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# The Limits of Democratic Decision Making in Territorial Matters

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**Euborders**

SOVEREIGNTY & SELF-DETERMINATION



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## **Abstract**

Groups claiming self-determination usually interpret this international human right as if it were an absolute entitlement, i.e. a right to secession. Conversely, states trying to counter secession usually interpret territorial integrity as if it were an absolute entitlement of states. But neither right or entitlement is absolute. Self-determination will be, in most circumstances, consummated internally, in the form of autonomy and self-government. At the same time, the principle of territorial integrity does not make secession illegal. International law is quite simply neutral on the question of unilateral secession: there is no entitlement to independence, but at the same time there is no prohibition of declarations of independence or even independence referendums. This is the case even where declarations of independence are extraconstitutional. Unilateral declarations of independence are rarely successful, however. A unilateral path to independence is therefore not illegal under international law, but it is politically very unlikely. This is because the international legal neutrality pertaining to secession puts the burden of changing the territorial status quo on the independence-seeking entity. In the absence of agreement with the parent state, the success of the independence claim is then pushed to the realm of international recognition.

**Keywords:** Self-determination, territorial integrity, independence referendums, secession, EU membership.

# The Limits of Democratic Decision Making in Territorial Matters

## I. Introduction

In March 2014, Crimea voted on whether to separate from Ukraine and its integration with Russia.<sup>1</sup> In September 2014, Scotland voted against independence from the United Kingdom (UK).<sup>2</sup> In June 2016, the UK voted to exit the European Union.<sup>3</sup> Referendums are often seen as a magic tool of democracy that ought to solve territorial claims justly—in accordance with the will of the people. However, territorial referendums are rarely a panacea. The theoretical ideal of solving territorial claims in accordance with the will of the people clashes with the international legal framework governing the territorial integrity of states, and opens a set of questions regarding the modalities of the expression of the will of the people.

This paper explains the legal restraints on the exercise of the right of self-determination, independence referendums, and state creation. It demonstrates that on territorial issues, the will of the people decides only very rarely. Self-determination is limited by the principle of territorial integrity.<sup>4</sup> The clash between self-determination and territorial integrity, however, creates a zone of legal neutrality in which declarations of independence are not illegal, only unlikely to be successful. The zone of legal neutrality, nevertheless, has its outer boundaries. The paper also addresses the legal challenges of secession within the EU and “secession” from the EU.<sup>5</sup> It concludes that any change in legal status requires negotiations rather than unilateral action. It may well be that comparative constitutional law rather than international law could provide more guidelines in this regard.

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<sup>1</sup> See ‘Crimea referendum: Voters “back Russia union”,’ BBC News (16 March 2014), at <http://www.bbc.com/news/world-europe-26606097>.

<sup>2</sup> See ‘Scottish referendum: Scotland votes ‘No’ to independence’, BBC News (19 September 2014), at <http://www.bbc.com/news/uk-scotland-29270441>.

<sup>3</sup> See ‘Brexit: Europe Stunned by UK Leave Vote’, BBC News (24 June 2016), at <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36616018>.

<sup>4</sup> Cf. M Keating, ‘States, Sovereignty, Borders and Self-Determination in Europe’.

<sup>5</sup> Cf. N Levrat, ‘The Right to National Self-Determination within the EU: A Legal Investigation’.

## II. The will of the people

On 16 March 2014, Crimea held a referendum on its future legal status. Reportedly, the choice to join Russia was supported by an overwhelming 95.5 percent of all votes cast, with 83 percent turnout.<sup>6</sup> On 17 March 2014, the Crimean parliament declared independence and applied to integrate with Russia.<sup>7</sup> The Russian parliament confirmed this in a vote, thus absorbing Crimea after a few days of putative independence.<sup>8</sup> When effectively annexing Crimea, President Vladimir Putin quoted the United States' position on the situation of Kosovo: "Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law."<sup>9</sup> At this point, President Putin continued:

They wrote this, disseminated it all over the world, had everyone agree and now they are outraged. Over what? The actions of Crimean people completely fit in with these instructions, as it were. For some reason, things that Kosovo Albanians ... were permitted to do, Russians, Ukrainians and Crimean Tatars in Crimea are not allowed. Again, one wonders why.<sup>10</sup>

Russia opposed Kosovo's declaration of independence.<sup>11</sup> Independence of Kosovo is also determinately opposed by, inter alia, China, India, Brazil, and South Africa.<sup>12</sup> In contrast, the US, the UK, Germany, and France actively supported the declaration issued

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<sup>6</sup> See 'Crimea referendum: Voters "back Russia union"', BBC News (16 March 2014), at <http://www.bbc.com/news/world-europe-26606097>.

<sup>7</sup> See 'Crimean parliament formally applies to join Russia', BBC News (17 March 2014), at <http://www.bbc.com/news/world-europe-26609667>.

<sup>8</sup> See 'Ukraine: Putin signs Crimea annexation', BBC News (21 March 2014), at <http://www.bbc.com/news/world-europe-26686949>.

<sup>9</sup> See 'Address by the President of the Russian Federation', Kremlin (18 March 2014), at <http://en.kremlin.ru/events/president/news/20603>.

<sup>10</sup> Ibid.

<sup>11</sup> Consider the following statement given by the representative of Russia in the UN Security Council after Kosovo's declaration of independence: "The Russian Federation continues to recognize the Republic of Serbia within its internationally recognized borders. The 17 February declaration by the local assembly of the Serbian province of Kosovo is a blatant breach of the norms and principles of international law—above all of the Charter of the United Nations—which undermines the foundations of the system of international relations. That illegal act is an open violation of the Republic of Serbia's sovereignty, the high-level Contact Group accords, Kosovo's Constitutional Framework, Security Council resolution 1244 (1999)—which is the basic document for the Kosovo settlement—and other relevant decisions of the Security Council." UN Security Council Official Records, 63rd Session, 5839th meeting at 6, UN Doc S/PV.5839 (18 February 2008).

