

Confining New International Borders in the Practice of Post-1990 State Creations

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Abstract

When dealing with the dissolution of Yugoslavia, the *Badinter* Commission applied the *uti possidetis* principle in order to “upgrade” internal boundaries to international borders. However, application of this principle outside of the context of decolonization remains controversial. Subsequent post-1990 state-creations nevertheless show a consistent practice of confining new international borders along internal boundary-lines. This article shows that such practice does not affirm the non-colonial scope of *uti possidetis*. Not just any internal boundary has a potential of becoming an international border in non-colonial situations – only boundaries delimiting historically well-established self-determination units have this potential.

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I. Introduction

The general legal position is that new state creations do not affect existing international borders. This follows from the Vienna Convention on the Law of Treaties (VCLT),¹ the Vienna Convention on Succession of States in Respect of Treaties (VCSST)² and the jurisprudence of the International Court of Justice (ICJ).³ The establishment of borders between former units of a parent-state or between a newly independent state and the remainder of its former parent-state is, however, much more controversial.

In the process of decolonization, new international borders were confined by the *uti possidetis* principle. The post-1990 era, however, saw a number of new states emerge outside of the colonial context. These new state creations resulted from both consensual and non-consensual dissolutions of federations,⁴ as well as from consensual secessions.⁵ There has also been one partially successful attempt at unilateral secession.⁶

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¹ See Art. 62 Sub. 2a VCLT. Notably, the ICJ has held that Art. 62 codified customary international law. See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, 64, para. 104.

² See Art. 11 VCSST. This article, *inter alia*, provides that a succession of states does not affect "a boundary established by a treaty."

³ The standard that the delimitation, established by a treaty, is permanent regardless of the later fate of that treaty was confirmed in the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Reports 1962, 34, where the ICJ argued: "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious." The standard was even more unequivocally affirmed in the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports 1994, 37, para. 73, where the ICJ argued: "A boundary established by treaty ... achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary ... [W]hen a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed."

⁴ The Soviet Union and Czechoslovakia are examples of consensual dissolutions of federations. See below section III.2.a. and section III.2.b. The Socialist Federative Republic of Yugoslavia (SFRY) is an example of a non-consensual dissolution of a federation. See below section III.2.e.

Where new states emerged consensually, new international delimitations were mutually agreed upon and commonly formalized in either bilateral or multilateral treaties.⁷ Non-consensual state creations are, however, much more problematic, as outside of the process of decolonization no right to independence is applicable.⁸ An entity may nevertheless emerge as an independent state against the wishes of its parent state if this emergence is universally accepted by the international community.⁹ The mode of state creation in such a circumstance excludes the possibility of a formalization of the new international border through a treaty. However, it seems that international acceptance of the emergence of a new state will not only determine the state creation but also confine its new international border.¹⁰

In the context of the dissolution of the Socialist Federative Republic of Yugoslavia (SFRY), the *Badinter* Commission, as an *ad hoc* body created to deal with the situation in the federation, applied the *uti possidetis* principle to delimit the newly emerged states.¹¹ Application of this colonial principle in a non-colonial situation remains controversial,¹² but the standard of “upgrading” of former internal boundaries to the status of international borders in the territory of the SFRY was nevertheless accepted in the practice of states and UN organs.¹³ Moreover, such a standard was also affirmed by mutual agreements in situations of consensual new state creations.¹⁴ The

⁵ Eritrea (see below section III.2.c.), East Timor (see below section III.2.d.) and Montenegro (see below section III.2.f.) may be regarded as consensual state creations in the post-1990 era.

⁶ Kosovo is an example of a non-consensual attempt at unilateral secession which has attracted a significant number of international recognitions. See below section III.2.g.

⁷ See the examples of the Soviet Union (section III.2.a.) and Czechoslovakia (section III.2.b.)

⁸ *Reference re Secession of Quebec* (1998) 2 SCR 217 (Canada) [hereinafter *The Québec case*], para. 112.

⁹ *The Québec case* (note 8), para. 155.

¹⁰ See note 48.

¹¹ The *Badinter* Commission, Opinion 2 (11.1.1992), reprinted in: S. Trifunovska, *Yugoslavia through Documents: From Its Creation to Its Dissolution*, 1994, 474 et seq.

¹² See, e.g., S. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, *AJIL* 90 (1996), 590 et seq.; M. Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice’s Jurisprudence*, *Mich. J. Int’l L.* 20 (1998-1999), 31 et seq.; P. Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, *Melbourne University Law Review* 24 (2000), 50 et seq.; R. McCorquodale/R. Pangalangan, *Pushing Back the Limitation of Territorial Boundaries*, *EJIL* 12 (2001), 867 et seq.

¹³ All former republics of the SFRY eventually received universal recognition as states and are members of the UN. The international community thus implicitly also accepted the “upgrading” of internal boundaries to the status of international borders.

¹⁴ See the examples of the Soviet Union, Czechoslovakia, Eritrea, East Timor and Montenegro.

standard of confining new international delimitation along the lines of previously existing internal boundaries thus seems to have notable support in the practice of post-1990 state creations. Yet this practice also shows that, unlike in colonial situations, not just any internal boundary has the potential to become an international border.

The article considers the importance of the previously existing internal boundary arrangement within the parent-state for determination of new international borders and argues that the delimitation in new post-1990 state creations cannot be ascribed to the operation of the *uti possidetis* principle. In turn, the article explains why in all successful post-1990 state creations, even in the absence of a presumption of *uti possidetis*, certain internal boundaries were nevertheless “upgraded” to the status of international borders.

The article initially discusses the scope of the *uti possidetis* principle and shows that its application beyond the process of decolonization has weak doctrinal foundations. Subsequently, it argues that the new international boundaries in the practice of post-1990 state creations were confined only along those internal boundaries which had a strong historical pedigree of delimiting self-determination units. Delimitation of new states in the post-1990 era was therefore not reminiscent of delimitation of new states emerging in the process of decolonization, where arbitrarily-drawn boundaries became international borders. Consequently, the article argues that the *Badinter* Commission was right when it confined new borders along the lines of internal boundaries in the territory of the SFRY. This practice was indeed confirmed in subsequent state creations. But the *Badinter* Commission was wrong when it ascribed the confinement of international borders along the lines of internal boundaries to the operation of *uti possidetis*.

II. The Creation of New States and the *uti possidetis* Principle

The *uti possidetis* principle was developed in the context of decolonization.¹⁵ However, in the post-1990 era the principle has been given prominence even in non-colonial situations and “has been interpreted as a pre-independence guarantee of certain interstate administrative boundaries in

¹⁵ The principle originates in Roman law, where it was used to determine a provisional status of property in private land claims. However, in its modern appearance it was used to permanently determine the territory of a newly emerging state. *S. Ratner* (note 12), 592 et seq.

the event of dissolution or secession”.¹⁶ This section will be initially concerned with the doctrinal foundations for the applicability of *uti possidetis* outside of the process of decolonization. Subsequently, it will consider the nature of internal boundaries and argue that not all of them are reminiscent of arbitrarily-drawn colonial delimitations. It is therefore questionable whether *uti possidetis* is the appropriate principle to invoke in all situations where internal boundaries are “upgraded” to the status of international borders.

1. Development of *uti possidetis*

The modern meaning of *uti possidetis* is captured in the following dictum of the Chamber of the ICJ in the *Frontier Dispute case*:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions of colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.¹⁷

The Chamber of the ICJ further argued: “the principle of *uti possidetis* freezes the territorial title; it stops the clock but does not put back the hands.”¹⁸

In the moment of gaining independence, *uti possidetis* therefore confined international borders along arbitrarily drawn colonial boundaries which took little account of local identities and were never intended to be international borders.¹⁹ Yet, despite the arbitrariness of colonial boundaries, the Chamber of the ICJ in the *Frontier Dispute case* held that *uti possidetis* “is a firmly established principle of international law where decolonization is concerned.”²⁰ The Chamber of the ICJ also held that in the context of decolonization, *uti possidetis* has become a principle of customary interna-

¹⁶ S. Lalonde, *Determining Boundaries in a Conflicted World*, 2002, 4 et seq.

¹⁷ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports 1986, 566, para. 23.

¹⁸ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (note 17), para. 30.

¹⁹ See S. Ratner (note 12), 595. See also *Land, Island and Maritime Frontier Dispute case (El Salvador v Honduras)*, ICJ Reports 1992, 387, para. 43.

²⁰ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (note 17), 565, para. 20.

tional law, applicable not only in Latin America, where it was initially developed.²¹

The position of the Chamber of the ICJ that *uti possidetis* forms a part of customary international law remains controversial. It is questionable whether the application of *uti possidetis* in the process of decolonization was required by a specific norm of international law or was rather only “a policy decision in order to avoid conflicts during decolonization.”²² This question falls beyond the scope of the present article.²³ What is significant is that *uti possidetis* was referred to in order to confine international borders along colonial boundaries, regardless of the origin of these boundaries. Whether as a policy choice or as a customary norm, “upgrading” of colonial boundaries to international borders was deemed to be necessary in order to prevent the decolonized territories from becoming *terra nullius* and in order to minimize the conflicts between the new states emerging in the process of decolonization.²⁴

2. The Application of *uti possidetis* Outside of the Process of Decolonization

Although traditionally associated with decolonization, arguments have been made that *uti possidetis* has been applied even in situations of new state creations not resulting from decolonization. In the context of dealing with the crisis in the SFRY, the *Badinter* Commission²⁵ resorted to *uti possidetis*

²¹ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (note 17), para. 21.

²² *S. Ratner* (note 12), 598. See also *H. Ghebrewebet*, *Identifying Units of Statehood and Determining International Boundaries*, 2006, 76 et seq., arguing: “The necessary element for the establishment of customary law, *opinio juris* is lacking ... Neither the Latin American republics nor the African states considered themselves bound to adopt the *uti possidetis* principle in delimiting their new international boundaries. Rather, they eventually agreed to adopt a *status quo* policy for reasons of expedience and convenience in the interests of peace and security.”

²³ For more see *H. Ghebrewebet* (note 22), 9 et seq.; *S. Lalonde* (note 16), 24 et seq., 103 et seq.

²⁴ *G. Abi-Saab*, *Le principe de l’uti possidetis son rôle et ses limites dans le contentieux territorial international*, in: M. G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, 2007, 657 (657 et seq.).

