Unilateral Law and Non-State Actors: Exploring a New Paradigm

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Abstract

Throughout the last decades, various non-state actors have been actively engaged in different aspects of international governance. More recently, a number of academic contributions explored the extent to which international law governs non-state actors. This Article advances the argument and explores whether non-state actors have developed law making capacities. Initially grounding itself in the *Nuclear Tests* and *Kosovo* cases of the International Court of Justice, the Article contends that non-state actors can create international rights and obligations through unilateral law-making processes. After a robust study, the Article concludes that unilateral non-state actions must meet three criteria to have legal effect as international law. First, producing such actions requires non-state actors of significant gravity. Second, other international entities must at least partly recognize these actions. Third, unilateral actions must justify their legal character with legitimate grounds. In meeting these three conditions, such unilateral actions of non-state actors produce international legal effects. As to its broader implications, the Article argues that the scope of international law has expanded to ensure that the voices of major international non-state actors are heard and reflected within the international legal order.

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A. Introduction

Recent developments in international law markedly feature an expansion of its subjects. An increasing number of academic contributions explore the growing role of various non-state actors in international law.[1] In analyzing major collective entities—which include peoples and indigenous groups—individuals, and NGOs, legal scholars devote considerable attention to the legal status of emerging actors.[2] In most cases, however, academic contributions tend to focus on the law-receiving role of these latter subjects. But, the rapid development of non-state actors and the changing structure of the international legal system suggests a more progressive approach. This Article advances the argument that non-state actors are far more than mere law-receivers. The Article further explores the possible role of non-state actors as quasi-formal law makers. To do so, the Article argues that non-state actors, under certain conditions, can create legally binding entitlements and obligations through unilateral actions.

The Article proceeds in three sections. The first section outlines the legal framework behind State-centered, unilateral law-making in international law. First, it provides a comprehensive overview of unilateral law-making through international treaties. Second, it explores examples and more detailed aspects of unilateral law-making by States through the jurisprudence of the International Court of Justice (ICJ). In short, the section provides the legal foundation for subsequent arguments by summarizing the legal status of State-centered unilateral law-making under international law.

The second section of the Article introduces the argument that non-state actors can contribute to the body of international law through unilateral law-making. The section outlines a theoretical framework for non-state unilateral law-making by exploring the case of the Kosovo Declaration of Independence, as well as related ICJ cases. After briefly describing the Kosovo situation and the ICJ proceedings, the section argues that certain non-state actors have sufficient legal capacity to produce unilateral actions with effect in international law. Moreover, after exploring several additional examples, the section outlines a set of criteria for effective non-state unilateral law-making that includes non-state actor status, international recognition, and legitimacy of claims.

The third section explores and applies the outlined framework to existing cases of non-state unilateral actions affecting international law. The Article subsequently considers Taiwan's commitment under international human rights covenants, declarations by non-state armed

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[1] *See generally* BARBARA K. WOODWARD, GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND GLOBAL GOVERNANCE: THEORY AND PRACTICE (Martinus Nijhoff 2010); CECILIA BAILLIET, NON-STATE ACTORS, SOFT LAW, AND PROTECTIVE REGIMES: FROM THE MARGINS (Cambridge Univ. Press 2012).

[2] *See* WOODWARD, *supra* note 1; BAILLIET, *supra* note 1; *see also* JEAN D'ASPREMONT, PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW (Routledge Paperback ed. 2013).

groups, and other examples. In summary, the Article aims to present a sound theory regarding the capacity of non-state actors to contribute to the body of international law through unilateral action.

B. Unilateral Law and States: Setting the Stage

I. Primary Sources

International law developed a comprehensive system of conventional sources. International treaties and rules of customary international law embody most of the international norms. These latter sources form the core of the contemporary international legal system. Aside from these major sources of international law, other international documents also exert a legally binding quality. Most derive their power from external sources—such as treaties—and have a specific case-by-case nature. For example, Security Council (SC) resolutions and the decisions of international tribunals are legally binding documents that derive their power from external treaties. Nevertheless, unilateral actions serve as an exception to the outlined pattern when they produce legal effects in international law even in the absence of corresponding treaties or the activity of international actors. This Section provides an overview of State-centered unilateral law-making as the starting point of the argument.

Unilateral action is an act of a legal person regarding legal or factual circumstances that is designed to create an obligation or produce other legal effects.[3] Accordingly, in international law—if such action takes place, a legal person must follow its commitment as a matter of international obligation. Such actions bind the entity that produced the legally binding unilateral action and, in principle, can bind other entities that accept corresponding commitments. A more detailed discussion of the aspects of unilateral law-making follows below.

In terms of their legal status, international treaty law does not expressly govern unilateral actions and their corresponding unilateral obligations. Considering that *prima facie* unilateral actions by definition require the intent of a single party, in principle, they fall outside the scope of the Vienna Convention on the Law of the Treaties (VCLT).[4] Hence, ICJ case law and academic literature have primarily explored the legal status of unilateral law through the prism of customary law.

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[3] *See* International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto, U.N. Doc. A/61/10, at 370 (2006) (providing a working definition of "unilateral action"); Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, para. 43 (Dec. 20) [hereinafter *Nuclear Tests*].

