Articles

The Sound of One Hand Clapping: Unilateral Declarations of Independence in International Law

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Abstract

In light of the uncertainty surrounding recent unilateral declarations of independence, this Article purports to re-visit the question of their legal nature under international law. The Article shows that the International Court of Justice's (ICJ) judgment in the Kosovo advisory opinion (hereafter referred to as the Kosovo Opinion) is of little assistance in establishing whether and to what extent such declarations fall within the ambit of international law. The Article proceeds to examine claims that unilateral declarations of independence are regulated—entirely or partly—by international law and argues that these claims are ill-founded on multiple grounds. The Article asserts that international law is legally neutral towards the claims—a proposition in accord with both the factual nature of the process of state formation in international law and with the relevant practice.

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A. Introduction

By virtue of their nature—as acts born in the twilight zone between Statehood and nothingness—unilateral declarations of independence pose a number of conceptual challenges. Do they fall within the ambit of international law and, if so, to what extent are they relevant in assessing claims to Statehood? Or, do they fall outside the realm of international law altogether? Recent attempts to legitimize declarations of independence with reference to international law highlight the importance of answering these questions. The 2014 Crimean Declaration of Independence expressly refers to the jurisprudence of the ICJ as authority for the proposition that "a unilateral declaration of independence by a part of the country does not violate any international norms."[1] Vladimir Putin, the Russian President, stated that:

> [T]he Crimean authorities referred to the well-known Kosovo precedent—a precedent our western colleagues created with their own hands in a very similar situation . . . . The UN International Court . . . made the following comment in its ruling of July 22, 2010, and I quote: "No general prohibition may be inferred from the practice of the UN Security Council with regard to declarations of independence" and "[g]eneral international law contains no prohibition on declarations of independence."[2]

The picture becomes more complicated in light of the fact that the proclamation of a new State is often accompanied by solemn undertakings that the new entity will comply with specific obligations set out in the text of the declaration of independence. The 2008 Kosovar Declaration of Independence (Kosovar Declaration) is a relevant example. It is quite clear from the text of the Kosovar Declaration that the Assembly of Kosovo not only proclaimed Kosovo's independence, but also expressly stated that Kosovo was legally bound to comply with certain obligations.[3] To what extent are these proclamations binding

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[1] *Crimea Parliament Declares Independence from Ukraine Ahead of Referendum*, RT (Mar. 11, 2014, 10:30 AM), rt.com/news/crimea-parliament-independence-ukraine-086/.

[2] Vladimir Putin, *Address by President of the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 18, 2014, 3:50 PM), http://eng.kremlin.ru/news/6889.

[3] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 75 (July 22) [hereinafter Kosovo Opinion]:

> 1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement. 2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective

on new States? According to the doctrine of unilateral juridical acts[4]—which was first enunciated by the ICJ in the *Nuclear Tests* cases[5] and further elaborated by the International Law Commission (ILC) in its decade long study on the topic[6]—the intention to be bound is crucial in conferring the character of a legal undertaking to unilateral declarations.[7] Could unilateral declarations of independence be considered unilateral juridical acts to the extent that they manifest the intention of their authors to be bound thereby? Serbia, for its part, considered the 2008 Kosovar Declaration as a "unilateral act expressing the intention of its authors to purportedly create a new State . . . [and] to undertake certain obligations . . . ."[8]—albeit one that failed to produce any legal effects because it, allegedly, contravened international law.[9] Some international lawyers have also shared the view that, because a manifest intention to create a legally binding document is

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> participation in political and decision-making processes. . . . 5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. . . . 9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) . . . . 12. We hereby affirm, clearly, specifically and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including especially, the obligations under the Ahtisaari Plan . . . . We declare publicly that all states are entitled to rely upon this declaration . . . .

[4] The term "juridical" or "legal" is employed throughout the text to connote acts that have binding force on the international plane, as opposed to "political" acts, such as acts that lie outside the ambit of law. For the theory of international juridical acts, see JAN HENDRIK WILLEM VERZIJL, INTERNATIONAL LAW IN A HISTORICAL PERSPECTIVE, VOL. VI: JURIDICAL FACTS AS SOURCES OF RIGHTS AND OBLIGATIONS 48 (1979).

[5] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 43 (Dec. 20) [hereinafter Nuclear Tests]; Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 46 (Dec. 20). The Court's judgments in these two cases are almost identical and for that reason all references are made to the case between Australia and France.

[6] Unilateral Acts of States, *in* Analytical Guide to the Work of the International Law Commission ch 9.9, (1949–97), U.N. Doc. E.98.V.10 (1998). For the final product of the ILC's work on the topic, see Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, U.N. GAOR, 61st Sess., Supp. 10; U.N. Doc. A/61/10, at 359 (2006) [hereinafter Guiding Principles].

[7] Nuclear Tests, 1974 I.C.J. at 267, ¶ 43 ("When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking . . . . An undertaking of this kind, if given publicly, and with an intent to be bound, even though not in the context of international negotiations, is binding.").

[8] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, (Request for an Advisory Opinion), Written Comments of the Government of the Republic of Serbia, *Kosovo*, ¶ 193 (July 14, 2009) [hereinafter Written Comments], http://www.icj-cij.org/docket/files/141/15686.pdf.

[9] *See id.* at ¶ 313.

evidenced through a declaration of independence, it should be considered a unilateral juridical act.[10]

In this light, this Article endeavors to re-visit the question of the juridical nature of unilateral declarations of independence. First, the Kosovo Opinion will be explored because this was the first case in which the question of the legal nature of unilateral declarations of independence arose. This Article will argue that, due to certain methodological shortcomings, the Opinion is of little precedential value in assessing the question at hand. Second, claims that unilateral declarations of independence are regulated—entirely or partly—by international law will be examined. In this respect, two lines of argumentation will be scrutinized. The first draws mainly from the arguments put forward by Serbia in the context of the Kosovo Opinion. Serbia argued that international law regulates unilateral declarations of independence. According to this line of argument, the lawfulness of these declarations hinges on the existence of a positive entitlement to declare independence under international law.[11] A second line of argument may be found in Vidmar's work on unilateral declarations of independence.[12] Vidmar argues that, although international law generally remains neutral in relation to unilateral declarations of independence, such declarations may be illegal if they are conjoined with a violation of a *jus cogens* norm. This Article suggests that both arguments are misguided to the extent that they: (a) do not take into account the context within which these acts occur, (b) ignore the identity of their authors as non-State actors, and (c) are based on an erroneous reading of the relevant Security Council (SC) practice.