²⁵ As a response to the crisis in the SFRY, the EC and its Member-States, on 27.8.1991, founded the Conference on Yugoslavia, under the auspices of which the Arbitration Commission was established. The Arbitration Commission was chaired by the President of the French Constitutional Court, *Robert Badinter*; therefore, it is commonly referred to as the “*Badinter* Commission”. The mandate of the Commission and the scope of its decisions were, however, not entirely defined: “The mandate given to the [Commission] was somewhat vague. At the

in order to “upgrade” internal boundaries between federal republics to the status of international borders. In its Opinion 3, the *Badinter* Commission stated:

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the [Chamber of the ICJ in the *Frontier Dispute case*].²⁶

At this point the *Badinter* Commission quoted a fragment of paragraph 20 of the *Frontier Dispute case*:

[*Uti possidetis*] is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles ...²⁷

This position of the *Badinter* Commission is highly controversial. The context of paragraph 20 of the *Frontier Dispute case* implies that the reference to *uti possidetis* as “a general principle” is to be understood as an argument stating that the principle is not limited to decolonization in Latin America but rather is a generally applicable principle in the context of decolonization. Furthermore, the observation that “there is no need, for the purposes of the present case, to show that [*uti possidetis*] is a firmly estab-

outset it was envisaged that the [Commission] would rule by means of binding decisions upon request from ‘valid Yugoslavian authorities’. Although no consultative procedure was formally established, the [Commission] was in fact called upon to give one opinion at the request of Lord *Carrington*, President of the Peace Conference ... similar requests were subsequently made by the Serbian Republic, using the Conference as intermediary ... and the Council of Ministers of the EEC.” *A. Pellet*, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, *EJIL* 3 (1992), 178 (178). The scope of the legal issues that the *Badinter* Commission dealt with was relatively broad. Indeed, “[m]inority rights, use of force, border changes, the rule of law, state succession, and recognition all eventually fell within the Commission’s brief”. *T. Grant*, *The Recognition of States: Law and Practice in Debate and Evolution*, 1999, 156 et seq. The opinions of the *Badinter* Commission were formally not legally binding; however, this was a body of strong legal persuasiveness and its opinions importantly shaped international response to the dissolution of the SFRY.

²⁶ The *Badinter* Commission, Opinion 3 (11.1.1992), reprinted in: S. Trifunovska (note 11), 479.

²⁷ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (note 17), 565, quoted in *The Badinter Commission*, Opinion 3.

lished principle of international law where decolonization is concerned”²⁸ is a strong indication of the ‘colonial scope’ of the reference to the *uti possidetis* principle in the *Frontier Dispute case*. Lastly, the omitted line at the end of the *Badinter* Commission’s quote of the *Frontier Dispute case* refers to “the challenging of frontiers following the withdrawal of the administering power.”²⁹ The reference to “administering power” is also a clear indication that the Chamber of the ICJ had decolonization in mind.

Therefore, nothing in the reasoning of the Chamber of the ICJ in the *Frontier Dispute case* suggests that the *uti possidetis* principle would apply in situations other than those dealing with decolonization.³⁰ In fact, the applicability of the *uti possidetis* principle was unequivocally limited to colonial situations. The *Badinter* Commission’s application of the *uti possidetis* principle outside of the context of decolonization was therefore underpinned by selective quoting of the *Frontier Dispute case*. With such foundations, Opinion 3 of the *Badinter* Commission is a rather weak authority when it is referred to in order to prove a doctrinal acceptance of the applicability of *uti possidetis* outside of the process of decolonization.

In its Opinion 3, the *Badinter* Commission did not specifically invoke all boundaries in the former SFRY but only the disputed ones: “The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at.”³¹ The *Badinter* Commission obviously took into account the armed conflict taking place in Croatia and Bosnia-Herzegovina at that time and applied the *uti possidetis* principle in order to bring these two states and their boundaries under the protection of Article 2 (4) of the UN Charter.³²

The reason for the *Badinter* Commission’s application of *uti possidetis* was evidently an attempt at peace activism. In this attempt the Commission’s objective was to confine new international borders along previously

²⁸ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (note 17), 565, para. 20.

²⁹ *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (note 17), 565, para. 20.

³⁰ One author has proposed a middle way between the colonial and non-colonial application of *uti possidetis*, arguing that the reasoning of the Chamber of the ICJ “makes it clear that [*uti possidetis*] is applicable specifically where a nation has been subjected to colonial, or colonial-like rule and should not be imposed in other situations”. *D. Luker*, *On the Borders of Justice: An Examination and Possible Solution to the Doctrine of Uti Possidetis*, in: R. Miller/R. Bratspies (eds.), *Progress in International Law*, 2008, 166 (emphasis added). This argument is also problematic, as it is unclear where the reasoning of the Chamber of the ICJ left open a possibility for the application of *uti possidetis* in “colonial-like” situations. It is rather obvious that the reasoning refers only to colonialism.

³¹ The *Badinter* Commission, Opinion 3.

³² *S. Ratner* (note 12), 614.

existing internal boundaries, whereas it obviously believed that this can only be done if *uti possidetis* were applied. This reasoning leads to two questions. First, whether “upgrades” of internal boundaries to international borders are only possible under the *uti possidetis* presumption. Second, whether internal boundaries within the SFRY and in other non-colonial state creations are reminiscent of colonial delimitations, so that *uti possidetis* is the appropriate principle to be invoked. These questions will be addressed in turn in subsequent sections.

3. Non-colonial Situations: Internal Boundaries and International Borders

It has been established that in the process of decolonization, *uti possidetis* was able to “upgrade” any colonial boundary to the status of an international border, regardless of the origin of the “upgraded” boundary.³³ This subsection will deal with internal boundaries outside of colonialism. It will argue that not all internal boundaries are reminiscent of colonial delimitation and therefore new international delimitation in such circumstances does not remind of the process of decolonization, where *uti possidetis* was applied.

An “upgrade” of internal boundaries to international borders can be problematic because internal boundaries are not established for the same purposes as international borders. Indeed, “[t]he core functional distinction between international borders and internal administrative boundaries lies in a critical antinomy: governments establish interstate boundaries to separate states and peoples, while they establish or recognize internal boundaries to unify and effectively govern a polity.”³⁴ For this reason internal administrative boundaries are not necessarily capable of determining the territory of a potentially independent state.³⁵

However, while it is true that internal boundaries are not established for the same purpose as are international borders, one also needs to take into account that not all internal boundaries have been established for the same purposes and they may also have different origins:

³³ See S. Ratner (note 12), 595. See also *Land, Island and Maritime Frontier Dispute case (El Salvador v Honduras)* (note 19), 387, para. 43.

³⁴ See S. Ratner (note 12), 602.

³⁵ See S. Ratner (note 12), 602.

In some cases [internal boundaries] ... are of relatively little importance; in others, such as is the case with federal states, they are of considerable significance. In many instances, such administrative borders have been changed by central government in a deliberate attempt to strengthen central control and weaken the growth of local power centres. In other cases, borders may have been shifted for more general reasons of promoting national unity or simply as a result of local pressures. In some states, such administrative borders can only be changed with the consent of the local province or state (in the subordinate sense) or unit. In some cases, internal lines are clear and of long standing. In others, they may be confused, of varying types and inconsistent.³⁶

While some internal boundaries may be established for pure administrative purposes, others have a strong historical pedigree and even delimit self-determination units. Therefore, not all internal boundaries are merely administrative lines, reminiscent of colonial delimitation. The internal organization of a multi-ethnic state, composed of delimited subunits, may be an arrangement for the exercise of the right of self-determination in its internal mode.³⁷ Federalism is one such possibility; however, this is not always the case.³⁸ One counter-argument is that peoples of non-federal states cannot simply be excluded from the exercise of their right of self-determination.³⁹ Furthermore, there exist federal states with units which do not constitute self-determination units (e.g. Austria) as well as unitary states with clearly delimited self-determination units (e.g. United Kingdom).

Moreover, the historical roots of an internal boundary do not necessarily constitute a self-determination unit. Borders between English counties have a long history⁴⁰ but the population of, for example, Nottinghamshire clearly does not constitute a people for the purpose of the right of self-determination. On the other hand, the internal boundary between England and Scot-

³⁶ *M. Shaw*, Peoples, Territorialism and Boundaries, EJIL 8 (1997), 478 (489).

³⁷ There is no single arrangement prescribed for the right of self-determination to be exercised in its internal mode. Indeed, “[t]he exercise of this right can take a variety of forms, from autonomy over most policies and laws in a region or part of a State ... to a people having exclusive control over only certain aspects of policy”. *R. McCorquodale*, Self-Determination: A Human Rights Approach, ICLQ 43 (1994), 857 (864). However, “customary and treaty law on internal self-determination [do not] provide guidelines on the possible distribution of power among institutionalized units or regions”. *A. Cassese*, Self-Determination of Peoples: A Legal Reappraisal, 1995, 332 et seq.

³⁸ See *Y. Dinstein*, The Degree of Self-Rule of Minorities in Unitarian and Federal States, in: C. Brölmann/R. Lefeber/M. Zieck (eds.), Peoples and Minorities in International Law, 1993, 223 et seq.

³⁹ See *P. Radan* (note 12), 71.

⁴⁰ For more on the background on English counties see A Vision of Britain through Time, at http://www.visionofbritain.org.uk/types/level_page.jsp?unit_level=4.

land is not merely administrative. Not only does it have a strong historical pedigree, but there exists no doubt that the right of self-determination is applicable to the Scottish people and that Scotland is a self-determination unit.⁴¹ In the case of hypothetical independence of Scotland, the international border of this state would be easy to ascertain.⁴²

For some internal boundaries it is rather difficult to imagine how they could become international borders. A hypothetical creation of an independent state of Nottinghamshire, delimited along its present internal boundary of an English county, would remind of *uti possidetis* applied in the context of decolonization. But it is very unlikely that Nottinghamshire would ever become an independent state. In some situations, however, a claim for an “upgrade” of other internal boundaries to international borders may be much more plausible. Scotland’s claim for an “upgrade” of its internal boundary with England to the status of an international border would hardly remind of the process of decolonization and of *uti possidetis*. The question is what makes Scotland-type boundaries different from Nottinghamshire-type boundaries and, consequently, which internal boundaries are potentially capable of becoming international borders.

As the right of self-determination is central in situations of new state creations,⁴³ the answer needs to be sought in its context. Arguably, a group of people to whom the right of self-determination does not apply cannot make a plausible claim for secession from their parent state.⁴⁴ As follows

⁴¹ Consider the following argument: “Scotland is a curious example of a sub-state national society in that, on the one hand, it is a former nation-state, indeed one of the oldest in Europe, but on the other, it is difficult to attribute points of clear objective distinction in terms of language, religion or ethnicity between Scotland and England ... Scotland’s claim to societal distinctiveness is, therefore, largely based upon the historical development of indigenous institutions of civic and public life which emerged when Scotland was an independent state and which, to some extent, survived the Union of Parliaments with England in 1707.” S. Tierney, *Constitutional Law and National Pluralism*, 2004, 71 et seq.

⁴² It would be the border in existence prior to the 1707 Union of Parliaments with England.

⁴³ Strictly speaking, the applicability of the right of self-determination is not a precondition for a new state creation. Yet peoples (who are beneficiaries of the right of self-determination) will more plausibly make a claim for their own state. The right of self-determination is also central in the doctrine of “remedial secession”, which follows from an inverted reading of the elaboration of territorial integrity in 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 (24.10.1970). See also *The Quebec case* (note 8), para. 134. For a detailed account of academic writing on remedial secession see A. Tancredi, *A Normative ‘due process’ in the Creation of States Through Secession*, in: M. Kohen (ed.), *Secession: International Law Perspectives*, 2006, 176 et seq.

⁴⁴ There is no explicit legal definition of a people. Some guidelines on the definition of peoples follow from observations of the International Commission of Jurists, *Events in East*

from the wording of the right of self-determination, this right only applies to peoples.⁴⁵ Thus, when a new state creation is in question, a claim for “upgrading” internal boundaries to international borders will be much more plausible where such boundaries delimit a self-determination unit, i.e. a territory populated by a distinct people, which is separate from either the rest of a parent-state or from other self-determination units within a parent-state. Yet not even the “self-determination approach” entirely resolves the question of which internal boundaries may eventually become international borders. This problem will be considered in the next section.

