# Distinguishing between Declarations of Independence and Secession

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This chapter draws a distinction between a declaration of independence and the underlying act of secession it supports by teasing apart from the question of session the status and treatment under international law and national law respectively of a declaration of independence. A declaration of independence following the consensual secession of territory being uncontentious under both international and national law, the chapter focuses exclusively on unilateral declarations of independence. Part II addresses the limited applicability of international law to unilateral declarations of independence, in particular the principle of territorial integrity and *jus cogens* norms, which may give rise to an obligation to withhold recognition of the seceding entity. Against the backdrop of national law, in which context a unilateral declaration of independence is generally unlawful, Part III considers the treatment by constitutional courts of unilateral declarations of independence and the role they may play in encouraging negotiated secession.

**Keywords**: declaration of independence, unilateral secession, territorial integrity, *jus cogens* (6)

## I. Introduction

A declaration of independence being an expression of the will to secede, its significance in a secessionist context depends on the characterisation of the act of secession as either unilateral or consensual. Where, on the one hand, the secession of part of the territory of an existing state is sought unilaterally, the issuance of a unilateral declaration of independence may serve as a catalysing step towards secession, as in the cases of Ireland[1] and Indonesia,[2] leading either to eventual independence or to its preclusion by the parent state.[3] Equally, in a unilateral context, the declaration may reflect the effective secession of territory that has already taken place, inviting on that basis recognition by states. Recognition may even follow where the effectiveness of the seceding entity is in doubt, as in the exceptional cases of Guinea Bissau and Bangladesh.[4] Where, on the other hand, the secession of part of the territory of an existing state is sought consensually, as in the case of Montenegro[5] and most recently in Bougainville,[6] a declaration of independence may be issued prior to or in pursuance of an agreement negotiated with the parent state, making

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[1] See the issuance prior to the Irish war of independence of the 'Proclamation of the Irish Republic' on 24 April 1916 and the 'Irish Declaration of Independence' on 21 January 1919.

[2] See the issuance prior to the Indonesian War of Independence of the proclamation of independence on 17 August 1945. See also James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 384.

[3] According to Christakis and Contantinides, '[t]he typical steps would be to declare independence, adopt a new constitution and new laws, replace all agents of the parent state . . . with agents from the separatist entity, establish perfect control over the territory, stop paying taxes to the predecessor state, etc'. Theodore Christakis and Aristoteles Constantinides, 'Territorial Disputes in the Context of Secessionist Conflicts' in Marcelo Cohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar 2018) 366-367.

[4] Crawford (n 2) 386-387.

[5] See Constitutional Charter of the State Union of Serbia and Montenegro 2003, art 60.

[6] Bougainville Peace Agreement, 30 August 2001, §§ 309-324; 'Bougainville Votes Overwhelmingly for Independence from Papua New Guinea', Deutsche Welle, 11 December 2019 <https://www.dw.com/en/bougainville-votes-overwhelmingly-for-independence-from-papua-new-guinea/a-51616334> accessed 13 December 2019.

it truly declaratory in nature.[7] This chapter thus focuses on the status under international law and national law respectively of declarations of independence issued in the context of unilateral secession, that is, on unilateral declarations of independence.

Characterising a declaration of independence as a component of the broader process of secession, and drawing on this basis a nuanced distinction between a declaration of independence and the underlying act of secession it supports, Part II examines the status under international law of unilateral declarations of independence vis-à-vis secession, while Part III addresses their status and treatment under national law.

## II. Unilateral Declarations of Independence under International Law

### 1. The Decolonisation Period

In limited circumstances, a right of secession may be rooted in the exercise by a people of their right to self-determination. Only in the context of decolonisation or where a people's right to self-determination is otherwise restricted as a result of alien subjugation, domination or exploitation is secession permissible.[8] That the scope of the right to self-determination includes the independence of former colonial territories was confirmed most recently by the International Court of Justice (ICJ) in its advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[9] Even in this limited context, however, there is insufficient agreement as to the modalities of bringing about the independence of a territory through the expression of a people's right to self-determination, precluding any formal requirement of a declaration of independence.

The minimal procedural requirement in relation to the independence of a non-self-governing territory is that it is brought about through the exercise of the free will of the people,[10] the modalities of which are to be determined the General Assembly[11] and which may in certain circumstances be dispensed with.[12] The formal irrelevance in this context of a declaration of independence is evidenced by the absence from the list of factors indicative of the attainment of the independence of non-self-governing territories – adopted by the General Assembly in Resolution 742 (1953) – of a declaration of independence.[13] So also, within the United Nations framework for non-self-governing territories, it is not a declaration of independence but a 'full measure of self-government' that is determinative of territorial status.[14] This is not to say that a

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[7] Christakis and Constantinides (n 3) 374. Note, however, that even consensual secession may be unlawful owing to the violation of a *jus cogens* norm; Vienna Convention on the Law of Treaties 1969, art 53.

[8] UNGA Res 1514, UN Doc A/RES/1514(XV), 14 December 1960, §§ 1, 5; *Reference Re Secession of Quebec* (Advisory Opinion) [1998] 2 SCR 217, §§ 132-3; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 ICJ Rep 403, §§ 79, 84.