[4] Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

And yet, because certain Vienna Convention articles may regard unilateral acts as rules of customary law, customary international treaty law might—at least partially—govern unilateral actions. Considering that strict definitions of treaties do not necessarily limit customary rules, an analogy between customary rules and unilateral obligations holds.[5] Aust supports this position by arguing that customary rules of treaties apply to international non-treaty agreements that are not expressly governed by the VCLT.[6] Consequently, customary rules reflected in the Vienna Convention may govern unilateral actions.

Moreover, because the Vienna Convention reflects a large body of customary rules, these various rules govern unilateral declarations. Rules—such as *pacta sunt servanda,* principles of interpretation, entry into force, invalidity, and other parts of the Convention—seem to fully apply to obligations created through unilateral statements. Accordingly, those States that rely on unilateral obligations as a mode of international law can benefit from a wide range of authorities. Moving forward, ICJ case law explores more detailed aspects of unilateral law-making and different ways of creating unilateral obligations.

II. Case Law

Several ICJ cases discussed the various detailed aspects of unilateral obligations. One of the most prominent examples is the *Nuclear Tests* case.[7] The case dealt with the ban on French nuclear tests. Through an array of public statements, several high French State officials—including the President—expressed their intention to stop atmospheric nuclear tests.[8] Following the statements, the Australian government filed a case against France asking it to cease all nuclear tests.[9]

One key aspect of the case regards the rules governing the formation of unilateral obligations. The Court concluded that States issuing unilateral obligations legally bind themselves to follow the content of such declarations.[10] But, not all unilateral declarations have this legally binding effect. The legal entity must clearly intend to be bound by its

[5] *See* MALGOSIA FITZMAURICE, OLUFEMI ELIAS & PANOS MERKOURIS, TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 65 (Martinus Nijhoff 2010).

[6] Anthony Aust, *Vienna Convention on the Law of Treaties* (1969), OXFORD: PUBLIC INTERNATIONAL LAW (June 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498 (last visited Jan. 14, 2018).

[7] See *Nuclear Tests*, *supra* note 3.

[8] *Id.* para. 41.

[9] *Id.* para. 1.

[10] *Id.* para. 46.

unilateral statement.[11] Case-by-case interpretation determines whether such an intention exists.[12]

Furthermore, following the *Temple of Preah Vihear* case, international law does not impose strict requirements on which forms of unilateral declarations contain an identifiable intent to be bound.[13] Hence, declarations and public statements—among other forms—may constitute legally binding unilateral declarations. Accordingly, the key criterion of any form of unilateral action is whether it has the capacity to reflect an intent to be bound.

Stepping aside from the general rules regarding unilateral obligations, the ICJ has outlined additional specific details of unilateral law making. For example, the Court has confirmed that unilateral obligations enjoy an array of recognized principles, including the mentioned *pacta sunt servanda.*[14] Moreover, the Court has concluded that States can unilaterally create obligations without these acts being directed towards or accepted by another State.[15] Thus, unilateral obligations can be created in *abstracto*—without direct interaction with other international actors. The Court has concluded that obligations created without a corresponding State are obligations *erga omnes.*[16] In other words, unilateral acts with a binding legal effect—not particularized toward some State—create obligations that affect the international community as a whole.

For the purposes of furthering the non-state actors' argument, however, this Article posits an alternative to the *erga omnes* approach**.** Referring back to the Vienna Convention, Article 34 proclaims that a treaty cannot create rights or obligations that affect other States without their consent.[17] Unilateral obligations are not treaties. Nevertheless, as discussed above, customary international law subsidizes the content of the VCLT when a lack of strict conformity to the definition of a treaty exists. Hence, Article 34 applies to unilateral acts through customary law.

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[11] *Id.* para. 43.

[12] *Id.* paras. 43–5.

[13] *See* Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgement, 1961 I.C.J. 17, 31 (May 26) [hereinafter *Temple of Preah Vihear*].

[14] *See Nuclear Tests*, *supra* note 3, para. 46.

[15] *Id.* para. 50.

[16] *Id.*

[17] VCLT, *supra* note 4, art. 34.

Under Article 34, the unilateral acts of States do not automatically grant rights to—or obligations on—other States unless these other States consent to receive such entitlements. Thus, consent is one of the primary requirements for creating both rights and obligations under international law. Unilateral acts should not create any rights for other States unless they consent to them. Accordingly, a State must accept the unilateral acts of another State to claim the existence of legal entitlements. Although international law generally allows for the principal capacity to create obligations in *abstracto*,[18] reliance on *abstracto* declarations is a condition for a corresponding State to express consent.

Two types of permissible consent flow from this requirement—express or tacit.[19] Following the *Nuclear Tests* case, consent could be tacit and implied from the reliance by a party in the process of adjudication. Comparatively, entitled officials can give express consent through their direct responses to the unilateral decisions.

Another important element of unilateral declarations is a State's representatives' legal capacity to create unilateral obligations. In the *Nuclear Tests* case, the ICJ concluded that statements made by the French government—and, in particular, by the president of France—were of a legal nature.[20] In its argument, the Court presumed that a president—as a head of State—acts on behalf of a State through actions and proclamations.[21] Similarly, Article 7 of the Vienna Convention presumes that heads of State represent the State through their actions.[22] Accordingly, heads of State and other officials mentioned in Article 7 of the VCLT appear to have sufficient legal capacity to create unilateral obligations.[23]

To summarize the theoretical framework, the unilateral actions of States form unilateral obligations. Customary rules of international law govern unilateral obligations created *in abstracto*, as well as those directed at a particular State. Unilateral obligations include any formulation that evinces a State's willingness to form an international obligation. Following the promulgation of unilateral obligations, other States may express their consent to the unilateral actions to obtain rights or obligations thereunder.