4. Preliminary Conclusion

The *uti possidetis* principle is inherently associated with the process of decolonization. It remains arguable whether it was applied as a norm of customary international law or as a policy solution. Whatever its normative status in international law, the consequences of *uti possidetis* were that arbitrarily-drawn colonial boundaries, regardless of their origin, were “upgraded” to international borders. When dealing with the dissolution of the SFRY, the *Badinter* Commission applied *uti possidetis* in the non-colonial context of a disintegrating federation. However, this application was doctrinally founded on selective quoting of the Chamber of the ICJ in the *Frontier Dispute case* and is therefore a rather weak authority for proving a non-colonial applicability of *uti possidetis*.

Pakistan: A Legal Study (1972), 49 et seq.: “If we look at the human communities recognized as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be [historical, racial or ethnic, cultural or linguistic, religious or ideological, geographical or territorial, economic, quantitative]. [A] people begins to exist only when it becomes conscious of its own identity and asserts its will to exist ... the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.”

Similar criteria and caveats accompanying these criteria were invoked in the document entitled “Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO”. The following criteria were specifically invoked: (a) a common historical tradition, (b) racial or ethnic identity, (c) cultural homogeneity, (d) linguistic unity, (e) religious or ideological affinity, (f) territorial connection, (g) common economic life. See UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations, SHS-89/CONF.602/7 (22.2.1990), para. 22.

⁴⁵ Art. 1 ICCPR (International Covenant on Civil and Political Rights); Art. 1 ICESCR (International Covenant on Economic, Social and Cultural Rights).

Moreover, unlike colonial boundaries, internal boundaries in non-colonial situations may delimit historically firmly-established self-determination units. An “upgrade” of such boundaries to the status of international borders is therefore not reminiscent of colonial situations, where the pedigree of the boundary did not matter. For this reason it is questionable whether the delimitation of newly emerged states outside of the process of decolonization can be ascribed to the operation of *uti possidetis*. It may well be that what matters in non-colonial state creations is not the mere existence of an internal boundary but rather the pedigree of that boundary – i.e. whether it delimits a historically firmly-established self-determination unit. In turn, the forthcoming section will consider the post-1990 practice of delimitation of new states and question whether *uti possidetis* really was at work in these situations.

III. The Nature and Relevance of Internal Boundaries in the Post-1990 Practice of New International Delimitation

This section is concerned with the relevance of internal boundaries and with the importance of the latest internal boundary arrangement in the post-1990 practice of confinement of new international borders. It will consider the pedigree of the “upgraded” internal boundaries – whether these are colonial-like arbitrarily-drawn lines or whether they generally delimit historically realized self-determination units.

Initially the situation of Québec will be considered. Although Québec did not emerge as an independent state, the question of borders was discussed along with other questions dealing with the possibility of secession. The opinions of jurists may provide some guidelines on the legal doctrine concerning the process of “upgrading” an internal boundary to an international border in the case of an emergence of a new state. The section will then turn to the practice of successful post-1990 state creations. It will argue that the *Badinter* Commission’s non-colonial application of *uti possidetis* was not followed in subsequent practice. Consequently, the Commission’s reference to this principle will be revisited in light of post-1990 practice. An argument will be made that the *Badinter* Commission had good reasons to confine new international borders along the previously existing internal boundaries, yet this was not a matter of *uti possidetis*. The section will also try to answer why the latest internal boundary arrangement has nevertheless been given significant prominence in the relevant practice.

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1. The Québec Situation and Its Significance for the Determination of International Borders

In the *Québec case*,⁴⁶ the Supreme Court of Canada made no direct references to the question of borders. Arguably, the view that Québec could, possibly, become an independent state in its present provincial boundaries was implied in the observation that the ultimate success of a unilateral secession would depend on recognition of the international community.⁴⁷ Since this observation refers to the entire territory of Québec and not only to one part of it, it may be interpreted in a way that international recognition could lead to Québec's statehood in its provincial boundaries.⁴⁸

But success of a unilateral secession in the UN Charter era is unlikely. The question of Québec's boundaries therefore also needs to be addressed in light of consensual secession, which could be an outcome of negotiations on the future legal status of Québec.⁴⁹ There are three major questions to be asked in this context: (i) Could Québec become an independent state within its present provincial borders or should earlier boundaries become relevant? (ii) Does the duty to negotiate a future legal status include a duty to negotiate future international borders? (iii) Could Québec become an independent state despite the wish of its minorities to remain in an association with Canada?

⁴⁶ In the *Québec case*, the Supreme Court of Canada dealt with three questions: "[1] Under the Constitution of Canada, can the National Assembly, legislature or government of Québec effect the secession of Québec from Canada unilaterally? [2] Does international law give the National Assembly, legislature or government of Québec the right to effect the secession of Québec from Canada unilaterally? [3] In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Québec the right to effect the secession of Québec from Canada unilaterally? [4] In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Québec to effect the secession of Québec from Canada unilaterally, which would take precedence in Canada?" *The Québec case* (note 8), Introduction, para. 2. The Court's reasoning on these three questions provides important guidelines on the position of international law in regard to unilateral secession and limits on the right of self-determination.

⁴⁷ *The Québec case* (note 8), para. 155.

⁴⁸ See *P. Radan*, (note 12), 56.

⁴⁹ In the *Québec case* the Supreme Court of Canada established that an expression of the will of the people in favour of independence would not lead to a right to secession. Yet such an expression could not be ignored and, consequently, an obligation would be put on both Québec and Canada to negotiate on the future legal status of Québec. The Court, however, stressed that negotiations would not start on a presumption that Québec would eventually become an independent state. See the *Québec case* (note 8), paras. 87-91.

In the Québec Report,⁵⁰ it was stated that Québec's provincial borders are guaranteed by Canadian constitutional law, while after a possible achievement of independence its borders would be protected by the principle of territorial integrity, which is firmly established in international law.⁵¹ However, there is a question of whether the borders protected by international law would be those presently determined by Canadian constitutional law. In this regard the Québec Report established that "[f]rom a strictly legal perspective, since the attainment of independence is an instantaneous occurrence, there can be no intermediate situation in which other rules would apply. Furthermore, recent precedents have demonstrated that the principle of *uti possidetis juris* can be transposed to the present case."⁵² To this the Québec Report added: "[I]f the territorial limits of Québec were to be altered between now and the date of any future sovereignty ... the borders of a sovereign Québec would not be its present boundaries (nor would they inevitably be those prevailing at the time of the formation of the Canadian Federation in 1867)."⁵³

The Québec Report thus takes a view that the critical date for "upgrading" of internal boundaries to international borders is the moment of gaining of independence. According to this doctrine, previous territorial arrangements do not matter. The Québec Report also invoked the *uti possidetis* principle, referred to by the *Badinter* Commission in the case of the dissolution of the SFRY.⁵⁴ However, it was established above that the applicability of the *uti possidetis* principle in non-colonial situations remains controversial and that its application by the *Badinter* Commission provides for a rather weak authority.⁵⁵

The Québec Report further strengthened its position on the question of the critical date for determination of international borders by holding that "[a] particular problem arises in respect of the territories ceded to Québec by the Federation in 1912".⁵⁶ In regard to these territories, the Québec Report concluded that only the latest territorial arrangement within a parent-

⁵⁰ The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty [hereinafter 'The Québec Report'] http://www.mri.gouv.qc.ca/la_bibliotheque/territoire/integrite_plan_an.html. The report was prepared in 1992 for the Québec Department of International Relations. Its authors were *Thomas Franck, Rosalyn Higgins, Malcolm Shaw, Alain Pellet* and *Christian Tomuschat*.

⁵¹ The Québec Report, chapter 2.1.

⁵² The Québec Report, chapter 2.1.

⁵³ The Québec Report, chapter 2.2.

⁵⁴ See The *Badinter* Commission, Opinion 3.

⁵⁵ See section II.2.

⁵⁶ The Québec Report, chapter 2.12. See also Art. 2 (c), The Act to extend the Boundaries of the Province of Québec (1912), quoted in: The Québec Report, chapter 2.12.

state is relevant.⁵⁷ At this point the reasoning also gives an idea of the position of the newly-created minorities within a new state. It follows from the Québec Report that such minorities have neither veto power regarding the question of secession from a parent-state nor the right to secession from the newly-created state. It should be noted, however, that secession is not an entitlement under international law and the status of minorities may be part of the negotiation process prior to a potential agreement on independence.⁵⁸

The Government of Canada did not accept that only the last internal boundary arrangement would be relevant for potential international delimitation of Québec.⁵⁹ It held that internal boundaries may automatically become international borders in a case of dissolution (e.g. the example of the SFRY) but not in a case of secession.⁶⁰ In this view, without a presumption of inviolability of previous internal boundaries, a non-consensual dissolution results in chaos as it is not clear who is the sovereign of a certain territory. This is not a problem in situations of consensual secessions as the parent state does not cease to exist and remains sovereign in the territory seeking secession until this territory emerges as an independent state. In the UN Charter era it is very unlikely that this would happen without the parent state's consent.

The position of the Government of Canada leads to the question of whether negotiations on future international borders may be made a part of the negotiation process on a potential consensual secession. According to *Pellet*, "negotiations on Québec's borders are possible but are not obligatory."⁶¹ *Pellet* further notes that the Supreme Court of Canada in the *Québec case* "has not ruled out the possibility that the issue of Québec's boundaries might be the subject of future negotiations [as] nothing in the Court's ruling precludes negotiations between the Parties dealing with the issue of Québec's borders."⁶² Nevertheless, according to *Pellet*, international law imposes no obligation to negotiate future international borders.⁶³

⁵⁷ The Québec Report, chapter 2.14.

⁵⁸ Compare (note 49).

⁵⁹ Statement of *Stéphane Dion*, Federal Minister of Intergovernmental Affairs in a Letter to the Premier of Québec, 11.8.1997, quoted in *P. Radan*, *The Borders of a Future Independent Québec: Does the Principle of Uti Possidetis Juris Apply?*, *Austral. Int'l L. J.* 4 (1997), 200 (201).

⁶⁰ *P. Radan* (note 59), 201.

⁶¹ *A. Pellet*, *Avis juridique sommaire sur le projet de loi donnant effet à l'exigence de clarté formulae par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec*, quoted in English translation in: *S. Lalonde*, *Québec's Boundaries in the Event of Secession*, *Macquarie Law Journal* 7 (2003), 129 (149).

⁶² *A. Pellet*, quoted in: *S. Lalonde* (note 61), 149.

⁶³ *A. Pellet*, quoted in: *S. Lalonde* (note 61), 149.