[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 25 February 2019 https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf accessed 5 January 2020, § 152.

[10] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, § 55; UNGA Res 1514, UN Doc A/RES/1514(XV), 14 December 1960, § 5; UNGA Res 1541, UN Doc A/RES/1541, 15 December 1960, Annex, Principles VII, IX; UNGA Res 2625, UN Doc A/RES/2625(XXV), 24 October 1970; Crawford (n 2) 387.

[11] *Chagos* (n 9) § 167.

[12] *Western Sahara* (n 10) § 59; *Chagos* (n 9) §§ 157-158.

[13] Annex to UNGA Res 742, UN Doc A/RES/742(VIII), 27 November 1953.

[14] The requirement is stated in the Annex to UNGA Res 1541 ('Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Art 73(*e*) of the Charter of the United

unilateral declaration of independence is inconsequential. On the contrary, even in the permissive context of decolonisation, the issuance of a unilateral declaration of independence may precipitate protracted armed conflict, as was the case in Vietnam, Timor-Leste, Algeria, Katanga and Biafra, among others, before independence could either be achieved or suppressed. Equally, the absence of a formal requirement of a declaration of independence notwithstanding, a declaration of independence may be useful in demonstrating the independence and effectiveness of the territory's government.[15]

2. Post-Decolonisation

Beyond these circumstances, and with scant support for a right of remedial secession when a people are 'blocked from the meaningful exercise of [their] right to self-determination internally',[16] it is widely accepted that international law does not recognise a right unilaterally to secede.[17] In other words, '[t]he position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally'.[18] The question nevertheless remains whether international law regulates – quite separate from the act of secession – the issuance by the seceding entity of a unilateral declaration of independence, whether owing to its unilateral character or otherwise.

*A. Kosovo*

It was not until the rendering by the ICJ of the advisory opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo*) that the question of the lawfulness under international law of a unilateral declaration of independence was cleaved from the broader question of secession.[19] This was quite different from the question that had previously been posed to the Supreme Court of Canada in *Reference re Secession of Quebec* (*Quebec*), in which context it was 'not the legality of the first step but the legality of the final act of purported unilateral secession' that was at issue.[20] In contrast, the question submitted by the General Assembly to the ICJ in *Kosovo* was drafted in the following restrictive terms:

> Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?[21]

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Nations'), which outlines the obligations on states administering non-self-governing territories under the UN Charter, art 73; UNGA Res 1541, UN Doc A/RES/1541, 15 December 1960, Annex, Principle II.

[15] Jure Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (2011) 24 Leiden Journal of International Law (LJIL) 355, 360.

[16] *Quebec* (n 8) §§ 134-135. On the limited support for a right of remedial secession, see Katherine Del Mar, 'The Myth of Remedial Secession' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2015) 79, 82-84; but see Antonello Tancredi, 'A Normative "Due Process" in the Creation of States through Secession' in Marcelo Cohen (ed), *Secession: International Law Perspectives* (CUP 2006) 171, 175-181. Grant suggests that remedial secession is limited to 'extreme cases'; Grant, 'Annexation of Crimea' (2015) 109(1) American Journal of International Law 68, 76.

[17] Crawford (n 2) 416.

[18] Crawford (n 2) 390.

[19] On the contrary, some suggest that the advisory opinion was in fact 'a legal assessment of secession'; Anne Peters, 'Does Kosovo Lie in the *Lotus*-Land of Freedom?' (2011) 24 LJIL 95, 96. See also Marc Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ *Kosovo* Opinion?' (2011) 24 LJIL 127, 135.

[20] *Quebec* (n 8) § 86.

[21] *Kosovo* (n 8) § 1.

Reflecting the approach taken by the General Assembly, the Court's framing of the question to exclude issues of Kosovo's independence from Serbia and its legal basis, if any, in the Kosovar right to self-determination narrowed its field of inquiry considerably. The Court's reading, moreover, of 'in accordance with international law' as requiring a determination only of 'whether or not the applicable international law prohibited the declaration of independence' further restricted the scope of its analysis.[22] As a result, when addressing first the question of the lawfulness under general international law of unilateral declarations of independence, it considered state practice prior to the period of decolonisation as 'point[ing] clearly to the conclusion that international law contained no prohibition of declarations of independence'.[23] It similarly concluded that there was subsequent to the period of decolonisation 'no general prohibition against unilateral declarations of independence'.[24] Secondly, when assessing the lawfulness of Kosovo's unilateral declaration of independence against the *lex specialis*, namely Security Council Resolution 1244 (1999) and the interim constitutional framework established thereunder, the Court again limited itself to a finding that the applicable law did not include 'a specific prohibition on issuing a declaration of independence'.[25] In this way, it excluded a more expansive reading of the question that might have required it to address the existence under international law of a permissive rule, springing from the right to self-determination or otherwise, that might have affirmed the accordance with international law of the unilateral declaration of Kosovo's independence.[26]