Against this background, the Article asserts that, under international law, declarations of independence are legally neutral acts. This claim will be tested against the backdrop of both theory and practice. It is concluded that this argument is the most convincing because it both comports with the widely held view that the creation of a State is a matter of fact, rather than law, and is supported by practice. By proving that unilateral declarations of independence are not regulated by international law, this Article proves that the legality of claims to Statehood is—and needs to be—disassociated from the putative legality of the means by which such claims come to the fore.

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[10] *See e.g.*, MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE 231 (2009).

[11] Written Comments, *supra* note 8, at ¶¶ 189–243 (July 14, 2009), http://www.icj-cij.org/docket/files/141/15686.pdf.

[12] *See generally*, Jure Vidmar, *Conceptualizing Declarations of Independence*, 32 OXFORD J. OF LEGAL STUD. 153 (2012); Jure Vidmar, *Unilateral Declarations of Independence in International Law*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 60 (Duncan French ed. 2013).

B. The *Kosovo Advisory Opinion*

The question of the juridical nature of unilateral declarations of independence arose squarely in the context of the 2010 *Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Kosovo Opinion).[13] Here, the General Assembly (GA) asked the Court to give its opinion on whether the Kosovar Declaration was in accordance with international law.[14] The Court interpreted the question narrowly and opined that it was not asked to rule on whether Kosovo had achieved Statehood, or on the validity and legal effects of the recognition of Kosovo by those States which had, at the time, recognized it as an independent State.[15] Thus, instead of examining whether international law confers a right upon the people of Kosovo to declare independence, the Court proceeded to ascertain whether the declaration violated any applicable legal rules.[16] Having examined the applicable rules of law, specifically the rules of general international law and the special regime created by SC Resolution 1244 (1999),[17] the Court concluded that "the adoption of that declaration did not violate any applicable rule of law."[18]

The Court has come under considerable attack for what has been perceived by many as an overly restrictive interpretation of the question before it. More specifically, it has been suggested that the Court focused on the legality of the declaration of independence per se in order to avoid the politically sensitive and underlying question of the existence of a right to remedial secession.[19]

Even the arguably narrowly-framed question regarding the accordance of Kosovo's Declaration with international law was not fully answered by the Court. The Court simply stated that the Kosovar Declaration was not against international law.[20] This rather Delphic pronouncement did not resolve the question of the precise legal nature of unilateral

[13] Kosovo Opinion, *supra* note 3, at ¶¶ 78–121.

[14] *Id.* at ¶ 51.

[15] *Id.*

[16] *Id.* at ¶¶ 78–121.

[17] S.C. Res. 1244 , U.N. Doc. S/RES/1244 (June 10, 1999).

[18] Kosovo Opinion, *supra* note 3, at ¶ 122.

[19] This narrow approach adopted by the majority of the judges was severely criticized not only by academics, but also by some of the judges. *See e.g.*, Robert Howse & Ruti Teitel, *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling in Kosovo?*, 11 GERMAN L. J. 841 (2010); *see also* Kosovo Opinion, *supra* note 3, at 478 (declaration of Simma, J.); Kosovo Opinion, *supra* note 3 at 618 (separate opinion by Yusuf, J.).

[20] Kosovo Opinion, *supra* note 3, at ¶ 122.

declarations of independence. By merely focusing on the existence of prohibitive rules, the Court did not clarify whether it considered these declarations to be legal, or purely political pronouncements. More problematic, the pronouncement of the Court may simultaneously lend support to two—mutually exclusive—propositions. By stating that a unilateral declaration of independence is not illegal, the Court could have negatively implied that, under international law, unilateral declarations of independence are legal—specifically that international law regulates unilateral declarations of independence. The Court could also have implied that unilateral declarations are mere political pronouncements, specifically that international law does not regulate unilateral declarations of independence.

Here is an example to elucidate the problems that could arise from the way that the Court chose to answer the question of unilateral declarations of independence: Let us assume that the question put forward to the Court was whether the use of nuclear weapons by a State in self-defense is in accordance with international law. Now assume that the Court examined this question by focusing exclusively on the existence of prohibitive rules and ignored the existence of any permissive rules offering States a positive entitlement to use nuclear weapons in self-defense. Using this methodological approach, if the Court's answer is that the use of nuclear weapons in self-defense does not violate international law, this does not automatically mean that there is a *right* to use nuclear weapons in case of self-defense. It could also mean that the use of nuclear weapons in self-defense is simply not regulated by international law.[21] By failing to consider both permissive and prohibitive rules, and by failing to clarify whether international law is neutral towards unilateral declarations of independence, the Court's pronouncement is of little assistance in ascertaining their juridical nature. Judge Simma highlighted the methodological shortcomings in the Court's argumentation in his Declaration:

> The Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; it could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts . . . . By reading the General Assembly's question as it did, the Court denied itself

[21] Of course, this particular question did arise in the context of nuclear weapons. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep., 226 (July 8). The Court's methodological approach in the Kosovo Opinion stands in stark contrast to the one adopted in the *Nuclear Weapons Advisory Opinion*. In the latter case, the Court examined both prohibitive and permissive relevant rules before concluding that "in view of the current state of international law . . . the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at risk." *Id*. at ¶ 52, 105 (2) E.

> the possibility to enquire into the precise status under international law of a declaration of independence.[22]

Another problem is that there is little academic or legal authority about unilateral declarations of independence. Few references to unilateral declarations of independence can be found in scholarly works preceding the Court's opinion on Kosovo.[23] Although the Kosovo Opinion itself attracted much scholarly attention, most of the voluminous writing produced in its aftermath is mainly centered on the existence of a right to remedial secession under international law.[24] In this light, we must seek beyond the existing jurisprudence and literature to answer the question of the juridical nature of unilateral declarations of independence.