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[18] *See Nuclear Tests*, *supra* note 3, para. 50; *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, para. 84 (July 22) [hereinafter *Kosovo*].

[19] *See* László Blutman, *Consent and Customary International Law*, EJIL: TALK! (Aug. 4, 2014), http://www.ejiltalk.org/consent-and-customary-international-law/.

[20] *Nuclear Tests*, *supra* note 3, para. 49.

[21] *Id.*

[22] VCLT, *supra* note 4, art. 7.

[23] *See Nuclear Tests*, *supra* note 2, para. 49.

The general theoretical framework behind unilateral acts, at first glance, has very little connection to non-State actors. Previous explorations of this framework have mainly focused on the actions of States undertaken by a limited number of State officials. With the exception of international organizations, non-State actors are generally divorced from the treaty making process. But, unilateral law does not restrict the actors that can create it. Considering this lack of direct restrictions on participating actors—as well as other aspects mentioned below—the Article subsequently argues that non-State actors can contribute to the body of international law through unilateral acts.

C. Unilateral Law and Non-State Actors: From Kosovo and Beyond

I. Kosovo Opinion: An Introduction

The main argument of this Article largely tracks the example of Kosovo and the events following its declaration of independence.[24] Kosovo features one of the most prominent examples of unilateral action taken by a partly recognized legal entity. Consequently, the ICJ explored the legal implications of Kosovo in an advisory opinion.[25] This Section starts with a general overview of the legal implications of the Kosovo Declaration of Independence and the corresponding ICJ opinion.

Kosovo is a region located in southern Serbia. Prior to 1999, Kosovo was a highly autonomous part of Yugoslavia.[26] In 1998, a conflict arose between the Yugoslavian forces and the Kosovo Liberation Army (KLA).[27] Following the conflict, NATO forces intervened to support the KLA.[28] Subsequently, a UN Interim Administration Mission was established in Kosovo to support autonomy of—and to ensure security and stability in—the Kosovo region.[29] With the backing of the UN presence, the independent government of Kosovo declared its independence from Serbia in 2008.[30] At present, Kosovo remains a partially

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[24] *See generally* JAMES SUMMERS, KOSOVO: A PRECEDENT?: THE DECLARATION OF INDEPENDENCE, THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS (Martinus Nijhoff 2011); MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE (Oxford Univ. Press 2009).

[25] *See Kosovo*, *supra* note 18.

[26] *See* MIRANDA VICKERS, THE STATUS OF KOSOVO IN SOCIALIST YUGOSLAVIA (U. of Bradford 1994).

[27] *See* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 231–40 (Routledge 2004).

[28] *See* HENNING FRANTZEN, NATO AND PEACE SUPPORT OPERATIONS, 1991–1999: POLICIES AND DOCTRINES 36–50 (Routledge 2005).

[29] *See* S.C. Res. 1244, para. 10 (June 10, 1999).

[30] *See Kosovo*, supra note 18, para. 78.

recognized State.[31] Following the major controversy regarding the status of Kosovo, the General Assembly (GA) asked the ICJ to determine whether the unilateral declaration of independence from Serbia by the self-government of Kosovo was is in accordance with international law.[32]

To tackle the legal question, the Court started with matters of jurisdiction.[33] Some of the participants contended that the stated question regarding the declaration of independence was purely political in nature and, therefore, international law did not apply to the case.[34] The Court refuted this point, arguing that the political nature of a question does not deprive it of a legal character.[35] After confirming its jurisdiction regarding political matters with legal character, the Court then moved to address the issues of discretion.[36] After discussing matters of discretion, the Court concluded that it would exercise its jurisdiction in the *Kosovo* case.[37]

The next section of the advisory opinion addressed the scope of the legal question before the Court.[38] The GA asked the Court whether "the unilateral declaration of independence by the Provisional Institutions of the Self-Government of Kosovo [was] in accordance with international law . . . ."[39] To a large extent, this section of the opinion defined the Court's conclusion. The Court began by strongly narrowing the proposed question.[40] First, the Court stated that it was not asked to address the legal consequences of the declaration of independence, nor the statehood status of Kosovo.[41] Furthermore, the Court contended that it was not asked to determine whether the declaration was an exercise of a legal right

[31] *See* J.R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 407–8 (Oxford Univ. Press 2006); Milena Sterio, *The Case of Kosovo: Self-determination, Secession, and Statehood Under International Law*, 104 PROCEEDINGS OF THE ANNUAL ASIL MEETING 361 (2010).

[32] *See Kosovo*, *supra* note 18, para. 1.

[33] *Id.* paras. 18–28.

[34] *Id.* para. 26.

[35] *Id.* para. 27.

[36] *Id.* paras. 29–48.

[37] *Id.*

[38] *Id.* para. 49.

[39] *Id.*

[40] *Id.* para. 50.

[41] *Id.*

given by international law.[42] Lastly, the Court concluded that it was simply asked to determine whether such a declaration violated international law, thus narrowing the question as much as possible.[43]

After defining the legal question, the Court briefly mentioned the right to self-determination and "remedial secession."[44] Importantly, the Court did not tackle these concepts, as doing so would expand "beyond the scope of the question."[45] The Court's significant narrowing of the question provided a straightforward decision that avoided major legal controversies. As discussed below, narrowing the scope of the question presents a major point of criticism against the opinion. But, doing so also provides the opportunity to take a lenient look at the development of international law.