### B. *Violation of the Principle of Territorial Integrity*

On the basis of its restrictive approach to the accordance with international law of the unilateral declaration of independence, the ICJ's advisory opinion in *Kosovo* is also notable for its rejection of the proposition that a prohibition on unilateral declarations of independence might be founded in the principle of territorial integrity. In the view of the Court, 'the scope of the principle of territorial integrity is confined to the sphere of relations between States', precluding its application to the issuance by a seceding entity of a unilateral declaration of independence.[27] The problem, in other words, is that 'for Kosovo to be bound to respect the right of territorial integrity of Serbia, it would have to be a State, and if it were a State, then it would no longer form part of Serbia's territory, and so no basis would exist for its territorial claim to impinge on the sovereign rights of Serbia'.[28] The Security Council has, for its part, invoked the principle of territorial integrity in its

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[22] ibid § 51.
[23] ibid § 79.
[24] The Court considered that Security Council resolutions condemning specific declarations of independence had been of 'exceptional' character; ibid § 81.
[25] ibid § 101; see also ibid §§ 114-115.
[26] See Declaration of Judge Simma, § 4; Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (n 15) 357-358; Ralph Wilde, 'Kosovo (Advisory Opinion)' in Rüdiger Wolfrum and Margrét Sólveigardóttir (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2011), § 14; Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 367, 383.
[27] *Kosovo* (n 8) § 80. For the view that the Court's position extends also to the act of secession, see Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ *Kosovo* Opinion?' (n 19) 135-136. See also Charter of the United Nations 1945, art 2(4); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex to UNGA Res 2625 (XXV) (1970), (a).
[28] Wilde (n 26) § 11. See also Olivier Corten, 'Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law' (2011) 24 LJIL 87, 94; Jure Vidmar, 'Unilateral Declarations of Independence in International Law' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (2013) 60, 70-73.

condemnation in specific contexts of the unilateral secession of territory, but these references have been limited calls for respect from states only.[29] Indeed, states have subsequent to the period of decolonisation refrained from conferring recognition on entities that have effectively seceded without the consent of the parent state, the only notable exception being the secession of Bangladesh in 1971.[30] In sum, given that the principle of territorial integrity is not opposable to the seceding entity, no question of the legality of its declaration of independence 'stem[s] from [its] unilateral character'.[31]

The inapplicability in the view of the ICJ of the principle of territorial integrity to the unilateral declaration of independence is contested by commentators who assert that the principle applies not only among states but also to 'entities within those states'.[32] In support is the pragmatic suggestion that secessionist conflicts are better resolved through negotiation, with the parent state's willingness to negotiate being premised on a guarantee as to its territorial integrity vis-à-vis the seceding entity.[33] The argument has normative purchase, but absent the expansion in practice of the principle of territorial integrity to address secessionist entities,[34] the better position is that the principle of territorial integrity, while not applicable to the conduct of the seceding entity in issuing a declaration of independence, nevertheless hinders the effective secession of the territory. It does so by making states 'reluctant to accept unilateral secession of parts of the independent States if the secession is opposed by the government of that State'.[35] Arguably, this reluctance takes the form of an obligation to withhold recognition in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, which obliges states to 'refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State'.[36]

### *C. Violation of Jus Cogens Norms*

Having clarified that it is not the unilateral nature of a declaration of independence that is at issue vis-à-vis the principle of territorial integrity, the status under international law of a declaration of independence may nevertheless be in question if the secession it supports is brought about in violation of other rules of international law. In *Kosovo*, the ICJ considered the illegality in the view of the Security Council of certain unilateral declarations of independence as arising

[29] UNGA Res 2775E, 29 November 1971, 1997th plenary meeting, § 1; UNSC Res 541, UN Doc S/RES/541, 18 November 1983, § 6; UNSC Res 787, UN Doc S/RES/787, 16 November 1992.
[30] Crawford argues that the independence of Bangladesh was an exceptional case that closely resembled independence being brought about in the context of decolonisation; Crawford (n 2) 141.
[31] Vidmar, 'Unilateral Declarations of Independence in International Law' (n 28) 70. Corten notes similarly that 'a declaration of independence . . . cannot be declared either "in conformity with" or "in violation of" international law'; Corten (n 28) 94.
[32] Christakis and Constantinides (n 3) 363. See also UNSC Resolution 541 in which the Security Council described the unilateral declaration of independence by the Turkish Cypriot authorities as being 'incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee'; UNSC Res 541, UN Doc S/RES/541, 18 November 1983.
[33] Christakis and Constantinides (n 3) 363. The Canadian Supreme Court in *Quebec* also considered that secession in pursuance of the right to self-determination must be exercised 'consistently with the maintenance of the territorial integrity' of states; *Quebec* (n 8) § 122.
[34] Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ *Kosovo* Opinion?' (n 19) 136.
[35] Crawford (n 2) 390; Wilde (n 16) § 12.
[36] Annex to UNGA Res 2625, UN Doc A/RES/2625(XXV), 24 October 1970, Principle 5.