A counterargument was made that if this were the case, Québec would automatically become an independent state within its present internal boundaries and would have no reason to negotiate its future borderline with Canada.⁶⁴

However, it should be recalled that territorial rearrangements are always possible as a result of negotiations when new states emerge. This was also affirmed in Opinion 3 of the *Badinter* Commission.⁶⁵ Furthermore, a situation of dissolution of a parent-state is significantly different from that of (negotiated) secession. Since there exists no 'right to unilateral secession' in international law but, perhaps, only a duty to negotiate the possible future legal status of a territory if the will of the people demands independence,⁶⁶ it is not possible to presume that in a case of negotiated secession, a secession-seeking entity would necessarily keep its former internal boundaries as international borders. When potential independence becomes a matter of political negotiations, it is not difficult to imagine that borders could also become part of these negotiations. When a secession-seeking entity is presented with the dilemma of having either independence within narrower borders or no independence at all, it is not possible to predict for which option such an entity would opt. But state practice in regard to this question is not developed.

It follows from the *Québec case* and from the Québec Report that the latest internal boundary arrangement within a parent state will form a strong base for the determination of a new international border. In the circumstances of a successful unilateral secession or of a non-consensual dissolution, it is virtually impossible to implement any other border arrangement. But success of a unilateral secession in the UN Charter era is very unlikely and, therefore, it is also unlikely that the secession-seeking entity would, without any negotiations, emerge as an independent state delimited along its former internal boundaries. When a new state creation is consensual, the new international borders are, in principle, negotiable, yet it may well be that the last internal boundary arrangement will still be very important. This issue will be further discussed in relation to the practice of successful post-1990 state creations.

⁶⁴ C. Hilling, *Débats*, in: O. Corten/B. Delcourt/P. Klein/N. Levrat (eds.), *Démembrements d'États et délimitations territoriales: L'uti possidetis en question(s)*, 1999, 445.

⁶⁵ The *Badinter* Commission, Opinion 3.

⁶⁶ See note 49.

2. The Post-1990 State Creations and the Practice of Border-Confinement

This subsection considers the practice of new international delimitation in successful post-1990 state creations. It is concerned with the confinement of new international borders in the processes of dissolutions of multiethnic federations (the Soviet Union, Czechoslovakia and the SFRY), the consensual creations of independent states of Eritrea, East Timor and Montenegro, and, ultimately, with Kosovo's unilateral secession. It will be argued that this practice gave significant prominence to the latest internal boundary arrangement and is thus compatible with the doctrine stemming from the Québec situation, but cannot be ascribed to the operation of *uti possidetis*.

a) International Delimitation in the Territory of the Former Soviet Union

In the situation of the Soviet Union, two separate developments need to be considered: the regained independence of the Baltic States and the ultimate dissolution of the federation.

Estonia, Latvia and Lithuania were independent states in the interwar period and were forcefully included in the Soviet Union by the Ribbentrop-Molotov Pact.⁶⁷ It remains arguable whether their pre-Second World War independence was restored or if they were new state creations.⁶⁸ While many states accept the continuity of the Baltic States with their international personalities in the inter-war period, such acceptance is not universal.⁶⁹ It is also significant that the Baltic States were not admitted to the UN before the Soviet Union consented to their independence.⁷⁰ The process of their (re)-gaining of independence therefore shows that even in a situation of suppressed independence, the peoples of the Baltic States did not have a "right of unilateral secession [but] rather ... a right 'to resolve their future status through free negotiation with the Soviet authorities in a way which takes proper account of the legitimate rights and interests of the parties con-

⁶⁷ See Art. 1, The German-Soviet Non-Aggression Pact (The Ribbentrop-Molotov Pact) (23.8.1939), Secret Additional Protocol, at http://www.geocities.com/iturks/html/riibbentrop_molotov_pact.html.

⁶⁸ See C. Warbrick, Recognition of States, ICLQ 41 (1992), 473 (474).

⁶⁹ P. van Elswege, State Continuity and Its Consequences: The Case of the Baltic States, IJIL 16 (2003), 377 (384).

⁷⁰ J. Crawford, The Creation of States in International Law, 2nd ed. 2006, 395 et seq.

cerned.”⁷¹ Indeed, the consent of their parent state was crucially important before the Baltic States were universally considered to have (re-)gained independence.

Upon the achievement of independence in 1991, Lithuania promptly accepted its delimitation along the lines of the latest internal boundary arrangement within the Soviet Union.⁷² Estonia and Latvia, however, disputed part of their borderlines with Russia, which were subject to territorial rearrangements in the Soviet era.⁷³ Initially they both insisted that the present international borders are the international borders in existence prior to the suppression of independence.⁷⁴ Russia, on the other hand, claimed that the international borders are confined along the lines established by the last internal territorial arrangement in the Soviet Union. In the border treaty, concluded in 2007 by the Russian Federation and the Republic of Latvia, the Russian view prevailed.⁷⁵ Thus, the new international border was confined along the lines of the most recent internal boundary, but no reference to *uti possidetis* was made. The treaty has been ratified by the legislatures of both Latvia⁷⁶ and Russia.⁷⁷

A similar treaty between Estonia and Russia has not entered into force. Estonia initially insisted on delimitation along the lines from the interwar period, established by the Peace Treaty of Tartu in 1920.⁷⁸ In 2005, however, a treaty on delimitation was signed between Estonia and Russia, which did not re-establish the border from 1920, but introduced “only minor changes to the ... border that was established when the Soviet Union occupied the Baltic states after World War II.”⁷⁹ The Estonian parliament ratified the

⁷¹ J. Crawford (note 70), quoting the Minister of State, Foreign and Commonwealth Office, United Kingdom Materials on International Law (Geoffrey Marston, ed.) (1991).

⁷² P. van Elswwege (note 69), 386.

⁷³ See Russia Spurns Estonia Border Deal, BBC (27.6.2005), at <http://news.bbc.co.uk/2/hi/europe/4626141.stm>.

⁷⁴ See Russia Spurns Estonia Border Deal (note 73). See also Information Note, The Border Treaty between the Russian Federation and the Republic of Latvia (8.6.2006), at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dru20060615_07/dru20060615_07en.pdf. The Latvian Constitution expressly provided that the disputable territory was part of the Republic of Latvia.

⁷⁵ See The Border Treaty Between the Russian Federation and the Republic of Latvia (note 74).

⁷⁶ See Latvia Ratified Border Treaty with Russia, Kommersant (17.5.2007), at http://www.kommersant.com/p-10733/r_500/border_treaty.

⁷⁷ See State Duma Ratifies Border Treaty with Latvia, Kommersant (5.9.2007), at http://www.kommersant.com/p-11344/r_500/Border_Latvia_ratify.

⁷⁸ Art. 3, The Peace Treaty of Tartu, LNTS. Vol. 1, 1922, 51 et seq. See also P. van Elswwege (note 69), 385.

⁷⁹ Radio Free Europe, Russia/Estonia, Milestone Border Treaty Signed (18.5.2005), at http://en.wikisource.org/wiki/Treaty_of_Peace_between_Russia_and_Estonia.

new border treaty, but in the process of ratification it also included a pre-ambulatory reference to the Peace Treaty of Tartu. Russia strongly opposed any such reference which could imply that the minor modifications are to be associated with the borderlines in the interwar period and, as a consequence, refused to ratify the treaty.⁸⁰

The signed, but not ratified, border treaty between Russia and Estonia nevertheless shows a tendency that the most recent internal boundary arrangement (albeit with minor modifications) will form a strong base for determination of new international borders. Furthermore, the border treaty between Russia and Latvia, which has entered into force, is entirely in line with the standard proposed in the Québec Report: in the case of secession, the most recent internal boundaries are those which would become international borders.⁸¹ Nevertheless, different outcomes of (political) negotiations are always possible and also permissible under international law.

After the Baltic States became independent, the Soviet Union initially continued in existence. However, it was soon dissolved and transformed into the Commonwealth of Independent States (CIS) by the Minsk Agreement and the Alma Ata Protocol, both signed in December 1991.⁸² Thus, the former Soviet republics became independent states under international law. The former Soviet republics also agreed that Russia would continue the Soviet Union's international personality.⁸³

⁸⁰ See Euractiv Network, Russia Withdraws from Border Treaty with Estonia (5.9.2005), at <http://www.euractiv.com/en/foreign-affairs/russia-withdraws-border-treaty-estonia/article-143852>.

⁸¹ See note 53.

⁸² On 8.12.1991, the presidents of Belarus, Russia and Ukraine signed the Agreement on the Establishment of the Commonwealth of Independent States (The Minsk Agreement), which, *inter alia*, comprehends the following formulation: "We, the Republic of Belarus, the Russian Federation ... and Ukraine, as founder states of the Union of Soviet Socialist Republics and signatories of the Union Agreement of 1922 ... hereby declare that the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists." The Agreement on the Establishment of the Commonwealth of Independent States ILM 31 (1992), 138. On 21.12.1991, a protocol to the Minsk Agreement was adopted (The Alma Ata Protocol) by the remaining Soviet Republics, with the exception of Georgia, by way of which the CIS was extended to these former republics from the moment of ratification of the Minsk Agreement. See the Protocol to the Agreement Establishing the Commonwealth of Independent States signed at Minsk on 8.12.1991 by the Republic of Belarus, the Russian Federation (RSFSR) and Ukraine ILM 31 (1992), 147.

⁸³ See the Decision by the Council of Heads of State of the Commonwealth of Independent States ILM 31 (1992), 138 para. 1. Subsequently, on 24.12.1991, the President of the Russian Federation addressed a letter to the UN Secretary-General, stating that Russia would continue the Soviet Union's membership in the UN. The Letter of the President of the Russian Federation to the UN Secretary-General, ILM 31 (1992), 138. No resolution confirming the continuity of membership was passed but Russia took up the seat of the Soviet Union

In regard to the question of borders, Article 5 of the Minsk Agreement provides: “The High Contracting Parties acknowledge and respect each other’s territorial integrity and the inviolability of existing borders within the Commonwealth.”⁸⁴ In addition to the Alma Ata Protocol, the Alma Ata Declaration was adopted, in which the newly independent states declared that they recognize and respect “each other’s territorial integrity and the inviolability of existing borders.”⁸⁵ The inviolability of borders was later affirmed even in the Charter of the CIS.⁸⁶

While internal boundaries of Soviet republics were “upgraded” to the status of international borders, the boundaries of autonomous republics (i.e. subunits of the republics) were not.⁸⁷ Although the founding documents of the CIS expressly invoked rights of the newly-created minorities,⁸⁸ no special provision was made which would give them a right to secession and creation of a new state or merger with another state. However, the new international delimitation was challenged by several ethnic groups in the territory of the CIS and the post-1991 era has seen a significant number of (vio-

without objections. *J. Crawford* (note 70), 395. Russia’s continued membership of the Soviet Union in the UN is, however, not uncontested by legal scholars. Significantly, this was not an example of state’s name change or secession of part of the Soviet Union’s territory. This was an example of dissolution and “with the demise of the Soviet Union ... its membership in the UN should have automatically lapsed and Russia should have been admitted to membership in the same way as the other newly-independent republic (except for Belarus and Ukraine).” *Y. Blum*, *Russia Takes Over the Soviet Union’s Seat at the United Nations*, *EJIL* 3 (1992), 354 (359). Although the former Soviet republics agreed that Russia would continue the Soviet Union’s membership in the UN, “[t]he correct legal path to this end would have been for all the republics of the Soviet Union except Russia to secede from the union, thus preserving the continuity between the Soviet Union and Russia for the UN membership purposes”. *Y. Blum* (note 83), 359. Yet it is questionable whether such a path was possible in rather complicated Soviet political situation in 1991.