<sup>12</sup> For a full list see 'Who Recognized Kosova as an Independent State', at <http://www.kosovothanksyou.com>.

by Kosovo.<sup>13</sup> The roles seem to be inverted. Does this indicate double standards, or is it rather that the two situations are different in law and fact? How are declarations of independence regulated in international law? What should be the role of democratic decision making in territorial matters?

## 1. International legal neutrality

In 1975, Judge Dillard of the International Court of Justice (ICJ) wrote in his Separate Opinion in the Western Sahara Advisory Opinion, that it was “for the people to determine the destiny of a territory, not for a territory to determine the destiny of the people.”<sup>14</sup> This may sound like a reasonable proposition but it needs to be properly qualified. Indeed, writing in 1956, Ivor Jennings no less famously pronounced that the right of self-determination looked like a very reasonable idea: let the people decide, yet the people cannot decide before someone decides who the people is.<sup>15</sup>

Self-determination is a legal right, codified by human rights treaties, in the common Article 1 of the International Convention of Civil and Political Rights (ICCPR) and the International Convention on Economic, Social, and Cultural Rights (ICESCR).<sup>16</sup> It also forms a part of customary international law, but claims for self-determination are nevertheless often utopian and even emotional. The language of democracy and democratic decision making can be dangerous if absolute legal entitlements are claimed on their basis. The democratic ideal of the will of the people needs to be contextualised properly within the applicable norms of international law. In the context of Crimea, President Putin used the rhetoric of a champion of democracy and self-determination. The principle of self-determination, indeed, has a long history of rhetorical utopia and misuse in realpolitik. Its two conceptual fathers, Woodrow Wilson and Vladimir Lenin, could not look more different, but they both proved that there was

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<sup>13</sup> Ibid.

<sup>14</sup> Western Sahara Advisory Opinion, ICJ, Advisory Opinion (16 October 1975), Separate Opinion of Judge Dillard, at 122.

<sup>15</sup> I Jennings, *The Approach to Self-Government* (Cambridge, CUP: 1956) at 55. See also Keating, *supra* note 4.

<sup>16</sup> International Covenant on Civil and Political Rights (ICCPR) (1966) & International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), Article 1.

a great discrepancy between the utopian conceptualisations of self-determination and its realistic application.<sup>17</sup>

As a theorist, Lenin wrote that peoples had the right to determine their future legal status democratically and even possessed the right to secession,<sup>18</sup> but in practice he vigorously defended the ceding of Belarussian and Ukrainian territories to Germany, and subsequently adopted the policy of systematic denial of self-determination to Soviet peoples.<sup>19</sup> Professor Wilson was writing that the will of the people was the superior international norm,<sup>20</sup> but the same President Wilson invaded Haiti.<sup>21</sup> His insistence on holding territorial referendums after World War I proved to be no perfect solution; the referendums created wrong expectations and left many groups disillusioned.<sup>22</sup> Subsequently, the maxim “let the people decide” was grossly abused when it served as an excuse for territorial annexations by Nazi Germany and fascist Italy.<sup>23</sup>

Self-determination has always been a concept that worked better rhetorically than practically. Crimea is not the first instance where ballot was (mis)used to redraw boundaries. The repeating history of self-determination proves that international law simply cannot accommodate the will of the people as a superior, absolute principle that trumps all other principles.<sup>24</sup> How exactly are the will of the people and self-determination accommodated in international law? After all, sometimes it does happen that the legal status of a territory changes. How is this done under international law?

## 2. Overcoming a counterclaim to territorial integrity

Claims for independence usually mean a clash between the right of self-determination and the principle of states’ territorial integrity. Those claiming independence speak of

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<sup>17</sup> For a thorough analysis see VI Lenin, *Questions of National Policy and Proletarian Internationalism* (Moscow: Foreign Languages Publishing House, year of publication unknown) at 135. ‘President Woodrow Wilson’s Fourteen Points’, Yale Law School, The Avalon Project. D Raič, *Statehood and the Law of Self-Determination* (The Hague: Kluwer Law International, 2002) at 186. A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP, 1995) at 19.

<sup>18</sup> See Lenin, *supra* note 17, at 135.

<sup>19</sup> See Raič, *supra* note 17, at 186.

<sup>20</sup> See Cassese, *supra* note 17, at 19.

<sup>21</sup> *Ibid.*

<sup>22</sup> Cf Raič, *supra* note 17, at 185.

<sup>23</sup> *Ibid.* at 194.

<sup>24</sup> See Keating, *supra* note 4.

self-determination as if it were an absolute right of peoples, while governments who try to counter secession see territorial integrity as an absolute right of states. Neither right is absolute. As Robert McCorquodale puts it:

[T]he right of self-determination is not an absolute right without any limitations. Its purpose is not directly to protect the personal or physical integrity of individuals or groups as is the purpose of the absolute rights and, unlike the absolute rights, the exercise of this right can involve major structural and institutional changes to a State and must affect, often significantly, most groups and individuals in that State and beyond that State. Therefore, the nature of the right does require some limitations to be implied on its exercise.<sup>25</sup>

International law is neutral on the question of secession: it is not prohibited, but neither is it an entitlement. As argued by the Supreme Court of Canada in the *Quebec case*:

Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.<sup>26</sup>

This means that independence is not a positive right or normative entitlement, but at the same time the *Quebec case* also affirms that international law does not prohibit unilateral declarations of independence.<sup>27</sup> International law is simply neutral on this matter. The consequence of this neutrality is, however, that the burden of shifting the territorial status quo lies on the independence-seeking entity. This is what makes secession unlikely to succeed, but it does not make it illegal.

