ethnically homogenous an ethnically homogenous state will emerge. The former Yugoslav republic of Slovenia serves as an illustration.

More importantly, in the case of a multi-ethnic federal unit where a majority ethnic group in a federal unit decides that the federal unit will secede, the approach of the Badinter Commission and Pellet Report approach is, on the example of the former Yugoslav republics of Croatia and Bosnia-Herzegovina, likely to facilitate violent "ethnic cleansing" which will result in either an ethnically homogenous state, or a *de facto* partition along ethnic lines of the now internationally recognised state.⁴⁵ The Dayton Accords confirmed Croatia as an example of the former and Bosnia-Herzegovina is an example of the latter. Ironically, international intervention in the form of economic sanctions against the Serbs, arming of the Croats and Bosnian Muslims, and NATO air strikes against the Serbs, facilitated this result. In effect, adherence to the approach as to borders propounded by the Badinter Commission and the Pellet Report led to the "ethnic cleansing" of the Serbs from the Krajina region of Croatia and western Bosnia. On the other hand it must be noted that international intervention on the side of the Croats and Bosnian Muslims was not unlimited and meant that the latter was prevented from "ethnically cleansing" the Serbs from eastern Bosnia, with the result that the territorial gains made by the Serbs as a result of "ethnic cleansing" in the earlier phases of the war in Bosnia-Herzegovina were consolidated, thereby enabling the three-way *de facto* partition of that state.

The question that must be asked then is whether the consequences of the Badinter Commission and Pellet Report approach to borders is more palatable than an alternative approach based upon holding plebiscites and facilitation of orderly and voluntary transfers of parts of the population. It is suggested that, if the case of former Yugoslavia is any form of reliable precedent, it is not, if only for the reason that the alternative approach is

Ratner notes that, whilst the ideal of liberal internationalists is laudable, there must be a recognition that the idea of diverse peoples living together in one state is not always possible and that "in certain instances account may have to be taken of the need to avoid leaving peoples in new states where they do not wish to be or that will not treat them with dignity": Ratner note 30 at 617.

⁴⁵ Ibid at 616.

much less likely to produce the violence and suffering that the Badinter Commission and Pellet Report approach is likely to produce.

It is suggested that in the case of a unilateral secession of Quebec from Canada, similar battle lines are likely to result as occurred in former Yugoslavia, especially in Croatia. Quebec with its dominant French-speaking population has minority English and indigenous native populations, many of whom live in parts of Quebec that adjoin the rest of Canada. In Croatia a similar situation prevailed in relation to Croatia's Serb population. The Quebec minority populations have declared their intention to stay within Canada and in many cases have formed representative bodies that have formally resolved to stay in Canada.⁴⁶ The Serb minority in Croatia acted in a similar manner when Croatia threatened to secede. The Quebec minority populations and many in the rest of Canada have warned that unilateral secession by Quebec could lead to violence. Croatia's Serbs and many voices in Yugoslavia made similar warnings prior to Croatia's secession.⁴⁷ To minimise the prospects of the type of violence that occurred in Croatia the implementation of the Badinter Commission and Pellet Report approach to the borders of an independent Quebec is arguably the most inappropriate approach to adopt.

By way of conclusion it can be stated that the principle of *uti possidetis juris* does not provide any legal justification for the view that, in cases of secession of a federal unit from a state, the borders of the relevant federal unit automatically become international borders as suggested by the Badinter Commission and Pellet Report. Nor, from a political or practical perspective does their approach have any merit, at least in cases where secession is driven by ethnonationalist impulses and the seceding unit's population is multi-ethnic in composition. The case of former Yugoslavia warns that more flexible solutions to such secessionist crises are required than the approach adopted by the Badinter Commission and Pellet Report. Their approach should be avoided in the event that there is a unilateral secession of the province of Quebec from Canada.

⁴⁶ At the time of the 1995 sovereignty referendum in Quebec, the Cree and Inuit nations organised their own referendums, with over 95 per cent voting in favour of remaining in Canada.

⁴⁷ On the attempted secession of the Serbs from Krajina see Radan, "The secession of the Republic of Serbian Krajina" (1995) 16:1-2 *The South Slav Journal* 14.

