

Study Guide

International Law Commission

The Legality of Succession & International Recognition

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What is the ILC?

The International Law Commission (ILC) is a body established by the United Nations in 1947 to promote the progressive development of international law and its codification.

The ILC approaches questions of international law through a consultative and deliberative process with legal experts in international law. The ILC often seeks input from states, international organisations, and other stakeholders to ensure a comprehensive perspective.

They prepare draft articles or instruments based on their findings, which are then discussed and revised. The final drafts are submitted to the UN General Assembly, where member states can discuss and consider adopting them.

Through these processes, the ILC plays a crucial role in shaping international legal norms and fostering cooperation among states.

Some legal documents drafted by the ILC are the following:

Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001): These articles outline principles related to state responsibility when breaches of international obligations occur. They address issues like the attribution of conduct, breaches, and the consequences of wrongful acts, and have influenced state practice and international jurisprudence.

Vienna Convention on the Law of Treaties (1969): This foundational treaty, resulting from the ILC's work, codifies rules governing the creation, interpretation, and termination of treaties between states. It's often referred to as the "treaty on treaties" and is central to diplomatic and legal relations.

Draft Articles on the Prevention and Punishment of Crimes Against Humanity (ongoing): The ILC is developing these draft articles to establish an international framework for the prevention, investigation, and prosecution of crimes against humanity.

They aim to fill gaps in international law where no standalone treaty addresses these atrocities comprehensively.

Draft Articles on the Law of Transboundary Aquifers (2008): These draft articles set out principles for managing shared groundwater resources, addressing issues of sustainable use, equitable distribution, and the responsibility of states to prevent significant harm.

Draft Code of Crimes Against the Peace and Security of Mankind (1996): This draft code was part of the groundwork leading to the Rome Statute of the International Criminal Court (ICC), outlining crimes such as genocide, war crimes, and crimes against humanity.

Draft Articles on the Protection of Persons in the Event of Disasters (2016): These articles provide a legal framework for the response and protection of people during disasters, emphasising state responsibilities, international cooperation, and human rights during such events.

In regard to the given examples, the delegates are expected to find common points for the possible legalisation of secessionist movements and other relevant legal questions through new draft articles, however, questions regarding the international nature of secession are also on the table.

Statehood and recognition

Traditionally, state recognition was based on two norms: objective criteria (Montevideo Convention) and recognition by other states. Recognition was dependent on certain criteria as well, such as whether the territory was claiming statehood as a result of serious violations of international law. The traditional legal framework was clear and consistent, consisting of the Montevideo criteria and the principle of *jus cogens*. This does not mean that states did not enjoy discretion in their act of recognition but there was a sort of consistency that could be seen in state practice.

However, state practice changed in the 90's after the dissolution of the Soviet Union and Yugoslavia.^[1] After the events that culminated in the unilateral secession of Kosovo, state recognition became a mixture of legal norms and political agendas, the latter frequently undermining the first. The Badinter Commission's 'Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' outlined new criteria for recognising statehood, marking a shift from the traditional framework. Subjective concepts such as human rights and democracy were considered essential for recognition of statehood.

Why is it important to have clear criteria for statehood?

Set criteria for recognition are beneficial to all parties involved, especially for the seceding entities who could avoid the legal limbo of being partially recognised. Countries which have issues with separatist movements could also use legal criteria for legally rebuking the claims of statehood of certain separatist entities. The question is what should these

criteria be, especially after the confusing legal norms that emerged in the 90s? How can the balance between objective criteria for statehood and subjective politics be achieved?

It is also important to note that recognition of seceding states has always been controversial when the seceding entity and the original state are in tension. Kosovo and Serbia still find themselves in delicate diplomatic situations, while in Sudan and South Sudan's case, secession was accepted by the original state (Sudan) and went on seamlessly, resulting in being recognised by all states.

Self-determination of peoples is another contentious subject that comes up in discussions of secession.^[2] International law is inclined to accept the right to self-determination of a people but it is also protecting the territorial integrity of established states. In this sense, there is a clash between protecting states and protecting a group of individuals. This tension is not that apparent in independence claims, such as the decolonisation efforts in the previous century, since international law recognised the right to self-determination of occupied territories/colonial territories. When it comes to seceding however, this issue is not resolved.

Country Profiles

When it comes to the foreign policy of countries, there are generally three identifiable groups: the states that adhere to conditional recognition, the states that are completely/highly against secession and states that accept consensual secession and/or are undecided in some aspects of this process.

Try to determine which group does the country you represent belong in. Some countries are mentioned in this section.

