Introduction

Secession: Final Frontier for International Law or Site of *Realpolitik* Revival?

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I. Introduction

In its opinion regarding the legality of the secession of Quebec, the Supreme Court of Canada observed that 'the process of [state] recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms.'[1] Mindful of the principle of effectivity, the Court was cautious not to overstate the bounds of legal authority in matters of secession.[2] Nevertheless, the acknowledgement of international law as a constitutive element of state behaviour in matters relating to secession marks a significant departure from conventional *realpolitik* accounts, wherein 'successful revolution begets its own legality.'[3]

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[1] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 143.

[2] One of the tenets of classical international law, the principle of effectivity privileges the territorial situation over appeals to legality. See Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Hampshire: Ashgate, 2008) at 151.

[3] Stanley A. de Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 West. Ont. L. Rev. 93 at 96.

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The Quebec secession reference illuminates the changing dynamics of secession in the post-Cold War era and the growing relevance of international law for political order in the twenty-first century. Appeals to international law have been a mainstay in the political rhetoric of almost every party to secessionist conflict over the past two decades, reflecting the tacit expectation that law should provide a normative framework for secession. Although for decades international law has been applied in the adjudication of independence for colonies, it is increasingly being invoked outside the context of salt-water decolonization.

The rising frequency with which international law is referenced both by secessionist movements and their detractors complicates the legal positivist claim that secession is a purely political matter and, as such, is outside the domain of law.[4] It also mounts a direct challenge to mainstream theories of International Relations, particularly realism, wherein international law is viewed as epiphenomenal to power politics. In the words of Hans Morgenthau, 'Where there is neither a community of interest nor balance of power, there is no international law.'[5] For realists, international law is merely a reflection of the political interests of powerful states and secession is therefore possible only when said interests coalesce with those of separatists or revolutionaries.[6]

Both the realist and the more traditional or conservative legal positivist perspectives assert that unilateral secession cannot be understood as the exercise of an *a priori* legal right or norm; international law merely acknowledges *de facto* political processes that result in the creation or dissolution of states. However, developments in recent cases of secession call this assertion into question. Most prominent among said developments is the uptake of secession within rights discourses, wherein unilateral secession has been posited by Allen Buchanan and other liberal theorists as

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[4] See James Crawford, *The Creation of States in International Law*, 2d ed. (Oxford: Clarendon Press, 2006) at 390, in which Crawford argues that 'secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be regulated internationally.'

[5] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 6th ed. (New York: McGraw-Hill, 1985) at 296.

[6] A similar claim can be made with respect to neoliberal institutionalism, which, along with neorealism, makes up the dominant structural approach to international relations. Like neorealism, neoliberal institutionalism is a rationalist theory in which self-satiated states seek to maximize their utility given exogenously-defined preferences. 'International law, from this perspective, is seen as a set of functional rules promulgated to solve co-operation problems under anarchy.' Christian Reus-Smit, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) at 15 [Reus-Smit].

'the remedy of last resort in conditions in which [a] group is the victim of persistent violations of important rights of its members.'[7] Though the concept remedial secession has broad support in the legal literature, its roots in positive international law are contested. Karen Knop interprets the language of non-discrimination in the United Nations *Friendly Relations Declaration*[8] as offering 'some support to the view of secession as the remedy of last resort for gross inequality of treatment,'[9] but doubts remain as to whether the right to self-determination can be used to legally contravene the territorial integrity norm.[10]

Debates pertaining to the interpretation of laws do little to detract from evidence alluding to the increasing relevance of international legal norms in cases of secession. Indeed it has become customary in recent cases of secession for parties to appeal to international law in an effort to legitimize positions for and against unilateral secession.[11] Furthermore, the request

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[7] Allen Buchanan & Margaret Moore, *States, Nations and Borders: the Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) at 247. For more on remedial right-only theories see Allen Buchanan, 'Theories of Secession' (1997) 26 Phil. & Pub. Aff. 31; Allen Buchanan, *Secession: The Morality of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991). For support of secession in broader liberal theory, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 186, where he argues that 'perhaps we should be more willing to consider secession... It is difficult to see why liberals should automatically oppose such peaceful, liberal secessions. After all, liberalism is fundamentally concerned, not with the fate of states, but with the freedom and well-being of individuals, and secession need not harm individual rights.'

