But states are never under an obligation to grant recognition. Under some circumstances they only have an obligation to withhold it. This is specified in Article 41 of the International Law Commission (ILC) Articles on State Responsibility: a violation of *jus cogens* triggers an obligation *erga omnes* to withhold recognition. Notably, Article 41 does not say that recognition would need to be withheld where a declaration of independence is unilateral. However, it is very unlikely that in the UN Charter era foreign states would accept an attempt at unilateral secession. This makes its success very unlikely, although not illegal. The neutrality of international law on the issue protects the territorial status quo. The burden of shifting the status quo is on the secession-seeking entity. This is what makes unilateral secession such a difficult process, but it does not make it illegal.

Not even remedial secession is an entitlement. The doctrine is theoretically grounded in an inverted reading of the “safeguard clause” in the Declaration on Principles of International Law, which affirms that the principle of territorial integrity limits the right of self-determination where a state possesses “a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” Yet there is no state practice in support of an inverted reading of this clause which ought to establish a rule that secession would be an entitlement where a state does not have a government “representing the whole people.” Nevertheless, in the case of oppression, foreign states may find a unilateral declaration of independence to be more legitimate and could be more likely to grant recognition. Yet even where oppression is at stake, foreign states do not have a duty to recognize.

Asilia issued its unilateral declaration of independence in the zone of international legal neutrality. It did not do anything illegal. At the same time, the declaration of independence did not create the state of Asilia. State creation will now depend on acceptance by foreign states. And foreign states do not commit an internationally wrongful act if they recognize. But they are unlikely to do so if Alfurna does not agree to Asilia’s independence. Nevertheless, if Asilia received universal or near-universal recognition, this could be seen as an equivalent of collective state creation—despite the general perception that recognition is declaratory. If recognition were widespread yet not virtually universal, Asilia’s legal status would be, at the least, ambiguous. For some it would be a state; for others it would not. The situation would be comparable to Kosovo.

**Remarks by Marcelo G. Kohen**

 Asked about the requirement for a legitimate unilateral declaration (UDI) of independence, a distinction must be made between what would be a *legitimate* and a *legal* UDI. The concept of legitimacy is essentially a political one. It can also refer to opportunity or convenience. A UDI issued without the support of the majority of the people in the name of which independence is proclaimed would certainly be politically illegitimate. A UDI issued after the favorable vote of the majority of a population established over a given territory does not

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9 Declaration on Principles of International Law, supra note 2, annex, principle 5.
10 Id.
12 Id.
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necessarily imply that this declaration is legal. Furthermore, if one follows the ICJ Kosovo advisory opinion, a UDI would just be an attempt at establishing a new state—a declaration of will by a group of persons acting on behalf of a people and nothing else.

If this were the case in all circumstances, then any UDI would not be illegal, since law does not prevent a group of people from proclaiming what they would like to pursue in this field. However, the Court itself acknowledged that in some cases international law recognizes a right to independence on the basis of the right to self-determination of peoples in non-self-governing territories or subject to alien subjugation, domination, or exploitation. In this particular case, if the factual conditions, or at least a minimum thereof, are met, such as some degree of territorial and population control by the government issuing it, a UDI triggers legal consequences, notably the creation of a new state. For instance, Guinea-Bissau and Cape-Verde unilaterally declared their independence from Portugal on September 24, 1973. The UN General Assembly immediately recognized this, on the basis of the principle of self-determination, and ascertained the creation of the newly independent state. In other words, only if there is a right to create a new state may a UDI be legal and produce legal effects. If not, then a UDI is just a sheet of paper, “a collection of words writ in water,” as James Crawford argued before the Court in the Kosovo advisory proceedings.

Does Oppression Create a Right to Secession?

In the Kosovo advisory opinion, the ICJ noted the existence of “radically different views” with regard to a right of “remedial secession.” In these circumstances, it is very difficult to envisage this doctrine having the possibility to become part of customary law. The doctrine is also an acknowledgement that self-determination does not normally apply to the population concerned. If the population were the holder of this right, there would be no need to invoke the violation of its rights as a ground for secession. According to the proponents of this alleged right, a national, religious, ethnic, or linguistic minority would become a “people” entitled to self-determination because of its oppression. If one follows this reasoning, Catalonia would have had the right to secede during the Franco regime, at a time when even the use of the Catalan language was prohibited, but not now, since Spain is a democracy in which Catalonia enjoys substantial autonomy. In other words, the message addressed by the doctrine of remedial secession to separatist movements all over the world is “the worse, the better” for attaining the political goal of the creation of an independent state.