⁸⁴ Art. 5 (1), The Minsk Agreement.

⁸⁵ The Alma Ata Declaration, *ILM* 31 (1992), 147 para. 3.

⁸⁶ Art. 3, CIS Charter.

⁸⁷ The following Autonomous Soviet Socialist Republics (ASSR) existed when Soviet Union was transformed into the CIS in 1991: within Azerbaijan: Nakhchivan ASSR; within Georgia: Abkhaz ASSR, Adjar ASSR; within Russia: Bashkir ASSR, Buryat ASSR, Chechen-Ingush ASSR, Chuvash ASSR, Dagestan ASSR, Kabardino-Balkar ASSR, Kalmyk ASSR, Karelian ASSR, Komi ASSR, Mari ASSR, Mordovian ASSR, Northern Osetian ASSR, Tatar ASSR, Tuva ASSR, Udmurt ASSR, Yakut ASSR; within Ukraine: Crimean ASSR; within Uzbekistan: Karakalpak ASSR. See Art. 85, *The Constitution of the Soviet Union* (1977). The Soviet Secession Law, which was never implemented in practice, on the other hand foresaw that in case a republic opted for independence, it would not necessarily keep its borders, as peoples in autonomous republics would be consulted separately. See Art. 3, *The Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR*, reprinted in: H. Hannum (ed.), *Documents on Autonomy and Minority Rights*, 1993, 753 et seq.

⁸⁸ Art. 2, Art. 3, The Minsk Agreement; The Alma Ata Declaration, para. 2.

lent) secessionist attempts. Abkhazia and South Ossetia have attempted to break away from Georgia,⁸⁹ Chechnya from Russia,⁹⁰ Nagorny-Kharabakh from Azerbaijan,⁹¹ and Gagauzia from Moldova.⁹² Despite some recognitions none of these entities has acquired sovereignty under international law or merged with another state.⁹³ To the present day, no change of the principle encompassed in the Minsk Agreement and in the Alma Ata Protocol has been accepted under international law; international delimitation in the territory of the former Soviet Union runs exclusively along the former internal boundaries of Soviet republics.

The “upgrade” of internal boundaries to the status of international borders in the founding documents of the CIS has been interpreted as a formal acceptance on the part of the former Soviet republics “that *uti possidetis juris* would be a valid solution to territorial disputes between them.”⁹⁴ The interpretation that the new international delimitation in the territory of the Soviet Union was a consequence of the operation of *uti possidetis* even appears in the Report of the EU Fact-Finding Mission investigating the armed conflict in Georgia in 2008.⁹⁵ Yet such arguments are problematic.

The *uti possidetis* argument in the Report of the Fact-Finding Mission has weak doctrinal foundations, as it uncritically refers to the *Badinter* Commission’s opinion that this principle is applicable beyond the process of decolonization.⁹⁶ Furthermore, the arguments in favour of Soviet *uti possidetis* ignore the fact that no single reference to this principle appears in the Minsk Agreement, in the Alma Ata Declaration, in the Alma Ata Protocol, in the Charter of the CIS or in any other document relevant for the dissolution of the Soviet Union. It is difficult to imagine that a reference to it was omitted accidentally.

In the absence of any specific reference to the principle, the argument in favour of Soviet *uti possidetis* therefore presumes that wherever an internal boundary becomes an international border, such an “upgrade” is a consequence of the operation of *uti possidetis*. Such an argument does not differentiate between internal boundaries of different kinds and the fact that not

⁸⁹ J. Crawford (note 70), 403. See also Council of the European Union, Report of the Independent Fact-Finding Mission on the Conflict in Georgia, 2009, at <http://www.ceiig.ch/Report.html> [hereinafter The Report of the Fact-Finding Mission].

⁹⁰ J. Crawford (note 70), 403.

⁹¹ J. Crawford (note 70), 403.

⁹² J. Crawford (note 70), 403.

⁹³ J. Crawford (note 70), 403.

⁹⁴ E. Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, Fletcher Forum of World Affairs, 27 (2003), 85 (92).

⁹⁵ The Report of the Fact-Finding Mission, 143.

⁹⁶ The Report of the Fact-Finding Mission, 143.

all internal boundaries are colonial-like administrative lines.⁹⁷ Yet the Soviet Union was one example where internal boundaries of different kinds existed, while only boundaries of one kind were “upgraded” to the status of international borders.⁹⁸

The internal organization of the Soviet Union was, at least formally, conceived as an arrangement for the internal exercise of the right of self-determination of its peoples.⁹⁹ While it may well be that the right of self-determination of the peoples of the Soviet Union was violated in practice, it is significant that Soviet federalism attached the constitutive peoples of the federation to their respective territorial units, some of which even had a previous history of being independent states.¹⁰⁰ Due to arbitrary territorial rearrangements within the Soviet Union, many boundaries of these units may rightfully be considered to have been unjust.¹⁰¹ However, they were nevertheless delimitations between different self-determination units, which were not without any historical pedigree.

Moreover, the former Soviet republics did not agree to “upgrade” all internal boundaries to the status of international borders but only those delimiting the republics (i.e. constitutionally-recognized self-determination units). The Report of the Fact-Finding Mission interpreted this as an acknowledgement of *uti possidetis* and argued: “Under *uti possidetis*, not only former administrative borders are transformed into state borders, but also territorial sub-units remain part of the newly independent state.”¹⁰² Yet it may well be that the fact that only the boundaries of republics were “upgraded” to the status of international borders suggests the opposite. It seems that what mattered for the new international delimitation in the territory of the Soviet Union was not the mere existence of an internal boundary. In-

⁹⁷ Compare note 36.

⁹⁸ See *S. Ratner* (note 12), 594, for an argument that in the process of decolonization boundaries of various kinds were upgraded to the status of international borders: “The Latin American boundaries were derived from various sorts of Spanish governmental instruments setting up hierarchical and other units such as provinces, *alcaldías*, *mayores*, *intendencias*, court (*audiencia*) districts, Captaincies-General, and Vice-Royalties.” See also *Land, Island and Maritime Frontier Dispute case (El Salvador v Honduras)* (note 19), 387, para. 43. In the non-colonial situation of the Soviet Union, on the other hand, only internal boundaries of one kind (i.e. those of the republics) were “upgraded” to the status of international border. Hierarchically lower internal boundaries existed, but those did not become international borders.

⁹⁹ See Art. 70, Constitution of the Union of Soviet Socialist Republics: “The Union of Soviet Socialist Republics is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Republics.” Reprinted in *H. Hannum* (note 87), 745.

¹⁰⁰ *J. Castellino*, *International Law and Self-Determination*, 2008, 118 et seq.

¹⁰¹ *J. Castellino* (note 100), 118 et seq.

¹⁰² The Report of the Fact-Finding Mission, 154.

deed, autonomous republics were also internally delimited territorial units but did not become states. What mattered was the fact that the internal boundaries delimited a constitutionally-defined self-determination unit. In the Soviet context only republics were territorial units of this kind and thus became independent states. Yet under the colonial *uti possidetis* presumption an “upgrade” of other internal boundaries to the status of international borders would be equally plausible.¹⁰³

The mutual agreement of the former Soviet republics on the new international delimitation therefore does not resemble the colonial *uti possidetis* principle (not even implicitly), according to which any boundary is capable of becoming an international border. Rather, it affirms that in non-colonial situations a plausible claim to independence can only be made by a territorial unit whose population qualifies as a people for the purpose of the right of self-determination. Consequently, only internal boundaries of such units are capable of becoming international borders. The case of the dissolution of the Soviet Union also affirms that where the exact boundaries of historically-realized self-determination units have been subject to change, the latest internal boundary will be considered very important when new international borders are confined.¹⁰⁴

b) The Czech-Slovak International Delimitation

The creation of the Czech and Slovak Republics is an example of consensual dissolution of the previous state.¹⁰⁵ The border between the two newly-created states was determined by the Treaty on the General Delimitation of the Common State Frontiers, signed on 29.10.1992.¹⁰⁶ According to this Treaty, the internal boundary between the two constituent parts of Czechoslovakia became the international border between the Czech and Slovak

¹⁰³ *Angelet* points out that *uti possidetis* in non-colonial situations cannot apply because territorial units at different levels of internal organization make claims to independence. Unlike in colonial situations, *uti possidetis* cannot answer the question of which of these units may become independent states and which may not. *N. Angelet, Quelques observations sur le principe de l’uti possidetis à l’aune du cas hypothétique de la Belgique*, in: O. Corten/B. Delcourt/P. Klein/N. Levrat (eds.), *Démembrements d’États et delimitations territoriales: L’uti possidetis en question(s)*, 1999, 204 et seq. The answer to this question is to be sought in the context of the right of self-determination and not within the context of *uti possidetis*.

¹⁰⁴ Compare note 53.

¹⁰⁵ See *E. Stein, Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup*, 1997, 45 et seq.; *J. Crawford* (note 70), 402.

¹⁰⁶ See *M. Shaw* (note 36), 500.

Republics.¹⁰⁷ Like the Minsk Agreement in the case of the dissolution of the Soviet Union, the Czech-Slovak delimitation treaty made no reference to *uti possidetis*.

The internal boundary within Czechoslovakia had a strong historical pedigree. It originated in the internal division within the Austro-Hungarian Monarchy. Czechs were linked to the Austrian part of the Monarchy while Slovaks were linked to the Hungarian part.¹⁰⁸ Thus, “[e]stablishment of the border between the present-day Czech and Slovak Republics is ... more plausibly associated with the historical pedigree of that line rather than with the line’s later status as an internal administrative subdivision of the former Czechoslovakia.”¹⁰⁹ The new international border was therefore confined along the boundary delimiting two historically firmly-established self-determination units, which was not reminiscent of arbitrarily-drawn colonial lines.

c) Eritrea

As an Italian colony, Eritrea was an entity separate from Ethiopia and was federated with the latter in 1952.¹¹⁰ In the 1952 federal Constitution, Eritrea was a self-governing unit. This status was suspended by the central government of Ethiopia in 1962.¹¹¹ Upon Eritrea’s consensual secession from Ethiopia,¹¹² the border between colonial Eritrea and Ethiopia was re-established.¹¹³ The Eritrea-Ethiopia Boundary Commission¹¹⁴ noted that “[t]he parties [Ethiopia and Eritrea] agree that a neutral Boundary Commis-

¹⁰⁷ See *M. Shaw* (note 36), 500.

¹⁰⁸ See *M. Anderson*, *Frontiers: Territory and State Formation in the Modern World*, 1997, 73 et seq.

¹⁰⁹ *T. Bartoš*, *Uti Possidetis. Quo Vadis?* *Austr. Yb. Int’l L.* 18 (1997) 37, 83.

¹¹⁰ See *M. Haile*, *Legality of Secessions: the Case of Eritrea*, *Emory Int’l L. Rev.* 8 (1994), 479 (482 et seq.). See also GA Res. 390 (V) A (2.12.1950).

¹¹¹ See *J. Crawford* (note 70), 402.

¹¹² See *J. Crawford* (note 70), 402.