> not from the unilateral character of [the] declarations as such, but from the fact that they were, or would have been connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).[37]

Presumably, the Court did not consider the aerial bombings on Serbia as tainting Kosovo's unilateral declaration of independence in this way.[38] As noted in the advisory opinion, the Security Council (and, where the case may be, the General Assembly) has on a handful of occasions to date condemned acts of unilateral secession on this basis, declaring the illegality in each context of a declaration of independence that sought to give effect to new territorial arrangements brought about through the violation of *jus cogens* norms.[39] While early cases addressed violations of the right to self-determination pursued by racist regimes, more recent examples pertain to violations of the prohibition on the threat or use of force or 'other unlawful means'.[40] In each context, the Security Council addressed separately the illegality of the unilateral declaration of independence, on the one hand, and the obligation on states to withhold recognition, on the other. In 1965, for instance, the Security Council '*condemn*[*ed*] the unilateral declaration of independence made by [the] racist minority in Southern Rhodesia' and called upon 'all States not to recognize [it]'.[41] In a subsequent resolution, it addressed – independently from the obligation of non-recognition – the unlawfulness in its view of the unilateral declaration of independence, which it characterised as 'having no legal validity'.[42] In the context of the 'sham "independence" of the Transkei' from South Africa,[43] it was the General Assembly that '[*r*]*eject*[*ed*] the declaration of "independence"' and 'declare[d] it invalid',[44] on which basis it called upon states not to afford recognition to the Transkei or other bantustans set up in pursuance of South Africa's policy of apartheid.[45] The Security Council

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[37] *Kosovo* (n 8) § 81. Vidmar explains that to be unlawful the declaration must attempt to 'consolidate an unlawful effective territorial situation'; Jure Vidmar, 'Conceptualizing Declarations of Independence in International Law' (2012) 32(1) Oxford Journal of Legal Studies 153, 171.

[38] Commentators offer varied explanations in support of this position. Orakhelashvili takes the view that the bombings were not intended to bring about the secession of Kosovo from Serbia; Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations Law 1, 30-31. Vidmar considers that Security Council Resolution 1244 (1999) 'interrupt[ed] the link between the illegal use of force in 1999 and the declaration of independence in 2008'; Jure Vidmar, 'Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo', EJIL Talk!, 20 March 2014 <https://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/> accessed 17 December 2019.

[39] The resolutions were not all issued under Chapter VII, UN Charter; Vidmar, 'Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo' (n 38). It remains unclear whether the obligation to withhold recognition arises independently or is conditioned on the imposition by the Security Council of a specific obligation of non-recognition under Chapter VII, UN Charter, whether based on the characterisation, in its view, of the act of secession as amounting to a violation of a *jus cogens* norm; Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation Without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill 2006) 99, 121. Vidmar argues that the obligation to withhold recognition is not conditioned upon a Security Council resolution under Chapter VII, UN Charter; Vidmar, 'Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo' (n 38). Orakhelashvili considers the role of relevant UN organs as 'implementing and declaratory of the *jus cogens* nullity'; Orakhelashvili (n 38) 29-30.

[40] UNGA Res 68/262, UN Doc A/RES/68/262, 1 April 2014, § 2; see also Grant (n 16) 90.

[41] UNSC Res 216, UN Doc S/RES/216, 12 November 1965, §§ 1-2.

[42] UNSC Res 217, UN Doc S/RES/217, 20 November 1965, § 3.

[43] UNGA Res 31/6A, 26 October 1976, Preamble.

[44] UNGA Res 31/6A, 26 October 1976, § 2.

[45] UNGA Res 31/6A, 26 October 1976, § 3; see also UNGA Res 3411/D, 28 November 1975, § 3.

followed suit.[46] Again, in 1983, 'the declaration by the Turkish Cypriot authorities of the secession of part of the Republic of Cyprus'[47] was condemned by the Security Council as being 'legally invalid'.[48] Finally, in 1992, when faced with the potential secession of Republika Srpska from Bosnia and Herzegovina, the Security Council affirmed pre-emptively that 'any taking of territory by force … is unlawful and unacceptable'[49] and clarified on the basis of the principle of territorial integrity that 'any entities unilaterally declared … will not be accepted'.[50] There was, in that context, no declaration of independence to condemn.

More recent examples involving the violation of *jus cogens* norms, including the *de facto* secession of Abkhazia and South Ossetia from Georgia and of Crimea from Ukraine in the brief period prior to its integration with Russia, remain for obvious reasons unaddressed by the Security Council.[51] In comparison with the situations previously discussed, international condemnation of these acts of secession did not specifically address the validity of the unilateral declarations of independence issued by the seceding entities and focused instead on the obligation on states not to recognise the independence of the territories, which had in each case been secured through the violation of *jus cogens* norms. The Independent International Fact-Finding Mission on the Conflict in Georgia, for instance, considering that Russia had violated the prohibition on the use of force,[52] found that '[r]ecognition of breakaway entities such as Abkhazia and South Ossetia by a third country is … contrary to international law'.[53] Russia's recognition in 2008 of Abkhazia and South Ossetia, which had each declared independence from Georgia following the latter's own independence in 1991, was also condemned within the Security Council[54] and in a resolution of the Parliamentary Assembly of the Council of Europe (CoE),[55] which called on member states not to recognise the independence of the territories.[56] Similarly, in respect of the secession of Crimea, the General Assembly in a resolution affirming the territorial integrity of Ukraine called on states to refrain from 'attempts to modify Ukraine's borders through the threat or use of force or other unlawful means'.[57] It characterised the Crimean referendum on 16 March 2014, which provided the basis for Crimea's declaration of independence, as 'having no validity'[58] and called on states not to recognise the situation by any means.[59] A draft resolution placed before the Security Council – and