In the *Quebec case*, the Supreme Court of Canada also reasoned that a democratic decision in favour of secession, at best, creates an obligation on both sides to negotiate the future legal status of the territory<sup>28</sup> but this is still not an entitlement to secession and

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<sup>25</sup> R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 ICLQ 857, 875-76.

<sup>26</sup> Reference re Secession of Quebec [1998] 2 SCR 217 (The Supreme Court of Canada) [hereinafter: the *Quebec case*], para 155.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. at 91.



there is still no pre-determined outcome. The central government does not enter into such negotiations with an obligation to determine the technicalities of secession. Negotiations could also lead to a new internal status for the territory, and a higher level of autonomy and self-government. The UK government was clearly committed to accepting the outcome of the independence referendum in Scotland even if it were in favour of independence.<sup>29</sup> This commitment goes beyond what is required by international law, and Scotland does not have any implications for Crimea. The principles of democratic decision making do not create a right to independence.

The principle of territorial integrity is reaffirmed in the Declaration on Principles of International Law which is generally seen as being reflective of a customary rule of international law:

Nothing in the foregoing paragraphs [on self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>30</sup>

Some writers have interpreted this provision as a foundation of the so-called remedial secession doctrine.<sup>31</sup> In this interpretation, the principle of territorial integrity applies only to states with a “government representing the whole people belonging to the territory without distinction as to race, creed or colour.”<sup>32</sup> There is little support for such an interpretation in state practice. Following the reasoning of the Supreme Court of Canada in the *Quebec case*,<sup>33</sup> the most realistic perception of “remedial secession” is probably that it is not a positive entitlement. The right to self-determination is never a right to

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<sup>29</sup> See ‘Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland’ (15 October 2012), at <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence> (last accessed on 30 October 2013).

<sup>30</sup> See ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’, GA Res 25/2625, Annex, Principle V.

<sup>31</sup> For an overview see A Tancredi, ‘A Normative ‘due process’ in the Creation of States Through Secession’ in M Kohen (ed.), *Secession: International Law Perspectives* (CUP, Cambridge 2006), at 176.

<sup>32</sup> See supra note 30.

<sup>33</sup> See supra note 26.

secession, not even where a people is suffering oppression. But where such remedial grounds do exist, foreign states may be more willing to grant recognition.<sup>34</sup> This remains their policy choice; states are never under an obligation to grant recognition.

### 3. State creation as a political process that creates legal status

State creation is a political process, deliberation, and negotiation. However, any introductory lecture or textbook on the international law of statehood usually starts with the statehood criteria. These are elaborated in the Montevideo Convention on the Rights and Duties of States and are said to have acquired the status of customary international law: (i) a permanent population, (ii) a defined territory; (iii) government; and (iv) the capacity to enter into relations with other states.<sup>35</sup>

The problem is that these criteria merely describe a state, or most states, but are not a legal definition of a state. States do not emerge automatically and self-evidently when these criteria are met. The criteria are too inclusive and too exclusive at the same time. Sometimes entities, such as Somaliland,<sup>36</sup> meet them, but are not states; and sometimes states do not meet them, but nevertheless emerge as states, such as Croatia and Bosnia-Herzegovina in 1992.<sup>37</sup> Most states look more or less as described in Article 1 of the Montevideo Convention, but the criteria are not a particularly useful tool if one tries to decide what the legal status of Kosovo is, why Bosnia-Herzegovina was a state in 1992, and what the legal status of Kosovo is today.

State-creation needs to be explained in another manner, not as an exercise in meeting the statehood criteria. The answer lies in the principle of territorial integrity. Somaliland is claiming independence in a part of the territory which is considered to be Somalia.<sup>38</sup> Somalia has been entirely ineffective for more than two decades, but still exists in law, at least as a legal fiction.<sup>39</sup> As long as it does exist in law, it is presumed that Somalia is protected

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<sup>34</sup> M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 EJIL 478, at 483.

<sup>35</sup> Convention on Rights and Duties of States (1933) art 1, 165 LNTS 19 [hereinafter Montevideo Convention].

<sup>36</sup> See J Crawford, *The Creation of States in International Law* (2nd edn., Oxford: OUP, 2006) at 415–17. *Ibid.* at 398.

<sup>37</sup> *Ibid.* at 398.

<sup>38</sup> See J Vidmar, *Democratic Statehood in International Law: The Emergence of New States in post-Cold War Practice* (Oxford: Hart, 2013) at 62.

<sup>39</sup> *Ibid.*

by the principle of territorial integrity and before Somalia's presumption of territorial integrity is overcome, Somaliland will not emerge as an independent state—regardless of whether it meets the Montevideo criteria—as there cannot be two overlapping states in a single territory. Kosovo has a similar problem to Serbia,<sup>40</sup> but Bosnia-Herzegovina in 1992 did not, because at the time it had become universally accepted that its parent state, the Socialist Federal Republic of Yugoslavia (SFRY), had ceased to exist.<sup>41</sup> There was no competing counter-claim to territorial integrity and Bosnia-Herzegovina emerged as a new state.<sup>42</sup>

Prior to the 2014 referendum on independence in Scotland, the UK waived its claim to territorial integrity and Scotland would become an independent state, had there been a yes vote.<sup>43</sup> Spain, on the other hand, opposes any independence attempts by Catalonia.<sup>44</sup> The counterclaim to territorial integrity is applicable and it is unlikely Catalonia would emerge as an independent state in such circumstances.