¹¹³ Notably, because of some disputed parts of the border, an armed conflict between Ethiopia and Eritrea broke out. See *C. Gray*, *The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?*, *EJIL* 17 (2006), 699 (701). A peace agreement was signed in December 2000 and included provisions for the establishment of three dispute settlement bodies, including the Eritrea-Ethiopia Boundary Commission (*C. Gray* (note 113), 703). The Commission was chaired by *Elibu Lauterpacht*, other members were: *Bola Adesumbo Ajibola*, *W. Michael Reisman*, *Stephen Schwebel* and *Arthur Watts*. The Boundary Commission delivered its decision on 13.4.2002.

¹¹⁴ See the Eritrea-Ethiopia Boundary Commission, Ch. I. 1.1. <http://www.un.org/NewLinks/eebcarbitration/EEBC-Decision.pdf>.

sion composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties [concluded between Ethiopia and Italy] (1900, 1902 and 1908) and applicable international law.”¹¹⁵

The example of Eritrea is different from most situations of border-determinations in Africa. Indeed, “[f]or the first time the principles of the intangibility of African frontiers and opposition to secession were breached, but in a way which conformed to the basis of the other African frontiers – the colonial frontier was restored.”¹¹⁶ Nevertheless, although the colonial boundary was restored, Eritrea clearly was not an example of decolonization.¹¹⁷ Therefore the establishment of its historical borders, albeit of colonial origin, cannot be ascribed to the *uti possidetis* principle.¹¹⁸ Significantly, the decision of the Eritrea-Ethiopia Boundary Commission makes no reference to this principle.

d) East Timor

The border between East Timor and Indonesia was determined according to the colonial delimitation between Portuguese and Dutch possessions on

¹¹⁵ Eritrea-Ethiopia Boundary Commission (note 114), Ch. I.1.2., para. 2. See also *R. Goy*, *L'indépendance de l'Érythrée*, AFDI 39 (1993), 337 (350). It should be noted that despite the prior agreement of both parties that they would accept the decision of the Boundary Commission, Ethiopia continues to oppose the delimitation decided on by the Commission in some disputed areas. In Ethiopia's view, the Commission's decision, which awards some disputed areas under Ethiopian control to Eritrea, is “totally illegal, unjust and irresponsible”. Ethiopia thus proposes “that the Security Council set up an alternative mechanism to demarcate the contested parts of the boundary in a just and legal manner”. UN Doc S/2003/1186 (19.12.2003), Annex I, para. 10. The implementation of the Commission's decision was called for by the Security Council in Resolutions 1586 and 1622. Neither resolution was adopted under Chapter VII of the UN Charter. See SC Res. 1586 (14.3.2005) and SC Res. 1622 (13.9.2005). For more see *C. Gray* (note 113), 707 et seq. See generally also *M. Shaw*, *Title, Control, and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission*, ICLQ 56 (2007), 755.

¹¹⁶ *M. Anderson* (note 108), 87.

¹¹⁷ Eritrea was decolonized when it was federated with Ethiopia. It needs to be recalled that the decolonization process did not only foresee an emergence as an independent state but also merger with another state. See GA Res. 1541 (15.12.1960), principle VI.

¹¹⁸ *Shaw* takes a different view (to some extent) and suggests that the delimitation between Ethiopia and Eritrea was about “determining the *uti possidetis* line”. *M. Shaw* (note 115), 776. Yet this is to accept that the *uti possidetis* principle is applicable also in situations which are not a matter of decolonization.

Timor Island.¹¹⁹ Since East Timor remained on the list of non-self-governing territories after Indonesia's occupation,¹²⁰ it can be argued that it was properly decolonized when it declared independence in 2002.¹²¹ Therefore one could potentially argue that the delimitation of East Timor was a matter of *uti possidetis*. Yet the real question was not East Timor's independence from Portugal but its independence from Indonesia, which was not a matter of decolonization, at least not in the traditional understanding of colonialism in the sense of European possessions of overseas territories.¹²² The delimitation of East Timor therefore has a colonial pedigree, yet East Timor also constitutes a self-determination unit, populated by a people with a distinct identity, whose independence was not a matter of decolonization.

The mode of state creation of East Timor was secession with the approval of the parent state.¹²³ Consequently, even the pattern of the determination of the international border was that of "upgrading" the former internal boundary, where such a boundary had a strong historical pedigree and delimited a self-determination unit. Although the historical pedigree of this boundary was colonial, the delimitation of East Timor cannot be ascribed to the *uti possidetis* principle.

e) The Dissolution of the SFRY and the Establishment of International Borders: Application of the *uti possidetis* Principle Re-examined in Light of Post-1990 State Practice

The example of the SFRY is more complex than other situations discussed in this subsection. The dissolution was not a consensual process based on a treaty. It was rather a consequence of a chain of secessions and of a constitutional breakdown of the federation which led the *Badinter* Com-

¹¹⁹ B. Singh, *East Timor, Indonesia and the World: Myths and Realities*, 1995, 6 et seq. See also N. Deeley, *The International Boundaries of East Timor*, 2001, 25 et seq. The territory of East Timor was also affirmed in the *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995, 95, para. 11.

¹²⁰ See R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, 2008, 179 et seq.

¹²¹ See *East Timor: Birth of a Nation*, BBC (19.5.2002), at <http://news.bbc.co.uk/2/hi/asiapacific/1996673.stm>. See also SC Res. 1338 (31.1.2001).

¹²² For more on the problem of the narrow understanding of colonialism see L. Buchheit, *Secession: The Legitimacy of Self-Determination*, 1978, 18 et seq.

¹²³ See generally UN Doc S/1999/513 (5.5.1999). See also I. Martin, *Self Determination in East Timor: The United Nations, the Ballot, and International Intervention*, 2001, 15 et seq.

mission to proclaim that the SFRY was in the process of dissolution.¹²⁴ In order to determine the new international borders, the *Badinter* Commission applied the *uti possidetis* principle.¹²⁵

As outlined above, many commentators have criticized the *Badinter* Commission's application of *uti possidetis* in the territory of the SFRY. In addition, some also see the internal boundaries established within the SFRY to be unfit for becoming international borders and, as such, reminiscent of boundaries established in colonial situations. In one such view, "in the SFRY, municipal borders were drawn by the Communist Party's Politbureau, taking little account of ethnic factors".¹²⁶ Yet the argument that the internal boundaries in the SFRY were colonial-like administrative lines is not accurate and it is arguable that the determination of new international borders in the territory of the former SFRY, despite reference to *uti possidetis*, did not differ from subsequent practice in post-1990 state creations, where no references to this principle were made.

It has been established that the practice of post-1990 state creations shows that internal boundaries are capable of becoming international borders where they delimit historically firmly established self-determination units. In order to establish whether the internal boundaries within the SFRY had the potential to become international borders in the absence of *uti possidetis* presumption, their historical pedigree needs to be considered.

The first common state of Southern Slavs was the Kingdom of Serbs, Croats and Slovenes, created on 1.12.1918.¹²⁷ Slovenia and Croatia previously did not exist as independent states; the territories settled by Slovenes and Croats, respectively, were part of the Habsburg Monarchy.¹²⁸ The Kingdom of Serbia had existed as an independent state since the Congress of Berlin in 1878,¹²⁹ but not all Serbs lived within the territory of this state. The former Habsburg territories of Vojvodina, Bosnia-Herzegovina and Croatia were also populated by significant shares of ethnic-Serb population.¹³⁰ Establishment of the Kingdom of Serbs, Croats and Slovenes, however, unified the Serb population in a common state. The new Kingdom also

¹²⁴ The *Badinter* Commission, Opinion 1 (29.11.1991), para. 3, reprinted in: S. Trifunovska (note 11), 415.

¹²⁵ See The *Badinter* Commission (note 11).

¹²⁶ T. Bartoš (note 109), 87. See also M. Kreća, *The Badinter Arbitration Commission – A Critical Commentary*, 1993, 12 et seq.

¹²⁷ P. Radan, *The Break-up of Yugoslavia and International Law*, 2002, 136.

¹²⁸ S. Pavlowitch, *Yugoslavia*, 1971, 42 et seq.

¹²⁹ S. Pavlowitch (note 128), 44.

¹³⁰ L. Cohen, *Broken Bonds: Yugoslavia's Disintegration and Balkan Politics in Transition*, 1995, 14 et seq.

included the territory of Montenegro, which was otherwise also recognized as an independent state at the Congress of Berlin in 1878,¹³¹ and Bosnia-Herzegovina, which was previously not a state but a separate unit within the Habsburg Monarchy with borders likewise established at the Congress of Berlin.¹³²

The Kingdom of Serbs, Croats and Slovenes was unified under the King of Serbia and created as a multiparty electoral democracy,¹³³ while it was initially not defined whether the new Kingdom would be a federal or a unitary state.¹³⁴ Since a significant Serb population lived outside of the frontiers of the former Kingdom of Serbia, the entire Serb population could not be federated within a single federal unit. Serbia was thus disinclined toward a federal arrangement. On the other hand, Slovenes and Croats feared Serbian centralism and demanded a federated state. In the end the Serbian majority within the parliament enacted the unitary Constitution of 1921.¹³⁵ The Constitution “was a reflection of the official view that the Serbs, Croats and Slovenes were three tribes of one unified nation, namely the Yugoslavs.”¹³⁶ The strong ideology of a unitary ‘Yugoslav people’ was also evident in the proclamation of the official language, which was ‘Serbo-Croato-Slovene’,¹³⁷ a language which linguistically does not exist. In this regard one commentator argued:

According to the constitution adopted in 1921, the new state expressed the political will of the single “three-named Serbo-Croatian-Slovenian people,” who allegedly spoke a single “Serbo-Croatian-Slovenian language.” Although an ethnic alliance composed of three different “tribes” was theoretically mandated to govern the country, the reality of power and rule was a centralized unitary kingdom, with state authority concentrated in Belgrade.¹³⁸

¹³¹ *S. Pavlowitch* (note 128), 44.

¹³² At the Congress of Berlin, Bosnia-Herzegovina was “entrusted to Austro-Hungarian administration” (*S. Pavlowitch* (note 128), 44). It was formally annexed by Austria-Hungary in 1908 (*S. Pavlowitch* (note 128), 48). In historical documents, Bosnia was first mentioned in the 10th century and in the 12th century even existed as an independent state. For more see *O. Ibrahimagić, Državno-pravni razvitak Bosne i Hercegovine*, 1998, 7 et seq.

¹³³ See *S. Pavlowitch* (note 128), 59 et seq.

¹³⁴ *P. Radan* (note 127), 138.

¹³⁵ *P. Radan* (note 127), 138.

¹³⁶ *P. Radan* (note 127), 138.

¹³⁷ Art. 3, Constitution of the Kingdom of Serbs, Croats and Slovenes (1921).

¹³⁸ *L. Cohen* (note 130), 14. Compare to *M. Shaw* (note 36), 489, arguing that in some circumstances “administrative borders have been changed by central government in a deliberate attempt to strengthen central control and weaken the growth of local power centres”. It can be argued that this was the case in the Kingdom of Serbs, Croats and Slovenes.