[8] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, GA Res 2625, UN GAOR, 25th Sess., Supp No 28, UN Doc A/8028 (1970).

[9] Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 77 [Knop].

[10] The *Declaration on Friendly Relations* notes that the right to self-determination cannot violate the principle of territorial integrity, which prohibits succession but not decolonization. See Knop, *ibid.* at 75.

[11] In the case of the unilateral declaration of independence of Kosovo by the Provisional Institutions of Self-Government of Kosovo on 17 February 2008, both Russia and Serbia condemned the actions of the PISG primarily on the grounds that they were illegal under international law and a violation of UNSC Resolution 1244 on the deployment of international civil and security presences in Kosovo; see Luke Harding, 'Kosovo breakaway illegal, says Putin,' *The Guardian* (15 February 2008), online: The Guardian <http://www.guardian.co.uk/world/2008/feb/15/russia.kosovo> and 'Kosovo Declares Independence from Serbia,' *Agence France Presse* (17 February 2008), online: Radio Free Europe <http://www.rferl.org/content/article/1079493.html>. The European Union offered a legal counterargument justifying its recognition and support of an independent Kosovar state; see Paul Reynolds, 'Legal furor over Kosovo recognition,' *BBC News* (16 February 2008), online: BBC News <http://news.bbc.co.uk/2/hi/europe/7244538.stm> [BBC]. Furthermore, in his statement recognizing the independence of South Ossetia and Abkhazia, Russian President Dmitry Medvedev cited international law as his justification, writing that 'being guided by the provisions of the UN Charter, the 1970 *Declaration*

made by the General Assembly in 2008 for an advisory opinion from the International Court of Justice regarding the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo marks the first time the ICJ has been asked to rule on the legality of a unilateral act of secession.[12] These facts suggest that, contrary to the claims of realism and legal positivism, international law is no longer epiphenomenal or neutral towards unilateral secession: when it comes to secession in the twenty-first century, international law matters. Specifying how, in which context, and to what extent it matters is the aim of this special issue.

II. International Law and the Politics of Secession

The evidence marshalled in support of international law is dismissed rather uncritically by those who privilege state power and interests as the sole determinants of secession. The arguments proffered by advocates of this perspective include the assumption that the ICJ advisory opinion on Kosovo's declaration of independence will likely have little impact on the recognition of Kosovo and that appeals to international law are commonly characterized as a last resort in the rhetorical caché of weak states. But these perspectives fail to capture the nuances of interests, specifically that:

> Treaties, like other legal arrangements, are artifacts of political choice and social existence. The process by which they are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states.[13]

Even if state actions were reducible to interest-based utility calculations, compliance with international law is not a one-shot game. For a state to violate commitments to which it was legally bound (even if only by virtue of its own consent) would be to incur costs in the form of sanctions for non-

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on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence'; Dmitry Medvedev, 'Statement by President of Russia Dmitry Medvedev, 26 August 2008,' (Moscow: President of Russia), online at <http://eng.kremlin.ru/speeches/2008/08/26/1543_type82912_205752.shtml>.

[12] See *Request for Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, 8 October 2008, online: International Court of Justice <http://www.icj-cij.org/docket/files/141/14799.pdf?PHPSESSID=a9e732ae9a6326850edafa38f49f9ce9>; *Kosova Declaration of Independence*, 17 February 2008, online: Republic of Kosovo Assembly <www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> [*Kosova Declaration*].

[13] Abram Chayes & Antonia Handler Chayes, 'On Compliance' (1993) 47 Int'l Org. 175 at 180.

compliance or forfeit potential future returns by compromising the integrity of an international agreement so as to render it ineffectual, thus precluding the state from leveraging said agreement to its benefit in the future. This is in large part the rationalist justification for Louis Henkin's aphorism that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[14] Of course, this argument is more complicated when it comes to secession because, for realists, sovereignty is paramount to all other interests. Accordingly, states will always defect when sovereignty is at stake.