In the last part of the judgment, the Court reached its substantive conclusion. First, the Court looked at general international law.[46] The principle of territorial integrity formed the main argument against the declaration. The Court concluded that the principle of territorial integrity limited interactions between States.[47] Because Kosovo was not a State at the moment of its declaration, it could not breach the principle of territorial integrity.[48] After a brief analysis of other factors, the Court concluded that general international law contains no prohibition on declarations of independence.[49]

The Court then assessed whether SC Resolution 1244—which created the interim administration—barred the declaration of independence. The Court concluded that the declaration existed outside of the constitutional framework outlined in SC Resolution 1244.[50] Nevertheless, the Court rejected assertions that the resolution and the constitutional framework contained prohibitions on declaring independence.[51] Thus, the SC resolution did

[42] *Id.* para. 56.

[43] *Id.*

[44] *Id.* paras. 82–3.

[45] *Id.* para. 83.

[46] *Id.* paras. 79–100.

[47] *Id.* para 80.

[48] *Id.*

[49] *Id.* para. 100.

[50] *Id.* para. 119.

[51] *Id.* para. 118

not bar the declaration by the self-government of Kosovo.[52] From this, the Court ultimately found that the declaration of independence did not violate international law.[53]

The *Kosovo* opinion and its conclusion represent a starting point for the legality and the legitimacy of certain actions made by non-State actors in relation to the body of international law. Despite criticism from several legal scholars and ICJ judges, the opinion provides an appealing ground to reconsider the legal capacities of non-State actors in international law.[54] The next section explores the legal implications of the advisory opinion and establishes the grounds for believing that non-State actors can have a legal capacity sufficient to create unilateral law.

II. Kosovo Opinion and Unilateral Law: Exploring the Actors

As mentioned above, international law is evolving into a more inclusive and open legal system.[55] This tendency manifests in various ways. Examples include the growing role of various non-state actors, NGOs, and individuals; the expansion of regional human rights protections; and other developments.[56] Using the Kosovo example, it is further possible to advance arguments of the inclusiveness of the international legal system by demonstrating that unilateral acts of major non-state actors constitute recognized sources of unilateral law. To do so, it is first necessary to outline the ways in which certain non-state actors have the legal capacity sufficient for producing documents with binding effect in international law.

In general, the status of non-state actors under international law is far from clear.[57] Contrary to States and International Organizations (IOs), non-state entities do not have clearly recognized legal personalities required for the creation of international obligations. In most cases, the actions of non-state actors are in one way or another associated with States or IOs. But, the contemporary international legal order seems to consider a number of

[52] *Id.* para. 119

[53] *Id.* para. 121.

[54] *See* MARKO MILANOVIC & MICHAEL WOOD, THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 187–219 (Oxford Univ. Press 2015); *see also* Declaration of Judge Simma, Declaration, 2010 I.C.J. 478 (July 22).

[55] *See, e.g.*, AOIFE O'DONOGHUE, CONSTITUTIONALISM IN GLOBAL CONSTITUTIONALISATION (Cambridge Univ. Press 2014); Mattias Goldmann, *We Need To Cut Off The Head Of The King: Past, Present, and Future Approaches to International Soft Law*, 25 LEIDEN J. INT'L L. 335 (2012); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315 (2011).

[56] *See supra* note 55; BAILLIET, supra note 1; WOODWARD, *supra* note 1.

[57] BAILLIET, supra note 1; WOODWARD, *supra* note 1; *see also* CEDRIC RYNGAERT, NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 172–190 (Routledge 2016).

non-state bodies.[58] Moreover, certain aspects of international law have come into direct contact with the activities of non-state actors, which in turn suggests that non-state entities can obtain a partial legal capacity under international law.

Taking the Kosovo example, when the self-government issued the declaration of independence, the question of the statehood of Kosovo remained unresolved.[59] Even now, the statehood of Kosovo is a matter of legal and political controversy.[60] Following the Montevideo Convention—and despite not being conditioned on its own recognition as such—the existence of a State depends on its capacity to enter into relations with other States.[61] Accordingly, because international relations must be reciprocal, a lack of external recognition can impair a State's capacity to enter into such relations. It thus seems persuasive that—at the moment of the declaration of independence—the statehood status of Kosovo was not confirmed. For the purposes of this Article, Kosovo—at the moment of its declaration—is treated as a non-state entity.

Bearing this in mind, the declaration of independence is attributable to a non-State entity. The self-government of Kosovo, as a non-state actor, created a document that exists within the international law sphere. That the self-government of Kosovo produced an international quasi-legal document is tenable for two reasons. First, the declaration fell under the jurisdiction of the ICJ. Second, the ICJ assessed the declaration on the merits of international law. Consequently, other non-State entities may *de facto* create documents within the sphere of the international legal system.

The second contention receives further support from other primary sources of international law that recognize certain non-state actors. Consider the application of the Geneva Convention to non-state armed groups.[62] In contemporary international law, both States and non-state entities must comply with humanitarian law.[63] These obligations attach to the

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[58] *See supra* notes 55–57.