C. Unilateral Declarations of Independence as Unilateral Juridical Acts?

The argument that unilateral declarations of independence constitute unilateral juridical acts may be summarized as follows: International law does not merely take note of the emergence of new States. Rather, international law governs the whole process of creation of new States.[25] Thus, in some cases, international law recognizes the existence of a positive right—the right to self-determination—to create new States.[26] In these cases, the relevant declarations are viewed as lawful unilateral juridical acts to the extent that the intention of their authors to purportedly create a new State is compatible with applicable rules of international law.[27] However, where there is no right to self-determination, international law may function as a barrier to the emergence of a new State—even if the material elements of the Montevideo Convention are fulfilled.[28] In these cases, the

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[22] Kosovo Opinion*, supra* note 3, at 479–80 (declaration of Simma, J.).

[23] *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 389–90 (2006); *see also* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 8 (1947).

[24] *See e.g.*, Jochen A. Frowein, *Kosovo and Lotus*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 923 (Ulrich Fastenrath ed., 2011); Hanna Jamar & Mary Katherine Vigness, *Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence*, 11 GERMAN L. J. 913 (2010); Alexander Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 MAX PLANC Y.B. OF UNITED NATIONS L. 1 (2009); Marcelo G. Kohen & Katherine Del Mar, *The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?*, 24 LEIDEN J. INT'L L. 109 (2011).

[25] *See* Written Comments, *supra* note 8, ¶ 174.

[26] *Id*.

[27] *Id*. at ¶ 181.

[28] *Id*. at ¶ 174; The Montevideo Convention was ratified through 1941 by 16 States, including the United States of America, Brazil, Mexico and Colombia). *See* Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

relevant declarations of independence are unlawful because the intention to create a new State is not founded on a positive entitlement to declare independence.[29] Finally, according to this line of argument, the critical date for assessing whether a new State has been lawfully created is the date the declaration of independence is issued.[30] This was, in broad strokes, the argument made by Serbia before the ICJ, which was further endorsed by a number of other States, including Argentina, Spain, and Russia.[31] Proponents of this view have pointed to the practice of the SC as evidence that international law is not neutral in relation to unilateral declarations of independence. These proponents claim that the SC has treated declarations unlawful when they were issued by entities that have no right to self-determination.[32] Supporters of this view cite to the SC resolutions about Southern Rhodesia,[33] Katanga,[34] and the Turkish Republic of Northern Cyprus[35] as evidence.

Without dwelling on the existence of a right to remedial secession—something that would be outside the purview of the present contribution—this Article argues that the above thesis is untenable in any case, regardless of whether one accepts that a right to remedial secession exists. This is true on a number of grounds. First, the proposition that unilateral declarations of independence can be viewed as unilateral juridical acts ignores the identity of the author of the declaration as a non-State entity. This argument draws its appeal by invoking a schema familiar to international lawyers: If X has the intention to create Y legal effects, and that intention does not contravene any applicable rules of international law, then X's declaration—manifesting the relevant intention—has, in fact, created the purported legal effects under international law.[36] But what this schema does not take into account is that, in this case, X is not a subject of international law. By arbitrarily transposing the doctrine of unilateral juridical acts to the sphere of non-State entities, this proposition assumes that international law bestows on non-subjects the ability to create international legal effects through acts of will. Despite this, there is no evidence that

[29] *See* Written Comments, *supra* note 8, at ¶ 313.

[30] *Id.* at ¶ 313; *See also* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Verbatim Record, C.R. 2009/24, at 73, ¶ 29, (Dec. 1) [hereinafter Kosovo—Verbatim Record], http://www.icj-cij.org/docket/files/141/15710.pdf.

[31] Of course, Serbia's final submission was that, because Kosovo did not have a right to external self-determination at the time that the Declaration was made, the Declaration was unlawful and did not create its purported legal effects—*i.e.* the creation of the Republic of Kosovo. Written Comments, *supra* note 8, ¶¶ 313-360.

[32] *Id*. at ¶¶ 208–10.

[33] *See* S.C. Res. 216. ¶ 1 (Nov. 12, 1965); S.C. Res. 217, ¶ 3 (Nov. 20, 1965).

[34] *See* S.C. Res. 169, ¶ 8 (Nov. 24, 1961).

[35] *See* S.C. Res. 541, ¶ 2 (Nov. 18, 1983).

[36] *See* Nuclear Tests, *supra* note 5, at ¶ 43; Guiding Principles, *supra* note 6, at 370.

international law treats the intention of a non-State entity similarly to that of a sovereign State.[37]

Furthermore, viewing unilateral declarations of independence as unilateral juridical acts would not comport with the factual nature of the process of the formation of States. If it were accepted that the Kosovar Declaration—or indeed any declaration of independence—constitutes a unilateral legal act, then it would mean that the effects of the declaration—the creation of a State—would arise solely by means of the declaration. In other words, accepting declarations of independence as unilateral legal acts would necessarily lead to the conclusion that international law allows an entity to become a State, its subject *par excellence*, purely by means of an act of will. Be that as it may, according to both practice[38] and doctrine[39] Statehood is a fact; either an entity satisfies the effectiveness-based criteria stipulated under the Montevideo Convention at the time that a declaration of independence is made or it does not.[40] A declaration of independence may

[37] In fact, the Court itself, in the context of the Kosovo Opinion, was quick to draw the line between States and non-State entities and rejected an argument according to which the principle of respect for territorial integrity is applicable *mutatis mutandis* to non-State entities. *See* Kosovo Opinion, *supra* note 3, at¶ 80.

[38] *See* Montevideo Convention, *supra* note 28, at art. 1; Reference re Secession of Quebec, 2 S.C.R. 217, ¶ 142 (1998), scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do; Opinion No. 1 of the Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM 1488, 1495 (1992) ([hereinafter Opinion No. 1 of the Badinter Commission] ("The Committee considers . . . that . . . the existence or disappearance of the state is a question of fact."). *See also The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia* vol. II, 127–29, RT (Sept., 2009), http://www.caucasus-dialog.net/Caucasus-Dialog/Activities_&_Docs_files/IIFFMCG_Volume_II%20Kopie.pdf, [hereinafter *The Report*].