Secession is therefore not only a topical lens with which to examine the interaction of law and politics in contemporary global affairs, but a significant test of the pervasiveness of international legal norms in the contemporary world order. Although a rich line of scholarly inquiry has emerged on the dialogical relationship between international law and international relations in the post-Cold War regime,[15] secession has largely remained a sacred cow for realists, leaving its status as a purely political domain virtually unchallenged in the IR literature. As such, secession is a secure fallback for realists as their positions increasingly come under fire from nascent constructivist approaches.[16] Far from downplaying the role of power, these approaches look beyond its raw materialist dimensions. The late Thomas Franck, for example, viewed power through the lens of legitimacy, observing that the rules of the international system 'display authority *in themselves*, which is to say that they are obeyed despite the fact that the system has no sovereign and no gendarmes.'[17] Franck attributed this 'compliance-pull' to the perceived legitimacy of a given rule and not to a coercive authority.

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[14] Louis Henkin, *How Nations Behave*, 2d ed. (New York: Columbia University Press, 1979) at 47.
[15] See, for example, Michael Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000); Kal Raustiala & Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes *et al*., eds., *Handbook of International Relations* (London: Sage, 2002) 538; David Armstrong, Theo Farrell & Hélène Lambert, *International Law and International Relations* (Cambridge: Cambridge University Press, 2007); Beth A. Simmons & Richard H. Steinberg, *International Law and International Relations* (Cambridge: Cambridge University Press, 2006); Thomas J. Biersteker *et al*., eds., *International Law and International Relations: Bridging Theory and Practice* (London: Routledge, 2007); Friedrich Kratochwil, 'The "Legalization" of World Politics?' (2003) 16 Leiden J. Int'l Law 878; Reus-Smit, *supra* note 6.
[16] *cf* Friedrich Kratochwil, *Rules, Norms, and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) [Franck]; Jutta Brunnée & Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2001) 39 Colum. J. Transnat'l L. 19.
[17] Franck, *ibid.* at 27 [Emphasis in original].

Cognizant of both the present and potential future limitations of international law as they pertain to secession in an anarchical system, this special issue does not seek to unseat power as a basic causal variable in any analysis of secession. Instead it seeks to bring the rather insular discussion on secession into a dialogue with paradigm-shifting developments in the broader IL/IR discourse. The contribution of such an endeavour is multifold. First, secession offers a platform with which to test emergent ideas about the limits and possibilities of international law. Second, it provides a focal point for critical interrogation of the dominant paradigms in both International Law and International Relations. Third, it compels us to ask, à la Martha Finnemore, of what is secession an instance?[18] Is it purely power politics or have international legal norms become sufficiently pervasive as to condition the behaviour of states even in matters directly related to sovereignty?[19] Is legality a necessary or a sufficient condition (if either) for the legitimacy of secession in the twenty-first century? Finally, if international law can indeed assume some normative or regulatory function with respect to secession, its sources, form and prospects merit analysis. These debates and questions are taken on by the contributors to this issue.

III. Contributions on Secession

Perhaps the most ambitious and controversial agenda for international law in this special issue is that set out by *Thomas Grant*, who argues that the United Nations can and should act as arbiter of state succession. Although recognition of the newly created state by the international community as a requisite component in the legality of secession remains in dispute (due to its omission in direct terms from the Montevideo Convention and ergo the classical legal criteria for statehood), in political terms its necessity is almost universally accepted. As membership in the UN General Assembly is the preeminent signifier of international recognition of statehood, the UN can leverage substantial power insofar as it confers legitimacy on newly created states. Grant contends that the UN has not marshalled this power effectively and that, by extending the provisions of decolonization in the *Charter* so as to play a more active role in determining admission to the General Assembly, the UN could assume a regulatory function in future cases of secession.