As a consequence of centralization and of an attempt to establish a unitary ‘Yugoslav people’, the 1922 ministerial decree established internal boundaries of thirty-three districts which did not follow ethnic lines.¹³⁹ Such a division was satisfactory for Serbs but opposed by Slovenes and Croats because it was set arbitrarily and did not delimit their respective historical territories.¹⁴⁰ Internal clashes in the Kingdom continued and on 6.1.1929 the King dissolved the parliament and introduced his personal dictatorship, claiming that this was necessary in order “to preserve the unity of the state and its peoples.”¹⁴¹ At that time the Kingdom of Serbs, Croats and Slovenes was also officially renamed the Kingdom of Yugoslavia.¹⁴² In 1931, the King promulgated a new unitary constitution, which divided the Kingdom into nine administrative units called *banovina*. In some situations these units came closer to historically delimited ethnic boundaries (e.g. the unit called *Dravska banovina* followed the historically delimited territory of Slovenes) but this was not always the case.¹⁴³

During the Second World War, in 1943, the second Yugoslavia (later known as the SFRY) was established by leaders of the partisan movement led by *Josip Broz-Tito*.¹⁴⁴ The new state was defined as a federation and the borders of its federal units were established by the Presidency of the Anti-Fascist Council of the National Liberation of Yugoslavia¹⁴⁵ on 24.2.1945:¹⁴⁶

This decision relied largely on older historical borders, both as they existed in interwar Yugoslavia and in the former Austro-Hungarian and Ottoman Empires. In many respects the decision accepted borders that coincided with, either exactly or approximately, the borders claimed by the various nationalist movements of the nineteenth and early twentieth century.¹⁴⁷

Ultimately, boundaries of no historical pedigree only had to be drawn between Slovenian and Croatian parts of the former Zone B of the Free Territory of Trieste,¹⁴⁸ between Croatia and Vojvodina (the former Habsburg territory with a majority Serb population)¹⁴⁹ and between Serbia and Mace-

¹³⁹ P. Radan (note 127), 138.

¹⁴⁰ P. Radan (note 127), 138.

¹⁴¹ P. Radan (note 127), 138.

¹⁴² See J. Lampe, *Yugoslavia as History: Twice there was a Country*, 2000, 159 et seq.

¹⁴³ See L. Cohen (note 130), 18 (map).

¹⁴⁴ For more see J. Lampe (note 142), 197 et seq.

¹⁴⁵ At the time, the Anti-Fascist Council of the National Liberation of Yugoslavia was the provisional legislature. See S. Pavlowitch (note 128), 175.

¹⁴⁶ P. Radan (note 127), 149.

¹⁴⁷ P. Radan (note 127), 149.

¹⁴⁸ For more on the Free Territory of Trieste see J. Crawford (note 70), 553.

¹⁴⁹ P. Radan (note 127), 151.

donia.¹⁵⁰ In these situations ethnic compositions of the territories were taken into account and geographical boundaries (e.g. rivers) were used for the purpose of delimitation.¹⁵¹ In the end, the boundary between Slovenia and Croatia (apart from the short part within the former Zone B of the Free Territory of Trieste) followed the former division between Austrian and Hungarian parts of the Habsburg (Dual) Monarchy.¹⁵² Croatia and Serbia only bordered in Vojvodina where ethnic and geographical principles were used for the exact delimitation.¹⁵³ Bosnia-Herzegovina was re-established along the lines determined at the Congress of Berlin,¹⁵⁴ which originated in the delimitation of the medieval Bosnian state and of the Bosnian entity within the Ottoman Empire.¹⁵⁵ Both Serbia and Montenegro were generally re-established along their pre-First World War international borders.¹⁵⁶ The only significant exception to the rule of boundaries of historical pedigree was Macedonia, which was part of the Kingdom of Serbia before the First World War.¹⁵⁷ To determine its boundaries, the boundaries of *Vardarska banovina*, a unit within the Kingdom of Yugoslavia, were taken into account, although they were significantly narrower and followed ethnic division lines between Serbs and Macedonians.¹⁵⁸ An autonomous province of Kosovo was also established within its historical borders.¹⁵⁹

Unlike the administrative units within the Kingdom of Yugoslavia which resembled the arbitrariness of colonial boundary drawing, the federal units of the SFRY were not created along arbitrary lines but followed boundaries of a historical pedigree, often even former international borders.

Federalism and drawing internal boundaries along the lines of borders of historical pedigree also re-created the problem of Serbs settled outside of the boundaries of Serbia. This was, however, not a problem originally created by the internal boundary arrangement within the SFRY but a problem

¹⁵⁰ P. Radan (note 127), 151.

¹⁵¹ P. Radan (note 127), 151.

¹⁵² See S. Pavlowitch (note 128), 43. The Hungarian-Croatian compromise of 1868 recognized Croatia the status of a separate unit linked to the Hungarian Crown.

¹⁵³ See P. Radan (note 127), 151.

¹⁵⁴ P. Radan (note 127), 151.

¹⁵⁵ See O. Ibrahimagić (note 132), 9 et seq.

¹⁵⁶ The exceptions were Kosovo and Vojvodina, which were not part of the Kingdom of Serbia but formally came under Serbian sovereignty in the time of the Kingdom of Serbs, Croats and Slovenes. See N. Malcolm, *Kosovo: A Short History*, 1998, 264 et seq.

¹⁵⁷ For more on the creation of the Macedonian republic and recognition of Macedonian ethnicity see S. Pavlowitch (note 128), 198 et seq.

¹⁵⁸ P. Radan (note 127), 151 et seq.

¹⁵⁹ For more on the historic background of Kosovo and its borders see N. Malcolm (note 156), 58 et seq.

inherited from the past. Furthermore, the internal boundaries in the SFRY did not create (or try to create) new ethnic identities within artificially-defined territorial arrangements but merely took into account the historically-created identities which the constitutional arrangement of the Kingdom of Yugoslavia disregarded and (unsuccessfully) tried to melt into a common Yugoslav ethnic identity.¹⁶⁰ Different identities were expressly recognized by the 1974 Constitution of the SFRY, which did not promote the idea of a common Yugoslav ethnic identity but rather created a federal arrangement which enabled the peoples of Yugoslavia to exercise the right of self-determination in its internal mode and vested wide powers within the republics.¹⁶¹

When the SFRY disintegrated, the internal boundaries “upgraded” to international borders were thus not random, colonial-like boundaries (as would have been the case had the internal boundaries within the Kingdom of Yugoslavia become international borders), but for the most part were historically firmly established borders between groups of peoples with different ethnic identities. Thus, the *Badinter* Commission should not be criticized for “upgrading” the internal boundaries to international borders. Indeed:

Any attempted ethnic reconfiguration of the Former Yugoslavia on a totally free-for-all basis ... would most likely have produced an even worse situation than that which did occur ... The absence of *uti possidetis* presumption would leave in place as the guiding principle only effective control or self-determination. To rely on effective control as the principal criterion for the creation of international boundaries would be to invite the use of force as the inexorable first step ... Self-determination is a principle whose definition in this extended version

¹⁶⁰ Compare note 138. The last reliable census in the SFRY dates to 1981 (the next one in 1990 was already heavily influenced by the crisis in the federation and was subject to some organized boycotts). The ethnic composition at the 1981 census was the following: Serbs (36.3 percent), Croats (19.7 percent), Muslims (7.9 percent), Slovenes (7.8 percent), Macedonians (6.0 percent), Albanians (5.8 percent), Yugoslavs (5.4 percent), Montenegrins (2.6 percent), Hungarians (2.3 percent). Other ethnic identities included: Italians, Roma, Turks, Slovaks, Bulgarians, Romanians and Germans. What is significant is that most of the population identified itself along ethnic lines. In this perception individuals belonged to one of the constitutive peoples of the SFRY and only a small percentage of barely over five percent identified itself with a common Yugoslav identity. The 1981 Census in the SFRY, *Popis stanovništva, domaćinstava i stanova u 1981. godini*, 1983.

¹⁶¹ The 1974 Constitution defined republics as states (Art. 3) and proclaimed borders of the republics inviolable without consent of the republic (Art. 5 (1)), empowered republics to adopt their own legislation applicable only in their respective territories and to exercise effective control in their territories (Art. 268) and gave republics powers to conduct their own foreign policies, subject to limitation by the general framework of the federal foreign policy (Art. 271).

is wholly unpredictable. Precisely which group would be entitled in such situations to claim a share of a territory?¹⁶²

In other words, it is not possible to accept that in situations of non-consensual dissolutions all borders are in flux and that the previously existing internal boundary arrangement could be changed by effective possession. This would be a call for ethnic cleansing. Instead, drawing borders along historically well-established boundaries, which separate peoples with different identities, seems to be a reasonable alternative. The *Badinter* Commission did what was later consensually achieved in Czechoslovakia.¹⁶³ It is, however, incorrect to term this process *uti possidetis*. The use of this term “implied that the [SFRY] was a *quasi* colonial administrative entity, namely, a party totally alien to the constituent nations of the old state.”¹⁶⁴ Besides the doctrinal question of whether this principle applies outside of colonial situations,¹⁶⁵ its colonial origin also implies confinement of international borders along arbitrarily drawn internal boundaries. It was shown in this section that this was not the case in the SFRY.

f) Montenegro

After the dissolution of the SFRY, Montenegro initially continued in the union with Serbia in the state formation called the Federal Republic of Yugoslavia (FRY). In 2003 the FRY was transformed into the State Union of Serbia and Montenegro (SUSM). In 2006, Montenegro declared independence.¹⁶⁶ The mode of state creation was consensual. Indeed, secession was expressly allowed under Article 60 of the Constitution of the State Union of Serbia and Montenegro (SUSM).¹⁶⁷ Article 60 also stipulated for Serbia’s continuity of the international personality of the SUSM. Serbia also continues the membership of the SUSM in the UN. Thus, there is no doubt that when Montenegro declared independence this did not amount to the dissolution of the SUSM but to Montenegro’s secession.

The border between Serbia and Montenegro was firmly established in Article 5 of the Constitution of the SUSM: “The border between state-

¹⁶² *M. Shaw* (note 36), 502.

¹⁶³ See section III. 2. b.

¹⁶⁴ *C. Antonopoulos*, *The Principle of Uti Possidetis in Contemporary International Law*, *Revue hellénique de droit international* 49 (1996), 29 (84).

¹⁶⁵ See section II. 2.

¹⁶⁶ See Declaration of Independence of the Republic of Montenegro, *The Official Gazette of the Republic of Montenegro* No. 36/06 (3.6.2006).

¹⁶⁷ Art. 60, Constitution of the SUSM (2003).

members shall not be altered unless there exists mutual consensus of both sides.”¹⁶⁸ Montenegro’s borders were identical to those in the FRY, in the SFRY and, with some minor changes, to those of the Montenegrin state recognized at the Congress of Berlin in 1878.¹⁶⁹

When Montenegro acquired independence in accordance with Article 60 of the Constitution of the SUSM, its new international delimitation was not a matter of *uti possidetis*. This principle was not mentioned in any of the founding documents of the new Montenegrin state. Even more importantly, Montenegro’s new international border was actually an old one and not reminiscent of colonial delimitation. Indeed, it had a strong historical pedigree of delimiting a self-determination unit and previously already had the status of being an international border.

g) Kosovo

On 17.2.2008, Kosovo’s Assembly declared independence.¹⁷⁰ As of 13.1.2010, recognition has been granted by sixty-five states.¹⁷¹ Independence is opposed by Serbia, Kosovo’s parent state,¹⁷² and the (attempt at) secession is therefore unilateral. The question of Kosovo’s declaration of independence, recognition and attributes of statehood remain controversial and are not considered in this article.¹⁷³ What is considered here is the origin of Kosovo’s borders and the question of delimitation in a situation of unilateral secession.