[46] UNSC Res 402 (1976), UN Doc S/RES/402, 22 December 1976, § 1. The Security Council endorsed the obligation of non-recognition, but did not address the question of the legality of the Transkei's declaration of independence.
[47] UNSC Res 541, UN Doc S/RES/541, 18 November 1983, § 1.
[48] UNSC Res 541, UN Doc S/RES/541, 18 November 1983, § 2.
[49] UNSC Res 787, UN Doc S/RES/787, 16 November 1992, § 2.
[50] UNSC Res 787, UN Doc S/RES/787, 16 November 1992, § 3.
[51] See e.g. 'The Situation in Georgia' (2008-09) <https://www.un.org/en/sc/repertoire/2008-2009/Part%20I/Europe/08-09_Georgia.pdf> accessed 17 December 2019, 130-135; Nico Krisch, 'Crimea and the Limits of International Law' EJIL Talk! Blog of the European Journal of International Law, 10 March 2014 <https://www.ejiltalk.org/crimea-and-the-limits-of-international-law/> accessed 17 December 2019.
[52] Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (2009) Vol. I, 23-26.
[53] ibid 17.
[54] 'The Situation in Georgia' (n 51) 132.
[55] Parliamentary Assembly of the Council of Europe Res 1633 (2008), § 9.
[56] ibid § 24.1.
[57] UNGA Res 68/262, UN Doc A/RES/68/262, 1 April 2014, § 2. For the views of states that rejected the secession of Crimea, see Mary Ellen O'Connell, 'The Crisis in Ukraine-2014' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 857-860; Grant (n 16) 87-88.
[58] UNGA Res 68/262, UN Doc A/RES/68/262, 1 April 2014, § 5.
[59] UNGA Res 68/262, UN Doc A/RES/68/262, 1 April 2014, § 6. The Resolution also called on states 'to refrain from any action or dealing that might be interpreted as recognizing any such altered status'; UNGA Res 68/262, UN Doc A/RES/68/262, 1 April 2014, § 6. See also Grant (n 16) 90.

vetoed by Russia – used the same language;[60] again, it was not the declaration of independence that was deemed to be unlawful. Neither did the Parliamentary Assembly of the CoE address the declaration of independence, instead condemning Russia's 'recognition of the results of the illegal so-called referendum'[61] and requesting that it 'reverse the illegal annexation of Crimea'.[62] Commentators nevertheless consider that owing to the unlawful threat or use of force by Russia, Crimea's unilateral declaration of independence 'cannot be regarded in isolation of that illegality'.[63]

While there is both a close connection and a fine line in practice between a declaration as to the illegality of a unilateral declaration of independence, on the one hand, and the obligation on states not to recognise the situation brought about through the violation of a *jus cogens* norm, on the other, the inconsistent practice of the Security Council, the General Assembly and other relevant institutions to date in condemning unilateral declarations of independence suggests that it is only the obligation to withhold recognition that is given concrete effect under international law. According to the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARSIWA), '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40', that is, of a *jus cogens* norm.[64] Albeit without reference to ARISWA, the obligation on states not to recognise situations arising from *jus cogens* violations was reiterated by the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.[65] In this framework, the significance of the unilateral declaration of independence appears to lie in triggering the obligation on states to withhold recognition of the situation brought about through the violation of a *jus cogens* norm, namely the independence of the seceding entity. The obligation to withhold recognition thus exists irrespective of whether the unilateral declaration of independence has itself been condemned by the Security Council as being unlawful.

While recognition is no longer considered as being constitutive of statehood,[66] the obligation to withhold recognition in respect of secession brought about through the violation of a *jus cogens* norm raises the question of the continued status under international law of the territory if and when it has effectively seceded.[67] It may be that the seceding entity, having met all the criteria for statehood, becomes effective notwithstanding the illegality associated with its declaration of independence. While it remains true that 'the secessionist entity does not acquire any title to the territory',[68] it nevertheless exists as a *de facto* state unless and until the situation is reversed and the *status quo ante* restored. Practical considerations may warrant a degree of recognition in this

[60] Draft Resolution, UN Doc S/2014/189, 15 March 2014, § 5. For a record of the proceedings before the Security Council, see UN Doc S/PV.7138, 15 March 2014.
[61] Parliamentary Assembly of the Council of Europe Res 1990 (2014), § 3.
[62] Parliamentary Assembly of the Council of Europe Res 2034 (2015), § 4.1.
[63] Marxsen (n 26) 384; see also Vidmar, 'Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo' (n 38).
[64] Articles on the Responsibility of States for Internationally Wrongful Acts 2001, art 41(2).
[65] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 136, § 159. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), [1971] ICJ Rep 16, §§ 123-124.
[66] Crawford argues that the constitutive theory of statehood 'leads to extreme subjectivity in the notion of the State, effectively destroying that which it seeks to define'; Crawford (n 2) 438. See also *Quebec* (n 8) § 142.
[67] Talmon (n 39) 122-123.
[68] Christakis and Constantinides (n 3) 351.