[39] *See* Matthew Craven, *Statehood, Self-Determination, and Recognition*, *in* INTERNATIONAL LAW 201, 215 (Malcolm D. Evans ed., 2014). CRAWFORD, *supra* note 23, at 5. Of course, a State is not, as Crawford notes, a fact "in the sense that a chair is a fact." *Id.* It is rather "a legal status attaching to a certain state of affairs by virtue of certain rules or pracices." *Id*. For a similiar approach, see also JURE VIDMAR, DEMOCRACY AND STATEHOOD IN INTERNATIONAL LAW 47 (2013) ("The emergence of a new state is not a simple matter of a self-evident fact, but rather a matter of an international legal acceptance of a certain territory having a specific legal status."). *See also* Théodore Christakis, *The State as A "Primary Fact": Some Thoughts on the Principle of Effectiveness*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 138 (Marcelo G. Kohen ed., 2006).

[40] This is not to suggest that an entity that fulfills the factual requirements enunciated in the Montevideo Convention on the Rights and Duties of States will *necessarily* achieve Statehood. In practice, recognition by other States plays an important role in consolidating claims to Statehood, as it will be discussed below. In modern State practice, it seems that recognition is not solely based on the existence of the factual elements of Statehood. A whole host of additional considerations, such as the existence of democratic institutions, respect for human rights, and the protection of minorities, may lead a State to grant or withhold recognition. *See e.g.,* the *EC Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 4 EUR. J. INT'L L. 72 (1993); *see also* VIDMAR, *supra* note 39, at 137–38. It would be unfair to assume that because modern recognition practice goes beyond the traditional criteria for Statehood, these criteria have become redundant. Rather, this recent trend highlights the fact that recognition is determined by both legal and political factors. *See* Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia*, 24 LEIDEN J. INT'L L. 467, 483–84 (2011).

not confer Statehood to an entity that was not a State before the declaration. As Norway stated during the proceedings before the Court: "Declarations of independence do not create or constitute States under international law. It is not the issuance of such declarations that satisfies the factual requirements, under international law, for Statehood or recognition."[41]

Second, by focusing on the date that the declaration of independence is issued as the critical date for assessing the legality of a claim to Statehood, this argument neglects the role of recognition in consolidating claims to Statehood. Although, in theory, recognition is of purely declaratory nature,[42] it cannot be seriously argued that a State is an entity that can effectively enter into relations with other States when it has received recognition by none or very few States. Both literature and practice support this proposition. The Supreme Court of Canada, in the Quebec secession reference case, expressly declared that "[a]lthough recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states."[43] Similarly, the Independent International Fact-Finding Mission on the conflict in Georgia stressed that "even if recognition has only declaratory value, the recognition of an entity as a state by other states can give a certain evidence of its legal status as a state."[44] In the cases of South Ossetia and Abkhazia, the Mission's Report specifically mentioned the lack of widespread recognition as evidence that neither acquired the status of a State under international law.[45] As far as doctrine is concerned, even avowed "declaratorists," such as Crawford have accepted that recognition plays an important role in solidifying claims to Statehood in modern State practice.[46]

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[41] *See* The Oral Statements Made During the Public Sitting at the Peace Palace, in the Kosovo Advisory Opinion, C.R. 2009/31, 46 (Dec. 9, 2009) (oral statements made by Norway), http://www.icj-cij.org/docket/files/141/15750.pdf; *id.,* at 9 (oral statements by France); The Oral Statements Made During the Public Sitting at the Peace Palace in the Kosovo Advisory Opinion, C.R. 2009/30, 57 (Dec. 9, 2009) (oral statements made by Finland), http://www.icj-cij.org/docket/files/141/15761.pdf.

[42] Montevideo Convention, *supra* note 28, at art. 6; *see also* Opinion No. 1 of the Badinter Commission, *supra* note 38, at 1495. ("The Committee considers . . . that the effects of recognition by other states are purely declaratory."). For different theories on recognition, see THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 1–18 (1999).

[43] *See* Reference re Secession of Quebec, 2 S.C.R. 217, at ¶ 142.

[44] *See* The Report, *supra* note 38, at 129.

[45] *Id.*; *see also* Caglar v. Billingham (Inspector of Taxes) & Related Appeals, S.T.C. 150, ¶ 182 (1996) ("In view of the non-recognition of the Turkish Republic of Northern Cyprus by the whole of the international community other than Turkey we conclude that it does not have functional independence as it cannot enter into relations with other States.").

[46] CRAWFORD, *supra* note 23, at 74; *see also* JAN KLABBERS, INTERNATIONAL LAW 73 (2013).

The stark contrast between successful secessionist attempts, such as Kosovo and Bangladesh on the one hand, and unsuccessful ones, such as Abkhazia and Biafra on the other, evidences the crucial role played by recognition in modern State practice.[47] All four cases involved disputed claims to Statehood and the grant or denial of recognition tipped the balance in whether a new State was created.[48] To ignore the effects of recognition—by focusing on the day that a given declaration of independence is made—would effectively mean that the legal status of Kosovo, which has been formally recognized by 111 States,[49] would be judged equally with that of Biafra which, at the time of its declaration, received a mere five recognitions.[50]

This is not to say that recognition alone is sufficient for an entity to achieve Statehood. To completely remove recognition from the picture, however, would be to divorce law from reality. To divorce law from reality would damage the legitimacy of law itself. By way of contrast to other normative orders, such as religion and morality, the law derives its authoritativeness *inter alia* from the fact that it remains relevant and reflects realities on the ground of practice.[51] The moment that law becomes an outdated system that has lost touch with reality, States may no longer feel compelled to obey rules that do not reflect their own practice. In the words of Jennings: "*Ex factis jus oritur* is an expression of a truth that no law can ignore save at its own peril."[52]

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[47] It would be beyond the scope of the present work to provide a detailed account of these four instances of unilateral secession. All of them have attracted much scholarly attention and thus, the relevant territory is fairly well chartered. On Bangladesh and Abkhazia, see John Dugard & David Raic, *The Role of Recognition in the Law and Practice of Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 94, 113–19, 120–23 (Marcelo G. Kohen ed., 2006). On Bangladesh, see CRAWFORD, *supra* note 23, at 393. On Kosovo, see KOSOVO AND INTERNATIONAL LAW: THE ICJ ADVISORY OPINION OF 22 JULY 2010 (Peter Hilpold ed., 2012); Jessica Almqvist, *The Politics of Recognition: The Question About the Final Status of Kosovo*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 165 (Duncan French ed., 2013). On Abkhazia, see Grace Bolton, *International Responses to the Secession Attempts of Kosovo, Abkhazia and South Ossetia 1989-2009*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 109 (Duncan French ed., 2013). On Biafra, see CRAWFORD, *supra* note 23, at 406; *see also* David A. Ijalaye, *Was "Biafra" at Any Time a State in International Law?*, 65 AM. J. INT'L L. 551 (1971).