Rather than trying to explain state creation with a set of four descriptive criteria, it is more plausible to define state creation as a process of overcoming a counter-claim to territorial integrity. In fact, not only the creation of a new state, but any alteration of the legal status of a territory is a political process in which a counterclaim to territorial integrity needs to be overcome. In international affairs, one cannot explain every phenomenon simply by interpreting the rules of the game. Basketball also has its rules, but these rules do not tell us which team will win the game. It is the highest scoring team who wins and its points only count when played by the rules. Similarly, the law of statehood determines the rules of the process of state creation but states are created in a political game played within these rules. The law of statehood alone does not tell us how states emerge. State creation is an eminently political process which creates a new legal status by overcoming the hurdle of territorial integrity.

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<sup>40</sup> See UN Security Council Official Records, 63rd Session, 5839th meeting at 4-5, UN Doc S/PV.5839 (18 February 2008).

<sup>41</sup> J Vidmar, 'Territorial Integrity and the Law of Statehood', 44 *George Washington International Law Review* (2012) 101, at 132.

<sup>42</sup> *Ibid.*

<sup>43</sup> See 'Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland' (15 October 2012), at <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>. See also S Tierney, 'Referendums in the United Kingdom and the European Union: Challenging Federalism?'

<sup>44</sup> See 'Catalonia vote: 80% back independence – officials', BBC News (10 November 2014), at <http://www.bbc.com/news/world-europe-29982960>.

#### 4. Modes of removing a counterclaim to territorial integrity

International law accepts different ways of overcoming a counterclaim to territorial integrity. These can also be called “modes of state creation.” The easiest is that the parent state gives its consent to independence and thus waives the claim to territorial integrity. The situation is then clear and there is no doubt that a new state has emerged.<sup>45</sup> Another mode is a dissolution of the parent state where the predecessor state no longer exists. Since there is no state, there is no claim to territorial integrity, and the constitutive units of the dissolved state become states themselves. A good example is Czechoslovakia where both constitutive units emerged as new states. Again, this was a political process involving the political elites of both republics of Czechoslovakia. A dissolution is not always as friendly and clear-cut as Czechoslovakia was.

Yugoslavia and the Soviet Union were also examples of this mode of state creation, but these situations were more complicated than in Czechoslovakia. A thorough discussion of these events would fall beyond the scope of this paper.<sup>46</sup> Suffice to say that the international community as a whole accepted that the former socialist federations no longer existed, its international legal personality was dissolved, and in the absence of any competing authority, their former constitutive republics stepped into the multiple new shoes of legal personality and territorial sovereignty.<sup>47</sup>

Where a parent state either agrees to independence, or ceases to exist, independence becomes much more feasible. There is no counterclaim to territorial integrity and new states then need to fill the gap of sovereignty over a territory. In other situations, the parent state continues in existence and continues to oppose any aspirations for independence of its subunits. Any attempt at secession is then unilateral. Where a declaration of independence is unilateral, it is issued in the zone of international legal neutrality.<sup>48</sup> The Supreme Court of Canada held in the *Quebec case* that a unilateral declaration of independence could be made effective through recognition by foreign states<sup>49</sup> yet, foreign states are very rarely willing to grant widespread recognition to an entity unilaterally claiming independence. In the post-World War II era, only Bangladesh and Kosovo have received a significant number of recognitions on the basis of a unilateral

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<sup>45</sup> See Vidmar, *supra* note 38, at 710–16.

<sup>46</sup> For more see *ibid* at 719–23.

<sup>47</sup> *Ibid*.

<sup>48</sup> See *supra* note 26.

<sup>49</sup> *Ibid*.

claim<sup>50</sup> and even there exceptional—“remedial”—circumstances were claimed.<sup>51</sup> It is also of note that Kosovo has not been universally recognised and neither had Bangladesh before Pakistan extended its recognition.<sup>52</sup>

## 5. Delimitation

In the process of decolonisation, it was accepted that the principle of *uti possidetis* was applicable. According to the Chamber of the ICJ in the *Frontier Dispute case*:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions of colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>53</sup>

The *uti possidetis* principle has been heavily criticised, as it confined international borders along the lines of arbitrarily-drawn colonial boundaries.<sup>54</sup> Arguably, *uti possidetis* solved the Ivor Jennings dilemma and decided who the people is and did so on the basis of territoriality.<sup>55</sup> While the right of self-determination nominally applies to peoples, its application was primarily territorial, at least in the process of decolonisation.

The principle of *uti possidetis* became controversial again when the Badinter Commission applied it in the territory of the Socialist Federal Republic of Yugoslavia (SFRY).<sup>56</sup> Criticism came from two sides: (i) doctrinally, the principle of *uti possidetis* should not be applicable outside of colonialism, and (ii) practically, the Badinter Commission upgraded the arbitrary internal boundaries to the status of international borders.<sup>57</sup> In reality, the internal boundaries in the SFRY were not as arbitrary as most colonial

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<sup>50</sup> See Crawford, *supra* note 36, at 393.

<sup>51</sup> *Ibid.* See also Vidmar, *supra* note 38, at 162–66.

<sup>52</sup> *Ibid.* See also *supra* note 12.

<sup>53</sup> *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, ICJ Rep 1986, 566, para 23.

<sup>54</sup> S Ratner, ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90 AJIL 590, at 595.

<sup>55</sup> See *supra* note 15.