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[18] Finnemore refers to 'of what is this an instance?' as 'the standard social science question' that drives her research in Martha Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force* (New York: Cornell University Press, 2003) at 12.

[19] This assumes that until now international legal norms have not been pervasive in the postwar international regime, but one might argue that the territorial integrity norm has been a defining feature of said regime.

In keeping with the theme of regulating secession through law, *Miodrag Jovanović* makes a case for embedding a clause on secession in national constitutions. Certainly as a means of avoiding violent conflict related to secession, Jovanović can marshal substantial empirical backing. The secession of Norway from the Kingdom of Sweden in 1905 was justified under the auspices of constitutional law. The Norwegian boycott of the Union cabinet prevented the king of Sweden from performing his constitutional duty to appoint a government for Norway, resulting in the 7 June 1905 proclamation by the Norwegian parliament that 'the union with Sweden under one king is dissolved in consequence of the king's ceasing to function as King of Norway.'[20] Furthermore, the 1991 secessions of Latvia and then Estonia from the Union of Soviet Socialist Republics—as well as the relatively peaceful secession of the twelve remaining republics (with the notable exceptions of Georgia and Azerbaijan)—ostensibly adhered to Article 72 of the USSR Constitution, which 'granted each union republic (but no other sub-federal unit) the right "to freely secede" from the federation.'[21]

In order to make his case, however, Jovanović must contend with the arguments that the constitutionalization of secession is inimical to national constitutional law and irreconcilable with liberal-democratic constitutionalism. He addresses both arguments with a view to setting the parameters for constitutionalizing secession, namely that a minimal liberal-democratic setting would need to be in effect.

It is hardly surprising that Kosovo's unilateral declaration of independence commands a formidable presence in this special issue. Kosovo's secession from Serbia has been mobilized in both scholarly and public discourses to support conventional *realpolitik* approaches to world politics, wherein the actions taken by the Provisional Institutions of Self-Government were possible only as a result of its political and military support from the European Union. These views notwithstanding, both the PISG and the EU sought to justify their respective positions in accordance with international law. In its declaration of independence, the PISG affirmed its intention to 'act consistent with principles of international law.'[22] The EU memorandum on Resolution 1244 went so far as to claim that 'once an entity has emerged as a state in the sense of international law, a political decision

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[20] Cited in Aleksandar Pavokić & Peter Radan, *Creating New States: Theory and Practice of Secession* (Hampshire: Ashgate, 2007) at 72. It should be noted that Allen Buchanan refers to this as a case of consensual, not constitutional secession.

[21] *Ibid.* at 131.

[22] *Kosova Declaration*, *supra* note 12.

can be taken to recognise it.'[23] This statement not only offered a legal justification for the EU's recognition of Kosovo as a sovereign state, but a political statement about the centrality of international law to matters of secession. To that end, as James Mayall argues,

> [t]he Kosovo crisis exposed the sharp conflict between those who view international society within a legalist paradigm and those who insist on the primacy of politics. This dispute is not about the importance of the rule of law to international society but about whether it is to be the servant or master of the state.[24]

In either case, Kosovo's secession may have wide-ranging implications. Already the political repercussions have included Russia's recognition of the independence of South Ossetia and Abkhazia from Georgia and the ensuing military conflict. The consequences for international law rest in large part on the upcoming ICJ advisory opinion on Kosovo, which many see as an opportunity to clarify the rules around secession—including the contemporary relevance of the Montevideo conventions and the role of recognition by the international community in affirming statehood.

Of course, much of the international controversy over Kosovo's secession stems predominately from its challenge to the territorial integrity norm and thus its potential precedent for secessionist movements around the world. Both the PISG and international community members supportive of Kosovar independence strategically invoked the idea that Kosovo, by virtue of its status as a 'special case', should not be considered as precedent in either political or legal domains.[25] This has done little, however, to satisfy questions or quell concerns regarding the ramifications of Kosovo's secession.

Among the possible ramifications of Kosovo's secession is the effect, if any, it may have on the prospects for Palestinian unilateral independence—an issue taken up by *Zohar Nevo and Tamar Megiddo*. They explore

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[23] BBC, *supra* note 11.