[48] *See* Dugard & Raic, *supra* note 47, at 96–97.

[49] *See "Who Recognized Kosova as an Independent State? The Kosovar People Thank you!*," www.kosovothanksyou.com (last visited Apr. 2, 2016).

[50] *See* Ijalaye, *supra* note 47, at 553–56.

[51] *See* MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 39 (2011); HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 256 (reprint 2011) (1933).

[52] *See* Robert Y. Jennings, *Nullity and Effectiveness in International Law*, *in* CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 64, 74 (Robert Y. Jennings *et al.* eds., 1965).

Third, and most importantly, the thesis that unilateral declarations of independence constitute, in essence, unilateral juridical acts rests on shaky evidentiary grounds. Proponents of this view have relied on the fact that, on a number of occasions, the SC has condemned declarations of independence as evidence that international law treats those particular declarations as unlawful.[53] The language employed in the resolutions may, at first glance, imply that the declarations of independence in question were considered contrary to international law. For example, the SC referred to the declarations of independence by Southern Rhodesia and by the Turkish Republic of Northern Cyprus as "legally invalid."[54] A careful examination of the context in which these resolutions were issued, however, reveals that the SC resolutions were not based on any actual international law rules that prohibit unilateral declarations of independence. At first, none of the debates on the SC resolutions regarding Katanga, Southern Rhodesia, or the Turkish Republic of Northern Cyprus raised the illegality of the declarations of independence *per se*.[55] Loutfi, representative of the United Arab Republic, only referenced the issue of illegality of unilateral declarations of independence in the context of the Katangan declaration of independence.[56] Loutfi expressly stated, however, that the Katangan declaration of independence was illegal as a matter of Congolese, and therefore domestic law.[57] No single reference to international law rules prohibiting unilateral declarations of independence can be found in the records of the meetings that preceded the adoption of the SC resolutions in question.

Furthermore, the argument that the SC has, on occasion, treated specific unilateral declarations as unlawful per se under international law is paradoxical to the purpose of the resolutions. If we accept that the SC considered that a particular entity was acting illegally under international law, then we need to accept that the SC considered that entity as a subject of international law in the first place. The very aim of the resolutions cited above was to deny these entities legal status under international law.[58] It would be odd if the SC accepted that an entity had the prerequisite legal personality to be able to commit an

[53] Written Comments, *supra* note 8, ¶¶ 208–10.

[54] On Southern Rhodesia, S.C. Res. 217, *supra* note 33, ¶ 3; on the Turkish Republic of Northern Cyprus, S.C. Res. 541, *supra* note 34, ¶ 3.

[55] *See Meeting Records*, UNITED NATIONS SEC. COUNCIL, http://www.un.org/en/sc/meetings/searchrecords.asp (last visited Apr. 2, 2016) (providing all verbatim records of SC meetings) (on file with author).

[56] U.N. SCOR, 16th Sess., 974th mtg. at ¶¶ 34–35, U.N. Doc. S/PV.974 (Nov. 15, 1961) (statement of Mr. Loutfi, United Arab Republic).

[57] *Id.*

[58] CRAWFORD, *supra* note 23, at 389.

internationally wrongful act when the aim of the resolutions was precisely to deny such entities the capacity to become subjects of international law.

The eminently political nature of the UN body in question must also be taken into account when interpreting the terms of its resolutions.[59] The SC is not a court. Thus, the "invalidity" the resolutions ascribe to certain unilateral declarations of independence does not necessarily coincide with the juridical concept of "invalidity." As Talmon aptly notes, SC statements "that a 'declaration of independence' is totally invalid must be viewed in the context of other such pronouncements."[60] Talmon cites a number of other acts that have been characterized as "invalid" by the SC, such as certain legislative and administrative measures, elections and their results, all statements by a State repudiating its foreign debt, and all acts taken by a government on behalf of, or concerning, a territory.[61] In all of these instances, including the resolutions at hand, the SC did not invoke a concrete legal basis to justify its pronouncement of "invalidity."[62] This lack of concrete legal basis does not accord with the stringent procedural safeguards associated with the concept of nullity in law.[63] Furthermore, omitting any reference to the UN Charter is particularly conspicuous when the SC addresses acts issued by non-State actors. This is not to suggest that the SC has not imposed obligations on non-State actors in its practice. The Court itself noted in the Kosovo Opinion that "it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and inter-governmental organizations."[64] As the Court stressed, however, the Charter provisions invoked are an important factor in determining whether such actors are bound by SC resolutions.[65]

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[59] Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. UNITED NATIONS L. 73, 80 (1998); ALEXANDER ORAKHELASHVILI, THE INTERPRETATIONS OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 487–93 (2008).

[60] Stefan Talmon, *The Constitutive Versus the Declaratory Doctrine of Recognition: Tertium Non Datur?* 75 BRIT. Y.B. INT'L L. 101, 142 (2004).

[61] *Id.*

[62] *Id.*

[63] *See* Rep of the Int'l Law Comm'n on the work of its 18th Sess., May 4–July 19, 1966, art. 62, at 262, U.N. Doc. A/CN.4/191; GAOR, 21st Sess., Supp. No. 9 (1966) (setting forth such safeguards); *see also* Jennings, *supra* note 52, at 74; Jochen A. Frowein, *Nullity in International Law*, 3 MAX PLANCK ENCYCLOPEDIA PUBLIC INT'L L. 743, 745 (1997).

[64] Kosovo Opinion, *supra* note 3, at ¶ 116.

[65] *Id*. at ¶ 117; *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1990), Advisory Opinion, 1971 I.C.J. 16, 54 (June 21).