1. Conditional/political recognition: this group of states shows the inconsistencies of the status quo the best. They recognise the claim of independence of some parties, while they deny this right to others.
 - The United States has recognised the independence of Kosovo. On the other hand, it does not recognise Taiwan, adhering to the 'One China' policy. However, it does support the membership of Taiwan in international forums such as the WTO.
 - Russia has used the concept of self-determination to argue for the secession of Crimea from Ukraine. It argued that due to the (sham) elections organised, Crimea should be separated from Ukraine and attached to Russia. At the same time, it does not recognise Kosovo because of its support of Serbia.
2. Against secession: these states are highly against secession, making it illegal to participate and pursue separatist movements. They tend to not recognise statehood claims of any secessionist movement, except when it is consensual.
 - India, Turkiye, Brazil, Spain and Indonesia for example, have a ban on secession in their Constitutions or in other legal decrees.
3. Supporting consensual secession/undecided: this group may overlap with the first and second one but not in totality. They might be against secession in their own

country but they will recognise the statehood of a secessionist entity if its consensual between the entity and the original state. They might also have avenues set up in law for legal secession within their state, dealing with secession on a domestic level.

- The UK has experienced many liberation movements, having been a colonial power on multiple continents. Concerning secession specifically, there have been secessionist movements flaring up from time to time among the states of the Kingdom. Ireland succeeded in seceding, although Northern Ireland did not. Scottish independence has also been on the table of discussion, as well as referendums for this possibility in 2014. The UK favours consensual secession.
- Papua New Guinea has been struggling with secessionist movements ever since its independence in the 60's. At the moment, the government is negotiating with a semi-autonomous region of Bougainville and is planning on granting independence to this region in the future. On 7 July 2021, it was announced that Bougainville will become independent by the end of 2027 pending approval of the PNG parliament.

ICJ Advisory Opinions

Chagos Archipelago and Mauritius

International Court of Justice, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 95

In the case of the Chagos Archipelago, Mauritius, during its time as a colony of the United Kingdom, was split into two entities with separate governance: mainland Mauritius and the Chagos Archipelago. The ICJ was asked to determine whether the decolonization of Mauritius was lawfully completed when the United Kingdom retained control of the islands after Mauritius gained independence in 1968. For context, Mauritius accepted British sovereignty over the islands in exchange for independence under diplomacy. Later on, Mauritius argued that they were coerced into this agreement and that independence should not have been a matter of negotiation.

The court concluded that the process of decolonization was not completed in accordance with international law. It found that the separation of the Chagos Islands from Mauritius violated key principles of international law, particularly the right to self-determination. The ICJ emphasized that the people of Mauritius had not given their free and informed consent to the detachment of the islands, rendering the United Kingdom's continued administration unlawful. The court called on the UK to end its administration of the islands "as rapidly as possible" and urged all UN member states to cooperate in ensuring that the decolonization process was completed. It should be noted that the United States has a military base in the British-controlled Chagos Archipelago, namely Diego Garcia.

The opinion was understood to be a powerful reminder of the centrality of self-determination under international law in cases involving decolonization, affirming that

the will of the people in such territories is a critical factor in determining the legality of territorial changes.

At the beginning of October 2024, following two years of negotiations between the United Kingdom and Mauritius, the UK agreed to transfer sovereignty of the Chagos Archipelago to Mauritius. However, the island on which Diego Garcia is located was leased to the UK for an undisclosed payment for a period of 99 years. Still, many issues remain regarding the Chagossians' right to self-determination, as their opinion was not considered in this decision.

Kosovo and Serbia

International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403

The ICJ's advisory opinion on Kosovo is perhaps the most well-known case related to secession in recent times. Following Kosovo's unilateral declaration of independence from Serbia in 2008, the ICJ was asked whether the declaration was in accordance with international law. Serbia led the initiative, but they specifically asked whether *The Declaration of Independence* was in conformity with international law rather than whether Kosovo's independence was. The reason behind this was arguably Serbia's hesitation and fear of the implications of the Court's advisory opinion if the Court decided Kosovo's independence was in accordance with international law. Yet, if the court agreed that only the *Declaration of Independence* was legal, that did not immediately mean Kosovo's independence was justified. However, if the court ruled that the declaration was illegal, that would indicate that Kosovo's independence was unjustified according to the Serbian perspective.

The Court found that Kosovo's declaration of independence did not violate international law, as there is no explicit prohibition against declarations of independence within the legal framework. The Court took the view that since the declaration was not prohibited, it could not be against international law, which vaguely implied that it was in conformity (see 1927 *France v. Turkey, Lotus Case*). Lawyers representing Kosovo successfully argued that a declaration of independence cannot be against international law, as it is not a matter of "international" law but rather a domestic issue Serbia faced. As a result, the court did not endorse or condemn the secession itself but clarified that international law does not generally prevent declarations of independence, as long as they do not violate prohibitions on the use of force or other fundamental international norms.