[24] James Mayall, 'The Concept of Humanitarian Intervention Revisited' in Mary Buckley & Sally N. Cummings, eds., *Kosovo: Perceptions of War and its Aftermath* (New York: Continuum, 2001) 274 at 274.

[25] The Kosovo Declaration of Independence notes that 'Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,' *Kosova Declaration*, *supra* note 12. The notion of Kosovo as a 'special case' was a mainstay in the rhetoric of supporters of Kosovar secession. An open letter authored by ten former foreign ministers from North America and Europe twice emphasized that 'Kosovo is a unique situation' and 'should not create a precedent for other unresolved conflicts,' Madeline Albright *et al*., 'Kosovo must be independent,' *New York Times* (15 June 2007), online at New York Times <http://www.nytimes.com/2007/06/15/opinion/15iht-edkosov.1.6153178.html>.

developments in the international law of statehood over the last century and offer an assessment of the degree to which the Kosovo case meets the classical legal requirements for statehood. Arguing that Kosovo does not meet said criteria, Nevo and Megiddo endeavour to unpack the analogies between Kosovo and Palestine, with the understanding that the latter also fails to meet the classical criteria for statehood.

Nino Kemoklidze draws on the Kosovo case in order to develop a cost-benefit analysis of recognizing a right to secession. She suggests that the moral hazard inherent in the international recognition of unilateral secession may in fact exacerbate violence against ethnic minorities and further destabilize already volatile regions. Her findings lend further support to an already burgeoning literature eschewing secession as a means to resolve ethnic conflict, which itself builds on Boutros Boutros-Ghali's assertion that 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.'[26]

The case against enshrining a right to secede in international law is also advocated by Donald Horowitz, who argues that secession

> does not create the homogenous successor states its proponents often assume will be created. Nor does secession reduce conflict, violence, or minority oppression once successor states are established. Guarantees of minority protection in secessionist regions are likely to be illusory; indeed, many secessionist movements have as one of their aims the expulsion or subordination of minorities in the secessionist regions.[27]

While secession, particularly in the context of self-determination, has largely become associated with the liberation of ethnic minorities, Horowitz exposes its accompanying illiberal consequences, among which is the creation of internally displaced peoples and refugees. A proposed remedy to this by-product of secession has been to ground refugee protections in a global rights discourse, but *Shauna Labman* problematizes both the concept and application of a rights-based approach to refugee protection. In arguing that the adoption of a refugee rights regime may actually serve to mobilize groups against refugees, Labman outlines the dialectic between the political and legal dimensions of global rights as they relate to refugee protection.

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[26] Boutros Boutros-Ghali, *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-keeping* (New York: United Nations, 1992) at para. 17.

[27] Donald L. Horowitz, 'A Right to Secede?' in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York: New York University Press, 2003)50 at 50.

IV. Conclusion

After nearly a half-century of relatively stable borders following the Second World War, the rash of secessions since the end of the Cold War has motivated discussions in both International Law and International Relations regarding the conditions by which secession may be possible. Since little if any legitimacy is attributed to unilateral declarations of independence that lack international political support,[28] the strength of the political dimension cannot be overlooked in any analysis of secession.

However, as the contributions to this special issue demonstrate, international law has moved inwards from the periphery of discourses on secession. Though not sufficient, legality is perhaps gradually becoming a necessary condition for secession. The precedent set in referring the Kosovo case to the ICJ speaks to an increasingly relevant norm in international relations in which, in order to be considered legitimate, secession must occur in accordance with international law. This reiterates the assertion that international law matters in cases of secession, but it also provokes questions about both the suitability and effectiveness of international law as a platform for regulating the terms of secession in the twenty-first century.

[28] Unilateral declarations of independence in recent history have been made *inter alia* by the Tamil Tigers in Sri Lanka, the Bougainvilleans in Papua New Guinea, the Mindanao Moros in Phillippines, and the Irian Jaya in Indonesia. None of the declarations have been recognized by the UN General Assembly.