Thus, it seems that where a sound legal basis is omitted, it would be a bridge too far to assume that "invalid" is tantamount to "absolute invalidity" in the legal sense. As Tancredi stresses:

> A void character does not represent the automatic effect of the resolution which contains the declaration of invalidity and the demand for non-recognition, since there is no organ having compulsory jurisdiction, endowed with the power to annul wrongful acts (and certainly the UN organs are not empowered to do so).[66]

Rather, in such cases, the use of the term "invalid" by the SC, or other UN organs, indicates that "*they* do not (or will not) treat as valid an act that has already taken place or will take place in the future."[67] In other words, rather than equating the above SC resolutions to judicial pronouncements of absolute nullity, the better view is that these simply reflect the SC's strong disapproval of certain acts.

Conversely, had these resolutions actually invalidated the declarations of independence by Katanga, Southern Rhodesia, and the Turkish Republic of Northern Cyprus, there would be no need to insert any requests for non-recognition. In other words, if the declarations in question were automatically null and void, there would be nothing left for States to recognize and, thus, no need to impose a duty of non-recognition. In all of these resolutions, however, the SC invariably requested Member States not to recognize the entities in question and/or to refrain from rendering any assistance to them.[68] D'Aspremont, representative of Burundi, also made this argument during the Kosovo Opinion proceedings:

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[66] Antonello Tancredi, *A Normative "Due Process" in the Creation of States Through Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 171, 200 (Marcelo G. Kohen ed., 2006).

[67] Talmon, *supra* note 60, at 143 (emphasis added); *see also* Oral Statements at the Peace Palace, C.R. 2009/28, at 29 n.24 (Dec. 4, 2009) (statement of Jean D'Aspremont, Rep. of Burundi), http://www.icj-cij.org/docket/files/141/15738.pdf ("Whereas, on occasion, the Security Council has condemned the adoption of a declaration of independence . . . nothing justifies the conclusion that, in these cases, any judgment of validity was made . . . by condemning a declaration of independence, the Security Council is merely expressing its disapproval.").

[68] *See* S.C. Res. 216, *supra* note 33, at ¶ 2 (statement of Southern Rhodesia) ("*The Security Council* . . . *[d]ecides to call upon* all States not to recognize this illegal minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime."); S.C. Res. 541, *supra* note 35, at ¶ 7 (statement of Turkish Republic of Northern Cyprus) ("The Security Council . . . *[c]alls upon* all States not to recognize any Cypriot State other than the Republic of Cyprus."); S.C. Res. 169, *supra* note 34, at ¶ 6(statement of Katanga) ("*The Security Council* . . . *[r]equests* all States to refrain from the supply of arms, equipment or other material which could be used for warlike purposes . . . .").

> It is indeed because the Security Council generally adds sanctions to its condemnation, that its action does not equate to any form of invalidation. If the Council had "invalidated" the declaration of independence which it condemned, the latter would have ceased to exist and it would not have been necessary to adopt any sanctions whatsoever.[69]

Another weakness of relying on the SC resolutions to argue that international law prohibits unilateral declarations of independence is that such arguments tend to overlook the actual justification used in these resolutions to find "invalidity." If there was a rule of international law outlawing declarations of independence, the SC would have expressly invoked it in order to justify why certain declarations are invalid. Any reference to a rule of international law prohibiting declarations of independence, however, is patently absent from the resolutions in question. Instead, the justification for declaring the declaration of independence by the Turkish Republic of Northern Cyprus legally invalid[70] was that it was incompatible with the 1960 Treaty that established of the Republic of Cyprus[71] and the 1960 Treaty of Guarantee.[72] In its resolution on Southern Rhodesia, the SC determined that the situation *resulting* from the declaration of independence constituted a threat to international peace and security before concluding that it was legally invalid.[73] In the resolution on Katanga, the SC strongly deprecated the secessionist movement as contrary to the Congolese Constitution and as having been carried out with the aid of external intervention.[74]

In sum, it is worth reiterating that: (a) The inability to reconcile the contention that the SC considered the declarations in question as unlawful per se with the overall aim of those resolutions; (b) the fact that the SC did not invoke a concrete legal basis for invalidating acts emanating from a non-State actor; and (c) the actual justification for the illegality attached to these declarations, all corroborate the view that the relevant practice of the SC resolutions cannot serve as conclusive evidence that international law prohibits such declarations.

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[69] C.R. 2009/28, *supra* note 67, at 29 (statement of Jean D'Aspremont, Rep. of Burundi).

[70] S.C. Res. 541, *supra* note 35.

[71] Treaty Concerning the Establishment of the Republic of Cyprus, Aug. 16, 1960, 382 U.N.T.S. 215.

[72] Treaty of Guarantee, Aug. 16, 1960, 382 U.N.T.S. 8.

[73] S.C. Res. 217, *supra* note 33, at ¶ 1.

[74] S.C. Res. 169, *supra* note 34, at ¶ 8.

The text of relevant SC resolutions does show that on occasion the SC has attempted to regulate the *acceptance* of such declarations by imposing on Member States the obligation not to recognize certain entities and/or to refrain from rendering any assistance to them. The commentary to Article 41 of the ILC Draft Articles on State Responsibility supports this proposition.[75] Therein, the SC resolution on Southern Rhodesia is cited as an example of the principle that, where a serious breach of an obligation arising under a peremptory norm of international law occurs, *other States* are under an obligation to withhold recognition.[76] Nowhere in the commentary is it suggested that the relevant SC practice supports anything more than a duty of non-recognition.

D. Unilateral Declarations of Independence as Illegal Acts?

Vidmar has questioned the above proposition, arguing that, under certain circumstances, a declaration of independence itself—and not only its acceptance—is illegal under international law.[77] Vidmar's argument can be broken down as follows: First, he draws a distinction between declarations of independence issued by "random groups" and those issued by representatives of an entity that meets, or is capable of meeting, the effectiveness criteria under the Montevideo Convention.[78] Only the latter are, in his view, acts regulated by international law and capable of being unlawful. Second, he claims that such declarations of independence—for instance, the ones issued by a (potentially) effective entity—are unlawful where they attempt "to consolidate an effective territorial situation created in breach of a norm of [*jus cogens*] character."[79]

In order to substantiate his argument, Vidmar relies on the abovementioned practice of the SC and on a passage from the Kosovo Opinion. He suggests that the independence of the Turkish Republic of Northern Cyprus and Southern Rhodesia would consolidate an otherwise unlawfully created territorial situation.[80] Thus, the fact that the SC characterized them as invalid means that it perceived them as having been issued in violation of a fundamental norm of international law.[81] Vidmar further contends that the following observation made by the Court in the Kosovo Opinion confirms his argument:

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[75] Rep. of the Int'l Law Comm'n on its 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 289, ¶ 8, U.N. Doc. A/56/10 (2001); GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter U.N. Doc. A/56/10].