[59] *See* DANIEL HÖGGER, THE RECOGNITION OF STATES: A STUDY ON THE HISTORICAL DEVELOPMENT IN DOCTRINE AND PRACTICE WITH A SPECIAL FOCUS ON THE REQUIREMENTS 71–77 (Lit Verlag 2015) (describing how Kosovo presently remains a partly recognized State).

[60] *See* SUMMERS, *supra* note 24, at 176–80.

[61] Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States art. 3, Dec. 26, 1934, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

[62] *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

[63] *Id.* The primary example is individual criminal responsibility under the International Criminal Court (ICC) Statue. Furthermore, International Humanitarian Law recognizes declarations by armed groups as unilateral acceptances of obligations. *See Armed Non-State Actors and the Protection of Civilians*, GENEVA ACADEMY, https://www.geneva-

unilateral declarations of acceptance of humanitarian law made by non-state armed groups.[64] Corresponding obligations bypass States and instead directly attach to those non-state actors which make such unilateral commitments.

Of note is also the shift to more inclusive modes of international governance as exemplified by the widespread participation of NGOs in international law-making.[65] A large number of NGOs have influenced an array of contemporary treaties, including: The Human Rights Covenants, the Convention on the Law of the Sea, and others.[66] Despite these examples of treaties being attributable to States, the contemporary law-making process is closely linked to the contributions of non-state actors.

Finally, international human rights law recognizes collective groups. Examples of such recognition include the right of ethnic minorities to enjoy culture, language, and religion, as well as the right to informed consent for indigenous groups.[67] The latter groups directly rely on the Human Rights Committee to defend their rights within the UN system.[68] In addition, indigenous people have vast access to other parts of the UN system including the Permanent Forum and the Expert Mechanism.[69] Non-state entities are thus closely linked to contemporary international law. Consequently, to obtain law-forming qualities, certain non-state entities may have outgrown their classical limitations as law receivers.

Following this contention, the next step is determining the extent of the latter law-forming qualities. The Kosovo advisory opinion opens a door for a debating the limits of permissible actions under international law. As concerns declarations, Judge Simma points out that the ICJ uses the "lotus principle" to allow everything that has not been expressly prohibited.[70] Judge Simma argues that, even though some actions are not expressly prohibited, they do

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academy.ch/our-projects/our-projects/armed-conflict/detail/17-armed-non-state-actors-and-the-protection-of-civilians (last visited Jan. 16, 2018).

[64] *See* STEFANIE HERR, BINDING NON-STATE ARMED GROUPS TO INTERNATIONAL HUMANITARIAN LAW: GENEVA CALL AND THE BAN OF ANTI-PERSONNEL MINES: LESSONS FROM SUDAN 5 (PRIF 2010).

[65] *See supra* notes 55–56.

[66] *See supra* note 65.

[67] *See* International Convention on Civil and Political Rights art. 27, Mar. 23, 1976, 999 U.N.T.S. 172 [hereinafter ICCPR]; *see also* Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. INT'L HUM. RTS. 54 (2011).

[68] *See, e.g.*, Human Rights Committee Comm. No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40), at 1 (Mar. 26, 1990) [hereinafter Lubicon Lake Band v. Canada].

[69] *See id.*; OFF. HIGH COMM'R HUMAN RTS., INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM (2013), http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf.

[70] *See* Declaration of Judge Simma, *supra* note 54; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

not have "the same colours of legality."[71] Despite basing his argument on a negative premise of the lotus principle, application of the principle may nonetheless allow for more fruitful development of international law.

Expanding on Simma's position, one may assess the legality and legitimacy of the actions of non-state actors not expressly governed by international law. Because international law is based on a permissive understanding of matters not expressly governed, the degree of legitimacy to claiming the existence of rights and duties depends on the context, effect, significance, and relation of such rights to other rules of international law. Support for this assertion is derived from the ICJ legally assessing the Kosovo declaration despite its political character and lack of a clear legal ground.[72] Hence, different declarations may have differing degrees of legitimacy and legality. Looking from a positive perspective, those colors of legality may justify the existence of rights and obligations created under unilateral declarations of non-state actors.

Following this line of inquiry, the type of legal effect produced by unilateral non-state actions is difficult to identify with precision. Identification depends on the actors involved, the content of specific declarations, the intent of the parties, and the legitimacy of the claims. If unilateral declarations by non-state entities that do not contradict international law meet the criteria of legality and legitimacy, such declarations may impose rights or duties upon the non-state actors themselves or upon other subjects of international law, including States. The next Section outlines three proposed criteria to identify whether a non-state entity has created a unilateral act that imposes rights and duties under international law.

III. Unilateral Law and Non-State Actors: Building a Framework

Considering the complexity of relations within the international legal system, it seems implausible that any non-state actor could create legally recognizable under international law. Hence, unilateral declarations must meet certain conditions to have legal standing in international law. This Section discusses the most apparent conditions derived from ICJ case law and academic literature.

The research demonstrates that under three key conditions the unilateral statements of non-state actors can create certain rights or obligations. The first condition requires a sufficient status. If a non-state entity has the sufficient status to affect the performance of international governance, then its unilateral actions—in certain circumstances—can produce international legal effects.[73] The second condition requires some degree of

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[71] *See* Declaration of Judge Simma, *supra* note 54.

[72] *See Kosovo*, *supra* note 18, paras. 26–7.