<sup>56</sup> The Badinter Commission, Opinion 3 (11 January 1992), 479.

<sup>57</sup> See generally T Bartoš, ‘Uti possidetis. Quo Vadis?’ (1997) 18 AUST YBIL 37.

boundaries had been and had a strong historic pedigree.<sup>58</sup> When new states are created, the latest internal boundary arrangement will serve as default presumption for the new international delimitation.<sup>59</sup>

An “upgrade” of internal boundaries to international borders can be problematic because internal boundaries are not established for the same purposes as international borders. Indeed, “[t]he core functional distinction between international borders and internal administrative boundaries lies in a critical antinomy: governments establish interstate boundaries to separate states and peoples, while they establish or recognize internal boundaries to unify and effectively govern a polity.”<sup>60</sup> For this reason internal administrative boundaries are not necessarily capable of determining the territory of a potentially independent state.<sup>61</sup>

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

In some cases [internal boundaries] are of relatively little importance; in others, such as is the case with federal states, they are of considerable significance. In many instances, such administrative borders have been changed by central government in a deliberate attempt to strengthen central control and weaken the growth of local power centres. In other cases, borders may have been shifted for more general reasons of promoting national unity or simply as a result of local pressures. In some states, such administrative borders can only be changed with the consent of the local province or state (in the subordinate sense) or unit. In some cases, internal lines are clear and of long standing. In others, they may be confused, of varying types and inconsistent.<sup>62</sup>

While some internal boundaries may be established for purely administrative purposes, others have a strong historical basis and even delimit self-determination units. Not all internal boundaries are merely administrative lines, reminiscent of colonial delimitation. The internal organisation of a multiethnic state, composed of delimited subunits,

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<sup>58</sup> See Vidmar, *supra* note 38, at 225–29.

<sup>59</sup> See S Lalonde, ‘Québec’s Boundaries in the Event of Secession’ (2003) 7 *Macquarie LJ* 129.

<sup>60</sup> Ratner, *supra* note 54, at 602.

<sup>61</sup> *Ibid.*

<sup>62</sup> Shaw, *supra* note 31, at 489.

may be an arrangement for the exercise of the right of self-determination internally.<sup>63</sup> Federalism is one such possibility, although this is not always the case.

Moreover, the historical roots of an internal boundary do not necessarily constitute a self-determination unit. Borders between English counties have a long history<sup>64</sup> but the population of Oxfordshire, for example, clearly does not constitute a people for the purpose of the right of self-determination. On the other hand, the internal boundary between England and Scotland is not merely administrative. Not only does it have a strong historical pedigree, there is also no doubt that the right of self-determination is applicable to the Scottish people and that Scotland is a self-determination unit.<sup>65</sup> In the case of the independence of Scotland, the international border of this state would be easy to ascertain.<sup>66</sup>

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

As the right of self-determination is very important for a plausible independence claim, the answer needs to be sought in its context. Arguably, a group of people to whom the right of self-determination does not apply cannot make a plausible claim for secession

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<sup>63</sup> Ibid.

<sup>64</sup> For more on the background on English counties see A Vision of Britain through Time, at <[http://www.visionofbritain.org.uk/types/level\\_page.jsp?unit\\_level=4](http://www.visionofbritain.org.uk/types/level_page.jsp?unit_level=4)>.

<sup>65</sup> Consider the following argument: “Scotland is a curious example of a sub-state national society in that, on the one hand, it is a former nation-state, indeed one of the oldest in Europe, but on the other, it is difficult to attribute points of clear objective distinction in terms of language, religion or ethnicity between Scotland and England ... Scotland’s claim to societal discreteness is, therefore, largely based upon the historical development of indigenous institutions of civic and public life which emerged when Scotland was an independent state and which, to some extent, survived the Union of Parliaments with England in 1707.” S Tierney, *Constitutional Law and National Pluralism* (OUP, Oxford 2006) 71.

from their parent state, and it is unlikely that their claim would trigger a political process possibly leading toward independence. As follows from the wording of the right of self-determination, this right only applies to peoples.<sup>67</sup> A claim for elevating internal boundaries to international borders will be much more plausible where such boundaries delimit a self-determination unit (i.e., a territory populated by a distinct people), which is separate from either the rest of a parent-state or from other self-determination units within a parent-state.

While in colonialism, *uti possidetis* territorially defined peoples, it is arguable that in noncolonial situations we have a combination of both approaches: peoples and territories. The identity of a separate people identifies a self-determination unit, while that unit is delimited by a preexisting internal boundary arrangement. Naturally, the borders of the new state will not be entirely fair and they will not create mono-ethnic nation states without any ethnic, linguistic, or religious minorities. But virtually no existing boundaries in the world do that; mono-ethnic nation states do not exist in practice. For better or worse, a mono-ethnic nation state without any minorities should not be set as standard where new states are created and delimited. As states with precise and entirely just boundaries do not exist in practice, why are new states sometimes held to a higher standard?<sup>68</sup>

### III. Territorial illegality and the concept of the state

Thus far, it has been argued that states emerge in a political process and in the zone of international legal neutrality without there being an entitlement to or prohibition of unilateral secession. This section considers the circumstances in which secession does lead to territorial illegality. In turn, the concept of the state will be explained to understand the legal framework regulating the emergence of new states and the exercise of the right of self-determination.

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<sup>67</sup> International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 1.

<sup>68</sup> Cf. P Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission' (2000) 24 MELB UNI LR 50.