Importantly, the court emphasised that the principle of territorial integrity, which Serbia invoked in its opposition to Kosovo's independence, applies to relations between states and does not directly address internal secessionist movements. This opinion has had significant implications for debates on secession worldwide, suggesting that while international law is neutral on the legality of secession, such declarations may proceed without violating international norms, depending on the specific context. However, an interesting point the ICJ made was that the people of Kosovo could not invoke a right to self-determination because they were an integral part of Yugoslavia. The Court refused to

grant Kosovo the same status as former colonial countries in Africa, Asia, and South America.

This decision was criticised by Serbia, as the Court and the international community refrained from condemning Kosovo's secessionist movement, while other secessionist movements had been condemned by the United Nations General Assembly, such as the declarations by the Turkish Republic of Northern Cyprus, the Moldovan Transnistrian Republic, and the Donetsk People's Republic. Nevertheless, the ICJ defended its position, stating that these examples of declarations of independence occurred after violations of jus cogens norms, which was not the case in Kosovo according to the Court.

Remedial self-determination is also invoked regularly as a concept in international law regarding discussions relating to Kosovo that suggests a group or population has the right to seek independence or autonomy as a remedy in cases of severe injustice or oppression by the state governing them. This form of self-determination is typically invoked when a population experiences sustained human rights violations, oppression, or denial of fundamental rights, with no reasonable means for internal self-governance or change within the existing state structure. Historically, this notion was pushed by African states at its beginning against South Africa's apartheid regime.

This concept often arises in discussions of secession, as it implies that if a state persistently denies a group's right to self-determination internally, that group may be justified in seeking independence as a last resort. However, it remains a contested notion in international law, with no universally agreed-upon criteria, and is balanced against principles of territorial integrity and state sovereignty. Some examples of debates surrounding remedial self-determination include Kosovo, Biafra, and the Chagos Archipelago.

Palestine

International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

(although not a secessionist movement but an independence movement, the Court's judgement is relevant because it discusses self-determination)

In the advisory opinion concerning Palestine, the ICJ was asked to assess the legality of Israel's construction of a wall in the Occupied Palestinian Territory (OPT), including East Jerusalem, and to determine the legal consequences of its construction. The court found that the construction of the wall was a violation of international law, as it severely infringed upon the rights of the Palestinian people to self-determination. The wall and its associated regime of restrictions on movement were deemed unlawful, and the court emphasized that such actions undermined the Palestinians' sovereignty over their territory.

In addressing the broader question of Palestinian statehood, the ICJ reaffirmed the right of the Palestinian people to self-determination, making clear that any actions that hinder the realisation of this right are in violation of international law. The court called for Israel to cease construction, dismantle the parts of the wall already built, and make reparations for

the damages caused by the construction. The advisory opinion also highlighted the responsibility of the international community not to recognize the illegal situation created by the wall. This opinion is significant in its recognition of the Palestinian right to self-determination, framing it as a legitimate claim to statehood under international law, and condemning obstacles that prevent the exercise of that right.

As a side note, it should be noted that although Palestine is not a full UN Member State, that is not an omission of statehood under international law. Furthermore, Palestine is an observer member of the UN and a full member of the ICC. In support of this matter, Palestine was the 30th ratifier of the amendment to include the crime of aggression in the Rome Statute. Thirty ratifications were necessary for the amendment to take effect, thus it could be argued that Palestinian statehood, as a participant and builder of international law, was affirmed by the ICC.

Guiding Questions

Please address the following topics in the debate and the resolution:

- What constitutes a legitimate claim to secede?
- Should secession be a matter of international law or domestic law?
- What grants legality to a declaration of independence?
- Are the Montevideo criteria still relevant? Should any criteria for statehood be added/removed? What criteria should guide the international community in its efforts to recognise a newly emerging state?
- What role should the international community take in cases of non consensual secession movements?
- How can the tension between self-determination and territorial integrity be reconciled in the context of secession?
- What are the rights and protections for individuals and groups within territories seeking to secede?

Sources for further research

Articles

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Opinio Juris: short articles/blogs on international law topics, including secession and ICJ Advisory opinions. <https://opiniojuris.org/2010/07/23/the-kosovo-advisory-opinion-self-determination-and-secession/>

Al Jazeera: there are articles on multiple secessionist movements around the world

EJIL:Talk: opinion pieces/blogs on the topic of secession

[1] Cedric Ryngaert and Sven Sobrie, "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia", *Leiden Journal of International Law* 24 (2011), 467-490

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