[76] *Id.*

[77] Vidmar, *supra* note 12, at 159.

[78] *Id*.

[79] *Id.* at 177.

[80] *Id.* at 171–74.

[81] *Id.*

> [T]he illegality attached [to some other] declarations of independence thus stemmed not from the unilateral character of these 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*).[82]

This position is riddled with logical inconsistencies and rests on thin evidentiary foundations. First, there is something intrinsically problematic in suggesting that a prohibition only applies to entities that "meet or are likely to meet the Montevideo criteria." How would we know that an entity has reached that threshold? As discussed already, in the absence of a central and objective authority that would determine Statehood, recognition typically serves as evidence that an entity has fulfilled the Montevideo criteria. How would this be extrapolated to Vidmar's schema? Would States recognize an entity simply for the purpose of attributing an internationally unlawful act thereto? Would the SC be tasked with determining the effectiveness of every single group claiming independence, and, if so, on what legal basis? Furthermore, making the applicability of a prohibition contingent upon effectiveness would insert a degree of subjectivity to the prohibition incompatible with the objectivity expected of legal rules.[83] Vidmar fails to explain *why* declarations of independence stemming from effective entities are the only ones that come within the purview of international law. The position that international law contains a limited prohibition of such declarations was also challenged by Crawford, as representative of the UK, during the Kosovo Opinion proceedings: "But does international law only condemn declarations of independence when made by representative bodies and not, for example, by military movements? Does international law only condemn declarations of independence that are likely to be effective?"[84]

Second, even if it is accepted that non-state actors are bound by *jus cogens* rules—a highly disputed proposition in itself that Vidmar fails to justify[85]—the link between the breach of

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[82] Kosovo Opinion, *supra* note 3, at ¶ 81.

[83] On the objectivity of legal rules, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 24 (2007).

[84] Oral Statements at the Peace Palace, C.R. 2009/32, at 47 (Dec. 10, 2009) [hereinafter C.R. 2009/32] http://www.icj-cij.org/docket/files/141/15734.pdf (statement of James Crawford, Rep. of the U.K.).

[85] For the difficulties of holding non-State actors bound by international law obligations, see Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, *in* NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 351 (Jan Klabbers & Jarna Petman eds., 2003).

the rule and the conduct of the entity is too tenuous to justify attributing liability to the latter. For example, Vidmar argues that the declaration of independence by the Turkish Republic of Northern Cyprus was illegal because it resulted from Turkey's illegal use of force.[86] This would attribute liability to an entity for a breach committed by another subject and would be at variance with the rules of attribution under the law of State responsibility.[87]

Third, Vidmar's argument is predicated on the allegedly breached norm having attained the status of a *jus cogens* norm at the time that the declaration of independence is made. There is little evidence to suggest that at the time that the declaration of independence of Southern Rhodesia was issued in November 1965[88] that self-determination had attained *jus cogens* status. The discussions in the ILC during its 1966 session evidence that the right to self-determination was not one of the most "obvious and settled rules of *jus cogens*,"[89] and it was not until well into the 1970s that it was widely recognized as having attained *jus cogens* status.[90]

All in all, Vidmar's thesis is only supported by the abovementioned dictum of the Court in the context of the Kosovo Opinion. Upon closer inspection, however, it seems that even this dictum is open to interpretation. Particularly, in the text directly preceding the dictum in question, the Court indicated that the SC had, on occasion, condemned particular declarations of independence but that "in all those instances the Security Council was making a determination as regards *the concrete situation existing at the time* that those declarations of independence were made."[91] This shows that, in the Court's view, the SC, in condemning particular declarations of independence, was primarily concerned with the circumstances surrounding the making of the declarations, rather than declarations themselves. Furthermore, the use of the word "condemning" instead of "invalidating" evidences that the Court was hesitant to ascribe legal effects to those resolutions. In any

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[86] Vidmar, *supra* note 12, at 171–72.

[87] *See* U.N. Doc. A/56/10, *supra* note 75, art. 2, at 34–36.

[88] On Southern Rhodesia's declaration of independence, see CARL PETER WATTS, RHODESIA'S UNILATERAL DECLARATION OF INDEPENDENCE: AN INTERNATIONAL HISTORY 1 (2012).

[89] Talmon, *supra* note 60, at 131; *see also Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly*, 2 Y.B. INT'L L. COMM'N 248 (1996).

[90] Talmon, *supra* note 60, at 131; MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 70–72 (1982); Surya Prakash Sinha, *Has Self-Determination Become a Principle of International Law Today?*, 17 INDIAN J. INT'L L. 332, 332–56 (1974).

[91] Kosovo Opinion, *supra* note 3, at ¶ 81 (emphasis added).

case, additional evidence is needed to substantiate Vidmar's position. The above extract cannot, in and of itself, serve as a basis for building a sound theory of qualified illegality of unilateral declarations of independence.

E. Unilateral Declarations of Independence as Legally Neutral Acts

Claims that international law, entirely or partly, regulates unilateral declarations of independence fall short of convincing to the extent that: They ignore the legal context within which these declarations are made; they do not take into account the identity of their authors as non-state entities; and they rest on shaky logical and evidentiary grounds. Against that background, this Section will explore the claim that these declarations fall outside the ambit of international law. It will argue that this claim carries more persuasive force than the ones described above because it is supported both in practice and theory.