## 1. Illegality of declarations of independence

International law is neutral with regard to the unilateral character of a declaration of independence, but this does not mean it is neutral in all circumstances. In the *Kosovo Advisory Opinion*, the ICJ made the following very powerful pronouncement:

[T]he illegality attached to [some other] declarations of independence [...] 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*).<sup>69</sup>

The ICJ here establishes a clear distinction between those declarations of independence that are merely unilateral and those that are illegal due to a breach of a particularly strong norm of international law. Historically, illegal declarations of independence were issued by Southern Rhodesia, the South African Homeland States, and Northern Cyprus.<sup>70</sup> These declarations were not only unilateral, but also backed by foreign military force, or issued in pursuance of racial discrimination which is what made them illegal. More recently, Crimea also issued one of those declarations of independence where international law was not neutral. The declaration was marked by illegality not because Ukraine did not agree or because it was against the Constitution of Ukraine; the illegality stems from Russia's military involvement.<sup>71</sup>

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<sup>69</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, ICJ Rep 2010, para 81.

<sup>70</sup> For collective responses in these situations see (Northern Cyprus): SC Res 541 (18 November 1983), Southern Rhodesia): GA Res 1747 (XVI) (27 June 1962), SC Res 202 (6 May 1965), GA Res 2022 (XX) (5 November 1965), GA Res 2024 (XX) (11 November 1965), SC Res 216 (12 November 1965), SC Res 217 (20 November 1965), SC Res 277 (18 March 1970); (the South African Homelands): GA Res 2671F (8 December 1970), GA Res 2775 (29 November 1971), GA Res 31/6A (26 October 1976), GA Res 402 (22 December 1976), GA Res 407 (25 May 1977), GA Res 32/105 N (14 December 1977), GA Res 34/93 G (12 December 1979), GA Res 37/43 (3 December 1982), GA Res 37/69A (9 December 1982).

<sup>71</sup> N Krisch, 'Crimea and the Limits of International Law', EJIL Talk! (10 March 2014), at <http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/>; A Sari, 'Ukraine Insta-Symposium: When does the Breach of a Status of Forces Agreement amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA', *Opinio Juris* (6 March 2014), at [www.opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/](http://www.opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/)

Under Article 41 of ILC Articles on State Responsibility, all states need to withhold recognition of such a situation.<sup>72</sup> This is an obligation owed *erga omnes*, that is, toward everyone in the international community. Foreign states are now under the obligation to withhold recognition of the shift of territorial sovereignty over Crimea. This territory may well be incorporated into Russia in fact, but it is not in law. Law and fact, however, do not always overlap and the law of statehood can resort to a legal fiction. Earlier, it was argued that Somalia exists as a legal fiction. Somewhat similarly, a legal fiction is also that Crimea is still a part of Ukraine.

Such precedents exist in international law and the closest analogy is Northern Cyprus. Formally, Northern Cyprus claims that it is an independent state, but it functions as a puppet state of Turkey.<sup>73</sup> The rest of the world sees Northern Cyprus as a part of Cyprus and the state is even an EU member as a whole.<sup>74</sup> Just like in Cyprus, there will likely be a long-term discrepancy between law and fact in Crimea.<sup>75</sup>

As an illegal occupying power, Russia even has some duties under international law in the administration of Crimea when it comes to the so-called private rights.<sup>76</sup> Despite the territorial illegality, in Crimea people are still born and people still die, they get married and they get divorced, and they conclude property transaction agreements. In other words, life goes on, and Russian authorities now have the duty to perform administrative tasks, such as issuing birth, death, and marriage certificates, divorce orders, and update the land books.<sup>77</sup> Any effective authority, no matter how illegal, has an obligation under international law to administer the territory in these aspects of social life. This was affirmed even by the ICJ in the *Namibia Advisory Opinion*.<sup>78</sup> These responsibilities

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<sup>72</sup> International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts, Article 41 (UN Doc A/RES/56/83, 28 January 2002) [hereinafter: ILC Articles on State Responsibility].

<sup>73</sup> See Raič, *supra* note 17, at 151–58.

<sup>74</sup> See European Union: Cyprus, available at [http://europa.eu/about-eu/countries/member-countries/cyprus/index\\_en.htm](http://europa.eu/about-eu/countries/member-countries/cyprus/index_en.htm).

<sup>75</sup> Cf *supra* notes 8 and 9.

<sup>76</sup> Cf E Milano, *Unlawful Territorial Situations in International Law* (Leiden: Nijhoff, 2006) at 141.

<sup>77</sup> See, e.g. S 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 C Tomuschat and J-M Thouvenin, *The Fundamental Rules of the International Legal Order* (Leiden, Nijhoff, 2006) 99, at 117.

<sup>78</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep 1971, at 16 (The Namibia Advisory Opinion).

that Russia now has in Crimea, however, in no way “cure” the underlying territorial illegality: that is, the shift in territorial sovereignty by an outside use of force.

## 2. Conceptualizing the state

The process of state creation cannot be explained adequately without clarifying the concept of the state in international law. It has been pointed out above that the Montevideo criteria for statehood have proved to be inadequate in practice and have neither statehood-creating nor statehood-denying effects. The criteria are nevertheless widely considered to form a part of customary international law.<sup>79</sup> Norms of customary international law, however, need to be precisely that—legal norms. As such, they need to be prescriptive, not merely a descriptive account of how more or less all states look like, more or less. The fundamental question that arises here is what the legal status of statehood is in international law.