[73] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 172, at 174 (Apr. 11) [hereinafter *Reparations*]. Following the logic of the Court, if an international entity performs functions

acceptance by corresponding States or a more general recognition by the international community.[74] Articles 11 and 34 of the VCLT indicate that unilateral obligations require the consent of at least several corresponding parties. The third condition is that a legitimate claim justifies the unilateral action. Claiming the existence of a unilateral law requires a non-state actor to show sufficient grounds legitimizing its claim. Hence, if a major non-State actor aims to create a legitimate unilateral obligation that is recognized by corresponding States, arguably, it can do so through unilateral law-making.

The first condition is based on the *Kosovo* and *Reparations* cases. The Kosovo declaration of independence resulted from the historical complexity of the issue,[75] the partial recognition of the Kosovo people,[76] and the preceding military conflict.[77] The *Kosovo* case fundamentally represents a long-lasting controversy involving major international actors. Considering the significance and scale of the issue, the declaration made by the self-government of Kosovo produced a significant reaction in the international community. Consequently, international law considerations led to finding that the declaration had legal effect.[78] Thus, for a document to fall within the sphere of international law, non-state actors must first introduce a minimum threshold of sufficient gravity.

The *Reparations* case provides further support for the previous assertion. In the *Reparations* case, the ICJ considered matters relating to international legal personality, and those conditions necessary for it.[79] The ICJ concluded that the gravity of the tasks performed by the UN presumed an international legal personality.[80] Although the UN—as an international legal entity—has a special link to the States which created it, non-state actors do not share a similar link to States.[81] Nevertheless**,** the argument regarding the gravity of the performed actions remains applicable to non-state actors.[82] Moreover, in conjunction with the example

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that can be explained only by the presence of international legal personality, such an entity is to be considered as an international legal person.

[74] *See* VCLT, *supra* note 4, art. 34.

[75] *See* VICKERS, *supra* note 26; RADAN, *supra* note 27.

[76] *See supra* note 59.

[77] *See supra* note 28.

[78] *See Kosovo*, *supra* note 18; *see also* SUMMERS, *supra* note 24, at 391.

[79] *See Reparations*, *supra* note 73, at 174.

[80] *Id.* at 185.

[81] *Id.* at 178, 185.

[82] *See id.*; *see also supra*, notes 56–7; RYNGAERT, *supra* note 57, at 195–203.

of Kosovo, major non-state actors may have special standing in international law.[83] As a result, only major non-state actors can realistically produce documents recognizable as part of unilateral law-making.

The second condition is the partial recognition of a non-state actor's unilateral law by other international actors. There are several reasons to believe that unilateral obligations require the recognition of other international entities. First, international law has a consensual nature. Under Articles 11 and 34 of the VCLT, a corresponding party must consent to the international rights and obligations for them to have a binding effect upon it. To claim that the unilateral declarations of non-state actors have a normative character, multiple international bodies must first accept them as sources of obligations or rights.

Second, from a more practical perspective, the uncertain international legal standing of non-state actors requires external acceptance to validate their declarations. Assuming that major non-state actors create international obligations without any corresponding action by other international entities leads to controversy. Such self-legislation would disregard the law of consensus between different international bodies. Accordingly, unilateral law-making by non-state actors seems to require at least partial recognition by other international entities.

Third, effective unilateral rights or obligations require a legitimate ground. Simma argues that different actions not expressly governed by international law may have different layers of legality. This contention approximates the legal debates surrounding the nexus between legality and legitimacy in the context of the use of force and humanitarian intervention.[84] A number of scholars argue that certain actions in the international sphere are justified, but illegal.[85] For example, in certain circumstances, a humanitarian intervention is morally justifiable, but illegal under international law.[86] Similarly, considering the *Kosovo* case—and noting that matters related to unilateral law-making are not expressly governed—issues related to unilateral law are not illegal unless proven otherwise. Thus, assessing this criterion turns away from questions of legality and instead focuses on the purported legitimacy behind the claims of non-state actors.

Accordingly, a brief outline of the possible grounds of legitimacy becomes sensible. One of the most straightforward examples is the gross violation of human rights. The *Reference re Secession of Quebec* case and the humanitarian intervention argument indicate that grave

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[83] *See supra* notes 56–7, 82.

[84] *See* PHILIP ALSTON & EUAN MACDONALD, HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179–215 (Oxford Univ. Press 2008).

[85] *See id.*; *see also* AIDAN HEHIR, HUMANITARIAN INTERVENTION: AN INTRODUCTION 112–118 (Palgrave Macmillan 2013).

[86] *See supra* notes 80, 85.

violations of human rights alter the rights and duties of non-state actors.[87] Particularly, the *Quebec* case noted that the right to external self-determination surfaces in most extreme cases of human rights abuses.[88] Outside of the scope of self-determination, severe human rights abuses legitimize unilateral actions of non-State actors, which in turn provides a degree of legality. Hence, reacting to gross human rights violations serves as a legitimate ground for unilateral non-state law.

Another ground of legitimacy for unilateral non-state law—and perhaps the most renowned—is democratic consent.[89] Just as consent of the governed is often perceived as primary political authority justification, so too is it another means to justify non-state actors forming unilateral law.[90] There may be other circumstantial legitimating factors that justify non-state actors making unilateral law. The lack of evident examples, however, precludes a clear outline. Hence, assessing legitimacy must conform to a case-by-case approach. Having outlined the criteria for effective unilateral law-making, the next Section explores other available cases of unilateral actions of non-state entities. Moreover, the next Section assesses the cases presented according to the outlined criteria.