context.[69] For a seceding entity that exists *de facto* with limited or no recognition by states, such as the territories of Northern Cyprus, Nagorno-Karabakh, Somaliland, Abkhazia and South Ossetia, among others,[70] the obligation to withhold recognition owing to the violation of a *jus cogens* norm in its creation is in tension with the underlying desideratum in international law of recognising territorial arrangements that exist in fact.[71] It may also conflict with an obligation to 'bring th[e] [illegal] situation to an end'.[72] Equally problematic are instances in which secession brought about through the violation of a *jus cogens* norm results in the incorporation of the seceding entity into the territory of an existing state, as in the case of Crimea. Here, the obligation to withhold recognition may be practically ineffective.[73] These concerns call for further consideration of the obligation to withhold recognition following the issuance in connection with a *jus cogens* violation of a unilateral declaration of independence.[74]

### *D. The Authors of the Declaration*

A final consideration under international law pertains to the authors of a unilateral declaration of independence. The issue was addressed in the ICJ's advisory opinion in *Kosovo* for the purpose of determining whether the authors of Kosovo's declaration of independence would have been bound by a prohibition under international law of a unilateral declaration of independence. Having concluded that there was no prohibition under general international law of a unilateral declaration of independence, the Court proceeded to examine whether such a prohibition might exist under the *lex specialis*, which in its view comprised Security Council Resolution 1244 (1999) and the interim constitutional framework established thereunder.[75] While concluding with reference to Security Council Resolution 1244 (1999) that it did not impose a prohibition on a unilateral declaration of independence,[76] the Court in relation to the interim constitutional framework took a different tack. Instead of determining likewise whether the interim constitutional framework included a prohibition on the issuance of a declaration of independence, the Court considered whether the authors of the declaration would have in any event been bound by such a prohibition.[77] On this basis, it concluded that since the authors of the declaration had not acted within the interim

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[69] Crawford (n 2) 377. See e.g. *South West Africa* (n 65), § 125; *Case of Chiragov and Others v Armenia* (2015) ECHR (Grand Chamber), § 119.

[70] For a descriptive account of select *de facto* states, see Milena Sterio, *Secession in International Law: A New Framework* (Edward Elgar 2018) 78-92. The South African bantustans and Southern Rhodesia also arguably met the objective criteria for statehood despite the absence of recognition.

[71] The classical position was that 'a seceding territory could properly be recognized as a State if it governed its territory effectively and with sufficient stability, such that there was no real likelihood of the previous sovereign reasserting its position'; Crawford (n 2) 382.

[72] *South West Africa* (n 65) § 117.

[73] Priya Urs, 'Crimea's Secession and Why Russia's Use of Force Does Not Matter', Blog of the Cambridge International Law Journal, 12 March 2014 <http://cilj.co.uk/2014/03/12/crimeas-secession-russias-use-force-matter/> accessed 17 December 2019.

[74] See generally, Talmon (n 39).

[75] UNMIK Reg 2001/9, 15 May 2001.

[76] *Kosovo* (n 8) §§ 104, 119.

[77] ibid §§ 120-121. But see Declaration of Judge Tomka, §§ 32-34. Vashakmadze and Lippold question whether the issuance of the unilateral declaration of independence, if *ultra vires*, would have been rendered null and void; Mindia Vashakmadze and Matthias Lippold, "'Nothing but a Road Towards Secession?" – The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo' (2010) 2 Goettingen Journal of International Law 619, 641.

constitutional framework[78] but 'in their capacity as representatives of the people of Kosovo outside the framework of the interim administration',[79] it could not be said that a 'specific prohibition on issuing a declaration of independence [was] applicable to those who adopted the declaration of independence'.[80]

The Court's suggestion that the authors of the declaration having acted 'in their capacity as representatives of the people of Kosovo'[81] were not bound by the *lex specialis* generated some discussion of the status under international law of a unilateral declaration of independence based on whether its authors could be said to represent the seceding entity. As has been observed and critiqued elsewhere, the Court did not itself engage with the question.[82] Various resolutions of the General Assembly suggest that the independence of former colonies brought about through the exercise of the right to self-determination must be in accordance with the 'freely expressed will and desire' of their peoples,[83] a requirement that was confirmed by the ICJ in its advisory opinion in *Western Sahara*.[84] On one view, even beyond decolonisation, a unilateral declaration of independence 'cannot be issued by just anyone' since it 'can potentially lead to a new state creation'.[85] Others go further in proposing that secession 'must be founded on the consent of a majority of the local population'.[86] These propositions are supported by the use in practice of independence referendums to legitimise unilateral declarations of independence, but absent a right to secede outside of the decolonisation context there remains no formal requirement under international law as to the identity of the authors of a unilateral declaration of independence. The most that can be said *lex lata* is that the recognition by states of the seceding entity as a state, based *inter alia* on the requirement of an effective and independent government,[87] is predicated on the ability of the authors of the declaration to represent the seceding entity.[88]

## III. Unilateral Declarations of Independence under National Law

In contrast with the limited applicability of international law to unilateral declarations of independence, an act of unilateral secession 'almost necessarily entail[s] breaches of municipal law'[89] and is in particular conflict with the principle of constitutionalism.[90] As such, national law is in most cases of unilateral secession the port of first call for a parent state seeking to oppose a unilateral declaration of independence. Even in the case of Kosovo's declaration, issued against