Historically, some theorists saw states as natural persons, comparable to humans in a municipal legal order.<sup>80</sup> Others have pointed out, however, that states are not “naturally born” creatures but rather legally-created entities.<sup>81</sup> As such, their legal status is comparable to that of corporations rather than humans in a municipal system. A state has its natural component, of course: a territory. The Montevideo requirement for a defined territory presumes that legal status rather than any natural fact needs to be determined here. When a person is born, that person exists naturally regardless of whether or not their birth certificate is ever issued. If it is not, the person may encounter severe legal problems, but this person nevertheless exists physically. It is different with states. The question is not whether or not a territory exists but rather what the territory’s legal status is. Statehood is that legal status. Where competing claims exist (e.g., Kosovo),<sup>82</sup> the legal status can be contested and even ambiguous. However, even in municipal law, legal status can sometimes be ambiguous and international lawyers should accept that in some borderline examples statehood cannot be objectivized and may be clarified only after a period of time.

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<sup>79</sup> M Dixon, R McCorquodale and S Williams, *Cases and Materials in International Law*, (OUP: Oxford, 2011) at 158.

<sup>80</sup> G Jellinek, *Allgemeine Staatslehre* (2nd edn, O. Häring, Berlin 1905) at 17.

<sup>81</sup> H Lauterpacht, *Recognition in International Law* (CUP: Cambridge, 1948) at 38.

<sup>82</sup> See *supra* note 40.

As states are not naturally born creatures, it remains to be answered where states are grounded in international law. If one is not prepared to accept the natural or even metaphysic theories of statehood, this status needs to be based on the sources of international law, as enumerated in Article 38(1), ICJ Statute. Sometimes, states are created by international treaties (e.g., Austria) and<sup>83</sup> in other examples, the existence of a state is accepted by other states in a less explicit way, but in practice they clearly indicate that they are accepting a certain entity as a separate state. The approach is evidently the same as for the formation of rules of customary international law which requires a uniform (although not universal) state practice and *opinio juris*.<sup>84</sup> Statehood is quite simply legal status under customary international law. Statehood criteria is not customary; it is statehood itself.

While recognition of states is not a constitutive act,<sup>85</sup> it can be indicative of state practice and *opinio juris*. Even those writers who defend the declaratory theory of recognition admit that universal or near universal recognition could have the effects of collective state creation.<sup>86</sup> Indeed, (near) universal recognition would be indicative of uniform state practice and *opinio juris* that a certain entity exists as a state in customary international law. At the same time, recognition is only one mode of expression of state practice and *opinio juris*. There are examples where states refused to recognise but nevertheless treated an entity as a state.<sup>87</sup>

#### IV. Secession and the EU

Some recent developments have raised the problem of secession from an EU member state and “secession” from the EU. Three questions will be considered in turn: (i) Can the new state continue as an EU member if it secedes from an EU member state?; (ii) What happens with EU citizenship rights in a case of secession within the EU?; (iii) What happens with EU citizenship rights in a case of “secession” from the EU?

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<sup>83</sup> See ‘Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, The Official Gazette of the Republic of Austria’ (30 July 1955), at [https://www.ris.bka.gv.at/Dokumente/BgblPdf/1955\\_152\\_0/1955\\_152\\_0.pdf](https://www.ris.bka.gv.at/Dokumente/BgblPdf/1955_152_0/1955_152_0.pdf)

<sup>84</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ, Judgment of 27 June 1986, para 188.

<sup>85</sup> See Dixon, McCorquodale and Williams, *supra* note 79, at 158.

<sup>86</sup> Crawford, *supra* note 36, at 501.

<sup>87</sup> See M Craven, ‘What’s in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood’, (1995) 16 *Australian Yearbook of International Law* 199 at 199–200.

## 1. Secession and EU membership

Prior to the Scottish independence referendum, Professors Alan Boyle and James Crawford drafted an expert opinion in which they argued that an independent Scotland would become a new state (without an automatic EU membership), while the rump UK would continue the UK's present international personality, including EU membership.<sup>88</sup> This argument is doctrinally sound. Unlike in the case of dissolution (e.g., SFRY),<sup>89</sup> it is inherent to secession that the rump state continues its international personality, while the seceded entity becomes a new person in international law.

While new states do not begin with an entirely clean slate and may inherit the obligations arising under customary international law as well as the predecessor's obligations under international treaties of humanitarian and human rights character, it is generally accepted that there is no automatic accession to treaties of an institutional character.<sup>90</sup> This would apply to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Even if the entity is already an EU territory as a part of a larger state, it does not automatically become an EU member state in its own right upon independence.

New states join the EU pursuant to Article 49 TEU, which in its core parts provides that:

Any European State [...] may apply to become a member of the Union [...] The conditions of admission [...] shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by *all* the contracting States in accordance with their respective constitutional requirements.<sup>91</sup>

The EU admission process requires unanimity which means that each existing member state can veto any EU expansion. It is arguable that in a case of secession from an

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<sup>88</sup> See Referendum on the Independence of Scotland – International Law Aspects (Opinion drafted by Alan Boyle and James Crawford) (2013) [hereinafter: The Boyle/Crawford Report], Part V, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf)

<sup>89</sup> Cf. supra note 41.

<sup>90</sup> See A Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?', 14 EJIL (2003) 141. See also The Boyle/Crawford Report, paras 134–142.

<sup>91</sup> Treaty on European Union (TEU), Article 49 (emphasis added).

EU member state, the new state could perhaps bypass Article 49. Unlike “regular” new members, an entity seceding from an EU member state has already been an EU territory and, as such, subjected to EU law. This argument certainly does have some merit and cannot be dismissed *prima facie*. Changes would nevertheless need to be made to the TEU and TFEU to reflect the fact that the EU had a new member and that one of the members had become a smaller state. This could be done by treaty revision pursuant to Article 48 TEU.