D. Unilateral Law and Non-State Actors: Applying the Framework

To advance the contention of this Article, this Section explores additional examples of non-state actions that have ramifications in international law. The argument progresses through an analysis of two main circumstances: Declarations of non-state armed groups in International Humanitarian Law (IHL) and the legal actions of contested quasi-state entities. The examples aim to show that various actions of non-state actors can have law-changing and law-making properties in international law.

The first noteworthy circumstances involve unilateral declarations of non-state armed groups in IHL. According to Article 96.3 of the Geneva Additional Protocol I (AP I), non-state armed forces can submit unilateral declarations insofar as they agree to obey Geneva Conventions.[91] A number of non-state armed groups have agreed to comply with the Geneva

[87] *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126, 130 (Can.) [hereinafter *Quebec*].

[88] *Id.*

[89] *See* STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW (Hart Pub. 2010); O'DONOGHUE, *supra* note 55, at 15–44; JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Awnsham Churchill 1689); JOHN MILTON, THE COLLECTED PROSE WORKS OF JOHN MILTON (Jazzybee Verlag 2013) (eBook).

[90] *See supra* note 89; *see also* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 107 (Polity Press 1987).

[91] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 96.3, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

Conventions through unilateral declarations.[92] The declarations have been issued in Sudan, South Africa, Angola, and others.[93] These declarations represent the commitment of various non-state groups towards international humanitarian standards.

The key factor for the purposes of the AP I is the legal status of the sources of unilateral obligations. At first sight, declarations obeying the Geneva Conventions arise under the AP I itself and, consequently, form part of international treaty law. But, non-state armed groups are not parties to the Geneva Conventions and, hence, cannot formally apply Article 96.3. of the AP I to create rights and obligations under the treaty. And yet, unilateral declarations *per se* can create obligations for non-state actors through unilateral law. Thus, the source of the obligations is not the AP I, but rather the declaration itself. In such a case, obligations rising from a declaration match the obligations of the Geneva Conventions.

Moreover, the criteria from the previous Section helps assess declarations under IHL. First, if non-state armed groups satisfy the fairly strict criteria for armed groups under IHL, they become synonymous with major non-State actors. In the latter cases, international law *per se* outlines the criteria that identifies a non-state actor as being of sufficient gravity. Second, unilateral declarations under IHL have been recognized by other international parties—including States and international organizations—thus satisfying the recognition requirement. Third, non-state armed groups meet the legitimacy requirement when they express their intent to protect subjects already protected under international humanitarian standards. Hence, by meeting all of the proposed requirements, unilateral declarations under IHL create rights and obligations for non-state actors. Thus, it becomes necessary to explore whether the same principle is applicable to other branches of international law.

The second example covers prospective unilateral law-making by quasi-state entities. The first example is Taiwan. The legal status of Taiwan is a matter of long-lasting controversy in international law.[94] Taiwan's status has been challenged as being a part of China, a part of the Republic of China, or its own independent State.[95] Considering that the status of Taiwan is uncertain and without prejudice to the Montevideo Convention, for the purposes of this Article, Taiwan is a non-state actor.

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[92] Churchill Ewumbue-Monono, *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, 88 INT'L REV. OF THE RED CROSS 905, 907–8 (2006).

[93] *Id.*

[94] *See* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE (Oxford Univ. Press 2015), A chapter on the statehood of Taiwan.

[95] *See* CRAWFORD, *supra* note 31, at 198–219.

Assuming that Taiwan is a non-state actor, assessing Taiwan's unilateral declarations through the outlined merits is tenable. For example, Taiwan has made an attempt to ratify the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[96] The depository rejected the Taiwanese attempts to ratify the documents on the basis of SC resolution 2758.[97] The resolution stated that the People's Republic of China (PRC) is the only legitimate representative of Taiwan in the UN.[98] As the ICCPR is only open to States, and in light of the SC resolution, the depository of the UN rejected the ratification of the documents by Taiwan.[99] Nevertheless, Taiwan undertakes to perform obligations under the Covenants by incorporating them into Taiwanese domestic law.[100]

Naturally, a question surfaces: What is the legal status of Taiwan's human rights commitments? Considering that the commitment to human rights has been expressed through unilateral actions, it is possible to make a parallel to unilateral obligations in international law. The three outlined criteria are thus applicable. First, Taiwan serves as a non-State actor of sufficient gravity.[101] Its developed system of domestic governance, territory, population, contesting its seats in the UN, as well as other factors, conclusively indicate that Taiwan is an actor of sufficient gravity capable of having unilateral law-making characteristics. Second, the Taiwanese human rights commitment is at least partially recognizable.[102] Outside of a strictly legal view, several State and non-state actors have recognized Taiwan's human rights commitment.[103] Lastly, Taiwan has a legitimate ground for creating unilateral obligations, insofar as it expands human rights protection for Taiwanese people.

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[96] *See* Wendy Zeldin, *Taiwan: Two International Human Rights Covenants Ratified*, LIBR. OF CONGRESS (Apr. 15, 2009), http://www.loc.gov/law/foreign-news/article/taiwan-two-international-human-rights-covenants-ratified/.