[78] *Kosovo* (n 8) § 105. But see Marcelo Cohen and Katherine del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?' (2011) 24 LJIL 109, 115, 118.
[79] *Kosovo* (n 8), § 109.
[80] ibid § 101. But see *Tomka* (n 77) §§ 10-21.
[81] Kosovo (n 8) § 109.
[82] Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (n 15) 361.
[83] UNGA Res 1514, UN Doc A/RES/1514(XV), 14 December 1960, § 5.
[84] *Western Sahara* (n 10) § 55.
[85] Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (n 15) 360.
[86] Tancredi (n 16) 190.
[87] Montevideo Convention on the Rights and Duties of States 1934, art 1(c).
[88] Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (n 15) 360. Consider the example of the 'Islamic State', which did not enjoy the support of the populations in the territories under its control; Marc Weller, 'Islamic State Crisis: What Force Does International Law Allow?' BBC, 25 September 2014 <https://www.bbc.co.uk/news/world-middle-east-29283286> accessed 6 January 2020.
[89] Grant (n 16) 70.
[90] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 481, 494.

the backdrop of its international administration, Serbian Parliament made a point of annulling the it under national law, deeming the declaration to be 'invalid and void' and asserting on that basis that the declaration did not produce 'any legal effect' within Serbia.[91]

Notwithstanding that a unilateral declaration of independence is generally issued in violation of national law, constitutional provisions have in specific historical contexts conferred upon sub-state entities a right to secede. Even with these constitutional routes to secession available, seceding entities have in a number of cases preferred unilaterally to secede instead of relying on relevant constitutional provisions. The seceding entity having lost faith in the institutions of the parent state or either party being unwilling to negotiate the question of secession, the reasons underlying the resort to unilateral declarations of independence remain political. Crimea serves as an illustrative example. While the 1996 Constitution of the Republic of Ukraine permits alterations to its territory on the basis of a national referendum,[92] the reliance by Crimean authorities on the results of a widely contested Crimean referendum (which the Constitutional Court of Ukraine found to be unconstitutional) brought its unilateral declaration of independence in direct conflict with national law.[93] The 1977 Constitution of the Former Union of Soviet Socialist Republics also allowed its constituent republics 'the right freely to secede',[94] but the Baltic states did not in their issuance of unilateral declarations of independence invoke the provision. As one commentator notes, 'it was probably not anticipated that any Union republic would ever dare to assert this constitutional right'.[95] Similarly, the dissolution of the former Yugoslavia was brought about not through resort to the right to secede in the 1974 Constitution of the Socialist Federal Republic of Yugoslavia but by the issuance by Croatia and Slovenia of unilateral declarations of independence.[96]

Barring the consensual secession of territory under constitutional provisions that give effect to a right to secede and in the absence of a politically negotiated solution,[97] the question of the lawfulness of a unilateral declaration of independence may fall to the consideration of a constitutional court. The judicial treatment of unilateral secession *ex post* addresses the issuance by the seceding entity of a unilateral declaration of independence or of other measures aimed at bringing about the independence of the territory. This was the case following the unilateral declarations of independence in the context of the American civil war, when a confederation of southern states, namely South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana and Texas,[98] sought unilaterally to withdraw from the union. Affirming the illegality under national law

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[91] Decision on the Annulment of the Illegitimate Acts of the Provisional Institutions of Self-government in Kosovo and Metohija on their Declaration of Unilateral Independence, Government of Serbia <https://en.wikisource.org/wiki/Decision_on_the_annulment_of_the_illegitimate_acts_of_the_provisional_institutions_of_self-government_in_Kosovo_and_Metohija_on_their_declaration_of_unilateral_independence> accessed 19 December 2019, § 1 cf Marc Weller, *Contested Statehood* (OUP 2009) 231.

[92] Constitution of the Republic of Ukraine 1996, art 73.

[93] *Judgment on all-Crimean Referendum* [2014] No. 2-rp/2014 (Ukraine) <https://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstituci> (English translation) accessed 19 December 2019, § 4.4.

[94] Constitution of the Former Union of Soviet Socialist Republics 1977, art 72.

[95] Marc Weller, *Escaping the Self-Determination Trap* (Brill 2009) 49.

[96] Constitution of the Socialist Federal Republic of Yugoslavia 1974, Basic Principles, s I.

[97] For an overview, see Elisa Novic and Priya Urs, 'Secession' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2016).