It is not possible to interpret the seventh paragraph of the Friendly Relations Declaration related to self-determination, the so-called “saving clause,” as allowing secession as a remedy. The purpose of this clause was to restrict the scope of self-determination, not to expand it. Neither the travaux préparatoires nor further practice support the a contrario reading of this clause. More fundamentally, the basic problem of this doctrine is that it takes for granted that separation is the remedy for gross violations of minority and human rights without advancing evidence for this. It can be asked why a new state, which by definition is created with the intention of having a permanent character, is the answer to the action of a given government, which by definition has a temporary character. This is tantamount to

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1 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (advisory opinion), 2010 I.C.J. 141, para. 114 (July 22) [hereinafter Kosovo Advisory Opinion].
2 Id. para. 79.
5 Kosovo Advisory Opinion, supra note 1, para. 82.
accepting the failure of human rights and displacing the solution to another field. The remedy for minority rights violations is to apply policies leading to their cessation, the punishment of their authors, and the creation of the basis for their respect within the state, reconciling people from different origins within a democratic framework instead of separating them. ‘Remedial secession’ leads to what Rosalyn Higgins has called ‘post-modern tribalism.’

It can then be ascertained that the only legal basis for a valid UDI producing legal effects is that emanating from the organs of a people entitled to the right of external self-determination. International law distinguishes three different categories of human communities enjoying different rights. Only ‘peoples’—in the legal sense of the term—are entitled to external self-determination. Indigenous peoples were recognized as holders of self-determination in its internal aspect. Minorities also enjoy internal self-determination together with the rest of the population of the state concerned. By definition, a minority defines itself by reference to a majority. Both the majority and the minority constitute the ‘people’ within a given state. The key question is who decides about the existence of a ‘people’ in the international law sense of the word, i.e., a human community entitled to self-determination in its broadest sense. It is certainly not the community that claims itself to be a people. No legal system puts in the hands of its subjects the capacity to decide whether or not they fulfill the conditions to possess these rights. There must be an objective or external qualification. The UN practice in the field of decolonization and even outside, in cases of alien domination, is that it is for the General Assembly to make such an ascertainment. As the ICJ stated in its *Western Sahara* advisory opinion:

> The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.6

For this reason, the same Court stated in its *Wall* advisory opinion that ‘[a]s regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue.’7 To some extent, recognition with regard to peoples plays a constitutive role, contrary to the situation with regard to the creation of states. In the cases in which such recognition has not occurred at the international level, the matter is governed by domestic law. As a rule, states do not recognize in their components or human communities existing within the state a right to unilaterally secede. The exception is furnished by those cases in which the state defines itself as constituted by a plurality of peoples having the right to self-determination and hence to separate. Non-respect of these relevant domestic rules by the central government can open the way for a legal secession from the international law viewpoint. For some, this was the situation of the SFRY with regard to the constituent republics. At present, these kinds of constitutional provisions exist in Ethiopia, St. Christopher and Nevis, and Uzbekistan.

In the *Kosovo* advisory opinion, the ICJ missed a historic opportunity to clarify the role of international law in the process of the creation of states outside decolonization. The question raised by the General Assembly, while referring to the accordance with international law of a UDI, was exclusively answered by the Court in terms of violation of obligations.

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It did not address the question of the existence of a right to declare independence, and even less that of the validity or invalidity of this unilateral act.

**Remarks by Vanessa J. Jiménez**

The panelist was asked to address six questions in particular. The following is a summary of those responses.

**I. Does there need to be an independence referendum to get a new independent state?**

While international law does not prohibit the breakup of a state, it also does not expressly permit it. What follows is that there is no law that says independence can only come on the heels of a referendum. However, having some mechanism to evidence the will of the people—whether it is a referendum or popular consultation process—can go a long way toward convincing the international community of the legitimacy of a people’s claims and to showing that the emerging new state government has the capacity to govern the territory.

State practice suggests that independence and statehood do not necessarily require a referendum. In the case of the former Socialist Federal Republic of Yugoslavia (SRFY) and former Czechoslovakia, the breakups of these states were classified as dissolutions. This meant that the original predecessor state disappeared and was not replaced by a ‘‘continuing state’’ which would have assumed all duties and obligations of the former. No sovereign existed to object or consent to the independence of the constituent republics. As such, referenda were not needed in these republics.

Bangladesh is another case of a new independent state emerging without a referendum. Some would argue that the international community—in spite of a unilateral declaration of independence (UDI) issued in 1971—accepted the independence because the Awami League formed a government with the capacity to govern its people and territory, there was a long history of grave human rights abuses, a clear and persistent denial of self-determination, and an absence of a government representing the whole people belonging to the territory. Bangladesh was perhaps, an example of what many would refer to as ‘‘remedial secession.’’

There is also the case of Kosovo. Kosovo held a referendum in 1991, but what has been focused upon has been its UDI of 2008 issued by its assembly and resulting in the International Court of Justice (ICJ) advisory opinion affirming that ‘‘general international law contains no applicable prohibition of declarations of independence.’’ To date, 91 states have recognized Kosovo, and the emerging state has joined the International Monetary Fund and World Bank. Kosovo may eventually follow the way of Bangladesh in that it shares many of its

* Director, the Sudan Project, the Public International Law & Policy Group.


3 Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22), para. 84.