[97] *See* G.A. Res. 2758 (XXVI), Restoration of the Lawful Rights of the People's Republic of China in the United Nations (Oct. 25, 1971); William A. Schabas, *Taiwan and the International Covenant on Civil and Political Rights*, PHD STUD. IN HUM. RTS. (Mar. 15, 2010), http://humanrightsdoctorate.blogspot.hk/2010/03/taiwan-and-international-covenant-on.html.

[98] *See* G.A. Res. 2758 (XXVI), *supra* note 97.

[99] *See* Schabas, *supra* note 97; *see also* Ewumbue-Monono, *supra* note 92; ICCPR, *supra* note 67, art. 48.

[100] *See* Ewumbue-Monono, *supra* note 92; Mark L. Shope, *The Adoption and Function of International Instruments: Thoughts on Taiwan's Enactment of the Act to Implement the ICCPR And the ICESCR*, 22 IND. INT'L & COMP. L. REV. 159 (2012).

[101] The sense of gravity can be derived from the fact that Taiwan was able to contest seats from the PRC in the UN.

[102] *See* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2013: Taiwan (2013), http://www.state.gov/documents/organization/220444.pdf; *Annual Report: Taiwan 2013*, AMNESTY INT'L (May 29, 2013), http://www.amnestyusa.org/research/reports/annual-report-taiwan-2013 (accessed June 4, 2016).

[103] *See supra* note 102.

What are the implications of the latter in terms of unilateral law? Arguably, Taiwan's implementation of the Covenants is a unilateral action that has implications in international law. In meeting the requirements, Taiwan obtained legal obligations under the ICCPR and the ICESCR through unilateral action. As is the case with other obligations in international law, individuals within Taiwan's jurisdiction enjoy the protections afforded by the human rights covenants. Taiwan itself must respect, protect, and promote these obligations.

Similarly, other quasi-state entities can act unilaterally to create international rights or obligations. Arguing *in abstracto*—and upon meeting the outlined requirements—autonomous areas like Hong Kong or Macau can form unilateral obligations through unilateral actions. Such actions, however, cannot run afoul of international law. Moreover, these actions must survive heavy scrutiny on the merits of their legality and legitimacy.

There are two additional aspects of unilateral law-making that merit discussion. The first is whether non-state actors can obtain rights through unilateral declarations. The answer is heavily conditioned upon the recognition of unilateral acts by non-state actors. In international law, rights are entitlements that are obtained through the consent of a corresponding party.[104] Similarly, to claim rights obtained through unilateral acts, a non-state entity must prove that other parties recognize and accept such acts as obligations. Moreover, exercising rights created through unilateral declarations is only done in relation to actors that have recognized such unilateral acts, thus, excluding other entities that have not recognized the acts.

The second issue is whether States themselves can claim existence of rights and obligations through the unilateral acts of non-state actors. Following the logic of *Nuclear Tests*, States can rely on unilateral acts that possess a legal nature.[105] As argued above, when States recognize the acts of non-state actors as legally binding, they can both provide rights and obtain obligations from the acts. An indirect example of this is the case of self-defense. A State can exercise her right to self-defense if attacked by non-state actors.[106] Importantly, in certain circumstances, non-state actors trigger and adjust the rights of States. As in a self-defense case, a non-state actor can create grounds for a State to exercise a right that would otherwise have been absent without the interference of the former. Hence, non-state actors can adjust the rights and obligations of States through their unilateral actions.

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[104] *See* Matthew J. Lister, *The Legitimating Role of Consent in International Law*, 11 CHI. J. INT'L L. 663 (2011).

[105] *See Nuclear Tests*, *supra* note 3, para. 46.

[106] *See generally* Stephanie A. Barbour & Zoe A. Salzman, *"The Tangled Web": The Right of Self-Defense Against Non-State Actors in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 53; S.C. Res. 1373, On Threats to International Peace And Security Caused By Terrorist Acts (Sept. 28, 2001).

Looking at the factual examples, non-state actors can both create unilateral rights and obligations for themselves, and amend the rights and obligations of corresponding parties. Applying the three outlined conditions demonstrates that the unilateral actions of non-state actors can have significant effect in international law.

E. Conclusion

Throughout the last several decades, the body of international law has faced the growing phenomenon of active non-state actors' participation in the various processes of international affairs. While the debates regarding the latter largely discussed the extent to which international law governs non-state actors, this Article took a different stance and explored whether non-state actors can contribute to the body of international law**.** Grounding itself in the *Nuclear Tests* and *Kosovo* cases by the ICJ, the Article argued that non-state actors can create international rights and obligations through the process of unilateral law-making. To create the mentioned legal consequences, unilateral actions must meet three criteria. First, producing such actions requires non-state actors of sufficient gravity. Second, at a minimum, other international actors must partly recognize such actions. Third, these actions must have a legitimate ground justifying their legal character. When non-state actors meet the outlined conditions, the unilateral action creates international legal effects. Moreover, the last section of the Article provided several factual examples of unilateral law-making in international law as analyzed through the prism of the outlined grounds.

As to the broader purpose of the work, the Article has argued that the scope of international law has expanded to ensure that the international legal order hears and reflects the voices of major international non-state actors within it. In light of the growing importance of non-state actors, arguing for their law-making capacities is essential to ensure timely development of international law and a more flexible and inclusive international legal order. Moreover, recognizing the opinions of non-state actors within international law can alleviate the political tension in those parts of the world where various entities have been left out of the international legal system.