[98] See e.g. South Carolina's 'Declaration of the Immediate Causes which Induce and Justify the Secession of South Carolina from the Federal Union' and the 'Ordinance of Secession' 1860

of the declarations, the Supreme Court of the United States in *Texas v White* famously declared that '[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'.[99] The same approach was taken more recently by the Spanish Constitutional Court following the adoption by Catalan Parliament of a number of resolutions in furtherance of Catalan independence. These resolutions included, among others, an initial declaration backed by 'the will of the citizens of Catalonia' to 'initiate the process to exercise the right to decide'[100] and a subsequent resolution 'declar[ing] the start of the process to create an independent Catalan state',[101] which Catalan Parliament considered as being immune from 'the decisions of the institutions of the Spanish State, in particular the Constitutional Court'.[102] Giving effect to these resolutions was a 2017 law calling for a referendum on independence.[103] Predictably, the Court determined in a series of decisions that the various resolutions and the 2017 law were in their declarations of Catalan sovereignty inconsistent with the Spanish Constitution.[104]

The Canadian Supreme Court, in contrast, went much further in its *ex ante* advisory opinion in *Quebec*, 'affirm[ing] the legitimacy of a negotiated secession' on the basis of the underlying constitutional principles of federalism, democracy, constitutionalism, rule of law, and respect for minorities.[105] It derived from these values an obligation to negotiate the question of the potential secession of Quebec, which it reasoned on the following basis:

> '[A] clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in the confederation would have to recognize.'[106]

The Clarity Act adopted by Canadian Parliament in pursuance of the advisory opinion gave concrete effect to the obligation to negotiate by outlining more specifically the circumstances in which it may arise.[107] Notably, both the advisory opinion and the Act condition the obligation to

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<https://www.atlantahistorycenter.com/assets/documents/SCarolina-Secession-p1-13.pdf> accessed 19 December 2019.

[99] *Texas v White* 74 US 700 [1869] 725 (US) 700.

[100] Res 5/X, 23 January 2013 (Catalonia) <https://www.parlament.cat/document/intrade/7176> accessed 19 December 2019.

[101] Res 1/X1, 9 November 2015 (Catalonia) <https://www.parlament.cat/document/intrade/153127> accessed 19 December 2019, § 2.

[102] Res 1/X1, 9 November 2015 (Catalonia) <https://www.parlament.cat/document/intrade/153127> accessed 19 December 2019, § 26. For background, see Asier Garrido Muñoz, 'Catalan Independence in the Spanish Constitution and Courts' OUPblog, 6 November 2017 <https://blog.oup.com/2017/11/catalan-independence-spanish-constitution-courts/?utm_source=twitter&utm_medium=oupacademic&utm_campaign=oupblog> accessed 19 December 2019.

[103] Ley 19/2017, 6 September 2017 (Catalonia).

[104] See e.g. Constitutional Court Judgment STC 42/2014 (Spain), 25 March 2014, unofficial translation <https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf> accessed 19 December 2019; Constitutional Court Judgment STC 259/2015 (Spain), 2 December 2015, unofficial translation <https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%20259%20-%202015%20%209N%20(English).pdf> accessed 19 December 2019; Constitutional Court Judgment STC 117/2017 (Spain), 24 October 2017, unofficial translation <https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf> accessed 19 December 2019.

[105] Mancini (n 90) 497.

[106] *Quebec* (n 8) § 150.

[107] Clarity Act 2000 (SC 2000, c 26) (Canada).

negotiate on a referendum result favouring independence, suggesting that the issuance by Quebec of a unilateral declaration of independence, with or without the support of a referendum favouring independence, would fall foul of the constitutional obligation to negotiate. A similar suggestion may be made at the international level on the basis of the obligation peacefully to settle disputes, particularly in Kosovo-type situations in which international negotiations are already ongoing.[108] This was evidently not the view taken by the ICJ vis-à-vis Kosovo's unilateral declaration of independence, but examples in practice of secession being brought about through international negotiations, such as the secession of Eritrea from Ethiopia and of South Sudan from Sudan, are worth noting.

## IV. Conclusion

This chapter has offered an overview of the status under international and national law respectively of a declaration of independence distinct from the underlying act of secession it supports. Having set aside the consensual secession of territory, in which context the question of the lawfulness of a declaration of independence does not arise, the chapter has focused on the status of declarations of independence issued unilaterally. Owing to the neutrality of international law vis-à-vis acts of secession, its reach in addressing unilateral declarations of independence remains limited. Beyond decolonisation, during which the crystallisation of the right to secede did not prompt extensive discussion of the status of unilateral declarations of independence, few inroads have been made. The seceding entity not being the addressee of the principle of territorial integrity, it is not the unilateral nature of a declaration of independence that is at issue. Only where secession is brought about through the violation of a *jus cogens* norm is a unilateral declaration of independence considered to be unlawful. Even then, there is a further distinction to be drawn between the illegality of the unilateral declaration of independence, in respect of which practice to date remains inconsistent, and the obligation on states to withhold recognition of the seceding entity whose independence is brought about through the violation of a *jus cogens* norm. Under national law, on the other hand, the issuance of a unilateral declaration of independence is by definition unlawful, whether owing to the affirmation in the constitution of the unity of the parent state or as a result of the seceding entity's circumvention of constitutional provisions that confer upon it a right to secede. Constitutional courts that have been called upon to assess the constitutionality of unilateral declarations of independence have predictably found them to be unconstitutional. Where, on the other hand, the question of secession arises before the issuance by the seceding entity of a unilateral declaration of independence, constitutional courts may have a role to play in encouraging the negotiation of the secessionist question within the constitutional framework, thereby discouraging the issuance by the seceding entity of a unilateral declaration of independence.

[108] Cohen and del Mar (n 78) 119.