After the medieval Serbian state lost the battle of Kosovo,¹⁷⁴ the territory came under Turkish rule.¹⁷⁵ In modern times, Ottoman Turks lost control

¹⁶⁸ Constitution of the SUSM (2003), Art 5(3), my own translation.

¹⁶⁹ Compare note 131.

¹⁷⁰ Kosovo Declaration of Independence, 17.2.2008, at <http://www.assemblykosova.org/?krye=news&newsid=1635&lang=en>.

¹⁷¹ See Who Recognized Kosovo as an Independent State, at <http://www.kosovothanksyou.com>.

¹⁷² UN Doc S/PV.5839 (18.2.2008), 5 (statement of the President of Serbia).

¹⁷³ See UN Doc S/PV.5839 (note 172) for reservations of some states in the Security Council. See also ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for Advisory Opinion), Order, General List No. 141 (17.10.2008). For a detailed analysis of Kosovo’s declaration of independence see *M. Weller*, *Contested Statehood: Kosovo’s Struggle for Independence*, 2009, 220 et seq.; *C. Warbrick*, *Kosovo: The Declaration of Independence*, ICLQ 57 (2008), 675 et seq.; *J. Vidmar*, *International Legal Responses to Kosovo’s Declaration of Independence*, Vand. J. Transnat’l L. 42 (2009), 779 et seq.

¹⁷⁴ For more on the battle of Kosovo, both fact and myth, see *M. Vickers*, *Between Serb and Albanian: A History of Kosovo*, 1998, 12 et seq; *N. Malcolm* (note 156), 58 et seq.

over Kosovo in 1912.¹⁷⁶ Kosovo came under the *de facto* authority of the Kingdom of Serbia.¹⁷⁷ After the First World War, Kosovo became part of the newly-created Kingdom of Serbs, Croats and Slovenes in 1918.¹⁷⁸ In the federal Yugoslav constitution of 1946, Kosovo, in its historically established borders, was formally defined as an autonomous province within the republic of Serbia.¹⁷⁹ This autonomous status was further expanded in the last Constitution of the SFRY from 1974.¹⁸⁰

In the late 1980s, Serbia suspended Kosovo's autonomy by unconstitutional means.¹⁸¹ In response, Kosovo Albanians created parallel state organs and in 1991 issued a declaration of independence.¹⁸² As Kosovo was not a republic but an autonomous province, the declaration was ignored by the *Badinter* Commission. Recognition was granted only by Albania.¹⁸³ Thus, like in the territory of the Soviet Union, in the territory of the SFRY not all internal boundaries became international borders, but only those delimiting federal republics.¹⁸⁴ It is notable that under the Constitution of the SFRY, only republics were defined as self-determination units, while the two autonomous provinces, Kosovo and Vojvodina, were considered to be self-governing units of Albanian and Hungarian ethnic minorities.¹⁸⁵ Thus, the reason that Kosovo's boundary was not elevated to the status of an international border in 1991 can be ascribed to the fact that under the SFRY's constitutional arrangement Kosovo Albanians were not bearers of the right of self-determination and Kosovo was not considered to be a separate constitutional self-determination unit (i.e. it was not a federal republic).

¹⁷⁵ See *M. Vickers* (note 174), 16 et seq.

¹⁷⁶ See *N. Malcolm* (note 156), 252.

¹⁷⁷ *N. Malcolm* (note 156), 264 et seq. In 1913 Albania became a state by the Treaty of London; however, Kosovo Albanians were left in Serbia against their will. For more see *M. Vickers*, *The Status of Kosovo in Socialist Yugoslavia*, *Bradford Studies on South Eastern Europe* 1 (1994), 1 (5 et seq.).

¹⁷⁸ See *N. Malcolm* (note 156), 266. This did not only apply to Kosovo Albanians but also to Albanians living in other parts of the Kingdom of Serbs, Croats and Slovenes (later called Yugoslavia).

¹⁷⁹ Art. 2, Constitution of the Federative Peoples' Republic of Yugoslavia (1946).

¹⁸⁰ Art. 2, Constitution of the SFRY (1974). See also the Constitution of the Socialist Autonomous Province of Kosovo (1974), translated in: Helsinki Committee for Human Rights in Serbia, *Kosovo: Law and Politics, Kosovo in Normative Acts Before and After 1974*, 1998, 41 et seq.

¹⁸¹ See *N. Malcolm* (note 156), 344.

¹⁸² *N. Malcolm* (note 156), 346 et seq.

¹⁸³ See *M. Vickers* (note 174), 251 et seq. See also *J. Crawford* (note 70), 408.

¹⁸⁴ Compare note 98.

¹⁸⁵ See Art. 1, Art. 2, Art. 3, The Constitution of the SFRY. See also *R. Rich*, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, *EJIL* 4 (1993), 36 (39).

The second half of the 1990s saw an escalation of ethnic conflict, which led to NATO intervention and establishment of international territorial administration under a Chapter VII resolution of the UN Security Council.¹⁸⁶ International territorial administration was established in the entire territory of Kosovo.¹⁸⁷ In one view, the UN Security Council Resolution 1244 thus acknowledged the applicability of *uti possidetis* in Kosovo.¹⁸⁸ Yet this interpretation is not convincing. The problems are not only that Resolution 1244 does not mention *uti possidetis* or that Kosovo is a non-colonial situation. Indeed, even if one accepted the non-colonial application of *uti possidetis*, the *sine qua non* for its application would still be a state creation. Although interpretations of Resolution 1244 may differ significantly, there is one point on which universal consensus exists: between 10.6.1999 (when Resolution 1244 was adopted) and 17.2.2008 (when independence was declared), Kosovo was not a state.¹⁸⁹ Hence, since there was no new state creation in question when Resolution 1244 was adopted, the latter could not apply *uti possidetis* in Kosovo.

Resolution 1244 therefore only established the international territorial administration in the territory of Kosovo, within its historically-realized boundaries. These are also the boundaries which have been, upon Kosovo's declaration of independence, recognized by sixty-five states as borders of the independent state of Kosovo. As was held in the *Québec case*, the success of unilateral secession ultimately depends on recognition.¹⁹⁰ This also implies that recognition acknowledges the "upgrading" of former internal boundaries to international borders. In the view of the sixty-five recognizing states Kosovo is thus a state within its historical borders. Yet no recognizing state made a reference to *uti possidetis*.

It is also significant that, in the process of negotiations on Kosovo's future status, division of the territory was never seriously discussed. This is somewhat surprising as Serbia has hinted that it would be potentially willing to accept partition of Kosovo.¹⁹¹ The division of Kosovo could therefore be used as one of the options which would make a consensual state creation (albeit within narrower borders) more likely.

¹⁸⁶ See SC Res. 1244 (10.6.1999).

¹⁸⁷ SC Res. 1244 especially paras 5, 6, 7. See also UNMIK/REG/1999/1 (25.7.1999).

¹⁸⁸ E. Hasani (note 94), 94.

¹⁸⁹ The dispute is around the question of whether Resolution 1244 prohibited the emergence of Kosovo as a state. Yet no one contends that with Resolution 1244 Kosovo became independent.

¹⁹⁰ *The Quebec case* (note 8), para. 155.

¹⁹¹ See Serbia's President Considers Kosovo Division, International Herald Tribune (30.9.2008), at <http://iht.nytimes.com/articles/ap/2008/09/30/europe/EU-Serbia-Kosovo.php>.

Although it remains controversial whether Kosovo has emerged as an independent state, this example nevertheless confirms the practice of new state delimitations in the post-1990 era: where previous internal boundaries delimit historically-established self-determination units, the new international border will be confined along these lines. Although negotiations on the future international border are in principle not excluded, there exists no relevant state practice. While Kosovo is perhaps one example where such practice could develop, this has not happened.

IV. Conclusion

When dealing with the situation in the SFRY, the *Badinter* Commission resorted to *uti possidetis* in order to justify the “upgrading” of internal boundaries to international borders. The application of this principle outside of the process of decolonization was, however, doctrinally underpinned by selective quoting of the Chamber of the ICJ in the *Frontier Dispute case*. So underpinned, the *Badinter* Commission’s extension of *uti possidetis* beyond the process of decolonization can hardly serve as an authority to be referred to in future situations. The non-colonial applicability of *uti possidetis* therefore has very weak doctrinal foundations and a reference to it did not appear in any documents which are legally relevant for subsequent state creations and delimitation of new states.

The relevant practice nevertheless shows that when new states are created, the previous internal boundary arrangement cannot be disregarded. Indeed, all new states created in the post-1990 period were delimited along previous internal boundaries, either by a formal agreement in the case of consensual state creations or by subsequent acceptance of states and UN organs in the case of non-consensual ones. It was shown that this was not the consequence of the operation of *uti possidetis*. Indeed, if *uti possidetis* applied in non-colonial situations, the pedigree of the “upgraded” boundary would not matter. Yet the practice of post-1990 state creations shows that it does matter what kind of a unit the boundary delimits.

Unlike the process of decolonization, the practice of post-1990 state creations shows that not just any internal boundary may potentially become an international border but only those boundaries that have a strong historical pedigree of delimiting self-determination units. In the practice of post-1990 state creations, most new international borders have had a previous history as international borders, borders between empires or ethnic-based internal boundaries within empires. Not even the SFRY was an exception to this

pattern but the situation was more complicated due to the non-consensual nature of its dissolution.

Therefore, when new international borders were confined in the post-1990 practice, it was not the importance of internal boundaries *per se* which was relevant for “upgrading” to international borders. What was important was the historical pedigree of these boundaries and the fact that they delimited historically-established self-determination units.

A well-known difficulty with the concept of self-determination was once pointed out in the following words: “On the surface [the idea of self-determination] seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who the people are.”¹⁹² It can be argued that in the process of decolonization *uti possidetis* decided who the people are. In so doing the principle imposed “identities on the various inhabitants of former colonies.”¹⁹³ In non-colonial situations, however, it was not the new international delimitation which decided who the peoples are for the purpose of the right of self-determination, nor did the new international delimitation try to create new identities. In the situations of post-1990 state creations the identities of separate peoples already existed and the internal boundaries did not delimit colonial-like entities. It was therefore the pedigree of a historically-realized self-determination unit and not *uti possidetis* which confined new international borders in the practice of post-1990 state creations. The new international borders also created new minorities and many of these borders are disputed as being unjust. But one needs to keep in mind that mono-ethnic ‘nation states’, the borders of which everyone perceives to be just, do not exist in reality. Therefore one cannot expect that such states could be created.

¹⁹² I. Jennings, *The Approach to Self-Government*, 1956, 55 et seq.

¹⁹³ A. Rosen, *Economic and Cooperative Post-Colonial Borders: How Two Interpretations of Borders by the I.C.J. May Undermine the Relationship Between Uti Possidetis and Democracy*, *Penn State International Law Review*, 25 (2006), 207 (212).