The position that unilateral declarations of independence are not regulated by international law comports with the widely held view that the creation of a State is a matter of fact, rather than law. According to this schema, declarations of independence are means by which entities put forward claims of Statehood, that other States may accept or reject, but are not in and of themselves a means of creating a State under international law. As Crawford noted before the Court: "A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community."[92] A number of States—including Norway, France, Jordan, the United States, and Croatia—also share the view that declarations of independence are mere political pronouncements and, as such, they are not regulated by international law.[93] Most importantly, the authors of the Kosovar Declaration themselves did not consider the Declaration to produce any legal effects:

> Although the declaration of independence doubtless aimed at that result [Statehood], it was not the declaration that achieved it under international law. Therefore, it is wrong to maintain that the declaration has an effect under international law, and consequently is subject to that law, because the representatives of

[92] C.R. 2009/32, *supra* note 84, at 47.

[93] *See* C.R. 2009/31, *supra* note 41, at 46, ¶ 10 (statement of Norway); *id.* at 38, ¶ 42 (statement of Jordan); *id.* at 5, ¶ 12 (statement of France); C.R. 2009/30, *supra* note 41, at 30, ¶ 20 (statement of the U.S.), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=2.

> the Kosovo people expressed their wish to create a sovereign State.[94]

State practice also supports the aforementioned proposition, namely that declarations of independence, far from constituting unilateral legal acts, are not regulated by international law. Although—as it was shown above—it is true that the SC has condemned specific declarations of independence in the past, those declarations were never characterized as unlawful *per se*. Rather than treating them as internationally wrongful acts, as it would have been the case if declarations of independence were regulated by international law, the SC merely obliged other States not to recognize the entities in question or to refrain from rendering any assistance to them.[95]

An overview of modern declarations of independence yields the same results. The numerous proclamations of independence made in the early 1990s by entities that wished to secede from the then Socialist Federal Republic of Yugoslavia are further examples of the political, rather than legal, nature of unilateral declarations of independence.[96] The claims of Statehood made by Slovenia, Croatia, Bosnia and Herzegovina, and so forth, were the object of close scrutiny both by the UN and the EU.[97] These claims, however, were never discussed in terms of "lawful" and "unlawful." The Arbitration Commission of the Conference on Yugoslavia—more widely known as the Badinter Commission—was set up by the EU Council in 1991 to provide legal advice to the Conference on Yugoslavia and delivered a number of opinions regarding the requests for recognition by entities in the territory of the SFRY.[98] The Badinter Commission never discussed or even raised the question of the lawfulness or unlawfulness of the relevant declarations of independence.[99] In the same vein, the Independent International Fact Finding Mission on the conflict in Georgia did not treat the Abkhazian and the South Ossetian declarations as internationally wrongful acts, although it concluded that the entities in question did not have a right to remedial secession.[100]

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[94] C.R. 2009/25, at 37 (statement of the authors of the 2008 Declaration of Independence), http://www.icj-cij.org/docket/files/141/15722.pdf.

[95] *See* S.C. Res. 216, *supra* note 33, at ¶ 2; S.C. Res. 541, *supra* note 35, at ¶ 7; S.C. Res. 169, *supra* note 34, at ¶ 6.

[96] CRAWFORD, *supra* note 23, at 395–401.

[97] *Id.*

[98] Opinion No. 1 of the Badinter Commission, *supra* note 38.

[99] *See* C.R. 2009/32, *supra* note 84, at 49, ¶ 14.

[100] The Report, *supra* note 38, at 144–47.

Moreover, apart from the Kosovo Opinion, the question of illegality of unilateral declarations of independence also arose in the context of the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide.[101] Yugoslavia contended in its preliminary objections that "Bosnia and Herzogovina . . . ha[ve] never been established in the territory and in the form in which [they] pretend to exist since [their] illegal declaration of independence."[102] The Court treated the declaration as a matter of fact, however, and rejected that objection.[103]

The argument that international law does not regulate unilateral declarations of independence is also supported by the opinions of the international law experts[104] in the context of the *Reference re Secession of Quebec* case. According to the experts, secession is a matter that falls within the domestic jurisdiction of the metropolitan State and is not regulated by international law. [105] If secession is not regulated by international law, then it is safe to assume that the act by which an entity secedes from the State—for example, the declaration of independence—is not regulated by international law either. According to Franck: "It cannot seriously be argued that international law *prohibits* secession. It cannot be seriously argued that international law *permits* secession . . . the law imposes *no duty* on any people not to secede."[106] Similarly, Abi-Saab notes that "but while international law does not recognize a right of secession outside the context of self-determination, this does not mean that it prohibits secession. The latter is basically a phenomenon not regulated by international law."[107] In this light, it becomes apparent that the view that unilateral declarations of independence fall outside the purview of international law is well-grounded in practice.

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[101] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Judgment, 1996 I.C.J. Rep. 595, (July 11).

[102] *Id.* at 604–05.

[103] *Id.* at 623, ¶ 47; *see also* C.R. 2009/32, *supra* note 84, at ¶ 16.

[104] *See generally* ANNE F. BAYEFSKY, SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED (2000) (providing reproductions of experts' opinions).

[105] James Crawford, *Response to Experts Reports of the* Amicus Curiae, *in* SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 153, 161 (2000).

[106] Thomas M. Franck, *Opinion Directed at Question 2 of the Reference*, *in* SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 75, 79 (2000).

[107] George Abi-Saab, *The Effectivity Required of an Entity that Declares Its Independence in Order for It to Be Considered a State in International Law*, *in* SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 69, 72–73 (2000).

F. Conclusion

This Article re-visited the question of the juridical nature of unilateral declarations of independence. It demonstrated that the ICJ's Kosovo Opinion left more questions unanswered than answered. By failing to examine both permissive and prohibitive rules and by failing to examine whether international law is neutral towards unilateral declarations of independence, the ruling of the Court is of little assistance in establishing the legal character of unilateral declarations of independence. It further showed that arguments that unilateral declarations of independence are regulated—entirely or partly—by international law are largely misguided, to the extent that they do not take into account the context within which these declarations are made, neglect the identity of their authors as non-State entities, and are based on an erroneous understanding of the relevant SC practice. This Article argued that the proposition that international law is legally neutral towards unilateral declarations of independence has more persuasive force because it accords both with the factual nature of the process of attaining Statehood and with the relevant practice. The conclusions reached in this Article are important in the process of evaluating controversial cases, such as Kosovo or Crimea. Establishing that unilateral declarations of independence are not regulated by international law allows us to reshape the debate on the emergence of new States by moving beyond the narrow confines of the legality of such declarations.