However, until recently, Canada's federal government has remained largely silent on the question of an independent Quebec's borders.

On 11 August 1997 Federal Minister for Intergovernmental Affairs, Stephane Dion, in a letter to Quebec's Premier, Lucien Bouchard, dramatically changed the course of the debate on Quebec's aspirations to independence. Dion's letter was the first authoritative statement of the Canadian government to challenge the view of the Pellet Report. Dion declared:

As to the question of territorial integrity, there is neither a paragraph nor a line in international law that protects Quebec's territory but not Canada's. International experience demonstrates that the borders of the entity seeking independence can be called into question, sometimes for reasons based upon democracy...Neither you nor I nor anyone else can predict that the borders of an independent Quebec would be those now guaranteed by the Canadian Constitution.⁵

Dion's assertion is, however, an overstatement. There is a precedent in international law supporting Quebec's claim that provincial borders become international borders after secession. That precedent comes from the secession of four republics from the former Yugoslavia in 1991. Croatia, Slovenia, Bosnia-Herzegovina and Macedonia all obtained international recognition and admission to the United Nations with borders unchanged from those they had as Yugoslav republics. The legal justification for the principle that former internal federal borders become international borders was provided by the Arbitration Commission of the Peace Conference on Yugoslavia ("the Badinter Commission") in its Opinion No 3 delivered on 11 January 1992.⁶ The Badinter Commission relied heavily on the principle of *uti possidetis juris* and the decision of the International Court of Justice in *Case Concerning the Frontier Dispute*

(United Kingdom), Malcolm Shaw (United Kingdom), Christian Tomuschat (Germany) and Alain Pellet (France). An English translation of the experts' report is available at <http://www.mri.gouv.qc.ca/etiqaeso.html> (visited in December 1997). Professor Pellet was the primary author of the report.

⁵ Canada NewsWire, 11 August, 1997. Dion restated this position in a subsequent letter of 26 August 1997 to the Deputy Premier of Quebec, Bernard Landry: Canada NewsWire, 26 August 1997.

⁶ Reprinted in Trifunovska S, *Yugoslavia through Documents from its Creation to its Dissolution* (1994, Martinus Nijhoff Publishers, Dordrecht) 479-480.

(*Burkina Faso and Mali*) (“*Frontier Dispute Case*”).⁷ The Pellet Report cited the decision of the Badinter Commission as support for its view that the borders of Quebec must remain unaltered if Quebec secedes from Canada.⁸

The purpose of this article is to question the validity of the Pellet Report’s view, not only from the perspective of international law, but also from the perspective of international politics and practice. From a legal perspective this requires some examination of the principle of *uti possidetis juris* and its development through the process of decolonisation to its adaptation by the Badinter Commission in the case of the fragmentation of former Yugoslavia.

The Badinter Commission’s Opinion 3 bases its justification for the continuation of internal federal borders as international borders upon the principle of *uti possidetis juris*. This principle, derived from Roman Law, was first widely applied in the context of border disputes between the newly independent states in South and Central America in the wake of the liberation of those areas from Spanish colonial rule. In essence the principle declared that title to territory was based upon legal rights of possession, which in turn were based upon former colonial administrative units as at the date of independence.

Another principle, that of *uti possidetis de facto*, was often invoked in Spanish America. According to this principle title to territory was determined by actual possession of territory by the colonial unit at the time of independence. Because evidence of what the former Spanish colonial borders were was often incomplete or conflicting,⁹ border disputes between the newly independent Latin American states were not uncommon. The resolution of these border disputes was usually a matter settled by treaty.

⁷ [1986] International Court of Justice Reports 554.

⁸ Pellet Report paras 2.44-2.46. Professor Pellet, who was an international law consultant to the Badinter Commission, subsequently endorsed the decision of the Commission: Pellet, “The opinions of the Badinter Arbitration Committee, a second breath for the self-determination of peoples” (1992) 3 European Journal of International Law 178.

⁹ Boundary Case Between Bolivia and Peru (1902) 11 Reports of International Arbitral Awards 133, 143; Honduras Borders (Guatemala/Honduras) (1933) 2 Reports of International Arbitral Awards 1307, 1325; Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) [1992] International Court of Justice Reports 383, 380 para 28.