Article 48 TEU provides that, “the Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties.”<sup>92</sup> It is arguable that any EU member state could propose a treaty revision to reflect that one EU member state has split into two EU member states. The new state could thus stay in the EU rather than join it. The appeal of the Article 48 procedure for the new state is exactly in that it means staying in the EU rather than joining it anew. However, Article 48 further provides that, “[t]he amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.”<sup>93</sup> Even Article 48 requires unanimity and the mighty sword of the veto power remains in place.

As the UK accepted the Scottish vote whatever the outcome, it was not to be expected that it would try to obstruct Scotland’s EU membership. This might not be the case where a new state emerged against the wishes of its parent state. Even if Catalonia were to become independent without reaching a political agreement with Spain, Catalonia could still face Spanish veto if it sought EU membership. However, if a political agreement with Spain were reached, it would be, in principle, legally possible for Catalonia to stay in the EU via Article 48 (treaty revision) rather than Article 49 (new membership).

## 2. “Secession” from the EU

Since 2009, TEU gives EU member states the specific right to exit the EU. Article 50(1) provides: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”<sup>94</sup> TEU specifies the right to exit

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<sup>92</sup> TEU, Article 48(2).

<sup>93</sup> Ibid., Article 48(4).

<sup>94</sup> TEU, Article 50(1).

in rather general terms. It refers to a member state which “decides to exit” but does not specify how such a decision is to be made domestically. Article 50 TEU further stipulates for a period of time in which the exact modalities and the future relationship are to be negotiated between the EU and the exiting state. In this context, Article 50(3) TEU provides that the “Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”<sup>95</sup>

In other words, Article 50 provides for legal automaticity and a withdrawal cannot be prevented by a failure of negotiations. In this respect, EU law is now different from most domestic legal systems and allows for a unilateral withdrawal of one of its constitutive units. EU law, however, does not specify any procedural requirements for a legitimate exit decision, nor does it regulate the legal consequences of an exit for certain categories of EU citizens. Furthermore, the only precedent for an EU exit is that of Greenland and differed crucially from the UK’s experience, as Greenland is a Danish territory, not an independent state. It was only a self-governing territory within an EU member state which left the Union, not a member state as a whole, and the residents of Greenland remained EU citizens by virtue of their Danish nationality.

On 29 March 2017, the United Kingdom (UK) triggered the mechanism to exit the EU pursuant to Article 50 TEU. In her letter to the President of the European Council, Donald Tusk, UK Prime Minister Theresa May stated: “On 23 June last year [2016], the people of the United Kingdom voted to leave the European Union.” Formally speaking, the referendum was not legally binding and it was policy choice rather than legal obligation to trigger Article 50. As such, Brexit is an uncharted territory and Article 50 foresees political negotiations rather than legal certainty.

Pursuant to Article 20 TFEU, EU citizenship is derived from citizenship of a member state.<sup>96</sup> This means that EU citizenship rights will be lost for UK citizens and, at the same time, EU citizenship will no longer generate any free movement rights in the UK. A similar effect could be achieved, however, through a Swiss-like set of agreements between the UK and EU member states.<sup>97</sup> But this again remains in the realm of political negotiations.

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<sup>95</sup> Ibid. Article 50(2).

<sup>96</sup> Treaty on the Functioning of the European Union (TFEU), Article 20.

<sup>97</sup> For a detailed analysis see J Vidmar and C Eggett, Brexit: Is everything going to change in law, so that very little would change in fact?, EJIL Talk (27 June 2016), at <https://www.ejiltalk.org/author/vidmarandceggett/>

## V. Conclusion

There is no right to secession in international law. The right of self-determination is not an absolute entitlement, not even where “remedial” grounds for secession may well exist. Self-determination is limited by the principle of territorial integrity of states. State creation is a process of overcoming a competing claim to territorial integrity. This process is political in nature and may or may not lead to the creation of the legal status of statehood under customary international law. A democratic expression of the will of the people at an independence referendum, at best, creates the obligation on both sides to negotiate a future legal status of the territory but there should be no presumption that such negotiations need to lead to independence. The outcome could well be a higher level of autonomy.

Even if an entity secedes from an EU member state, that entity does not automatically become an EU member state in its own right. Even if the newly independent state of this kind were able to avoid the standard admission procedure of Article 49 TEU, it would still be subjected to the treaty revision procedure of Article 48 TEU. And Article 48, just like Article 49, foresees decision making by unanimity. In other words, “Route 48” and “Route 49” toward EU membership both contain the veto hurdle. Even if Catalonia, for instance, managed to emerge without reaching a political agreement with its parent state, it could still face Spanish veto should it seek EU membership.

The unilateral path to independence is virtually never successful in contemporary practice. The reason for this is political rather than legal. International law does not prohibit unilateral secession. But neither does international law make unilateral secession an entitlement. In other words, international law does not grant peoples or their territories a right to independence: international law is neutral on the question of unilateral secession. The legal neutrality, however, makes the territorial status quo a default setting. The independence-seeking entity has the burden of shifting the territorial status quo with political means and since there is no legal entitlement to this effect, shifting the territorial status quo is a very difficult job: not illegal, but nevertheless politically difficult to accomplish.

Some comparative constitutional developments may be more significant than international legal regulation. As noted in the Quebec case, in a constitutional democracy the will of the people in favour of independence cannot be ignored. It is arguable that the central government at least has the duty to negotiate, but so does the independence-seeking side which needs to be prepared to compromise. Neither international law nor comparative constitutional practice define or interpret the will of the people as an absolute entitlement when it comes to decision making on territorial matters.



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# Euborders

SOVEREIGNTY & SELF-DETERMINATION



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