The Autonomous Community of Catalonia and International Law

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The attempt by the Autonomous Community of Catalonia (hereinafter «Catalonia») to break away from Spain raises several interesting questions that go to the heart of international law, namely statehood, self-determination, territorial integrity, and recognition. This article demonstrates that Catalonia has no entitlement under international law to obtain independence. It has nonetheless the right to pursue its economic, social, and cultural policies, even beyond its borders and those of Spain, provided that the Spanish Constitution and the Statute of Autonomy are respected.

Keywords Self-Determination – Secession – Statehood – Minorities – Human Rights – Catalonia

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I. Introduction

The question of the claim to independence put forward by the Autonomous Community of Catalonia (hereinafter «Catalonia») has dominated the political agenda in Spain for several years and no definitive solution is in sight yet. This article provides a concise overview of the events related to the Catalan independence bid, which culminated to the 2017 illegal referendum, and the position taken by the Constitutional Tribunal. It then analyses the relevant international legal issues with a view to defining Catalonia's entitlements under international law and to assess its claim from the standpoint of the key concepts and principles, most prominently statehood, self-

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determination, secession and recognition. Understanding and respecting those concepts and principles is indispensable to reach a satisfactory solution in the present crisis.

II. Overview of the Facts

The Constitution of Spain, promulgated in 1978, provides that «[n]ational sovereignty is vested in the Spanish people, from whom emanate the powers of the State» (Article 1.2). It also solemnly proclaims «the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards», and guarantees «the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all» (Article 2). Accordingly, Articles 148 and 149 define, respectively, the exclusive competences of the State and those of Autonomous Communities.[1]

The relationship between the central government and Catalonia are currently governed by the 2006 Statute of Autonomy according to which Catalonia's self-government is founded on the Constitution and the historical rights of the Catalan people. The Statute also protects the wish of Catalonia «to develop its political personality within the framework of a State, which recognises and respects the diversity of identities of the peoples of Spain».[2]

On 28 June 2010, the Constitutional Tribunal declared unconstitutional several provisions of the Statute.[3] It firmly held that the autonomy of Catalonia is based on and must be exercised in accordance with the Constitution. It also emphasised that the Statute is subordinated to the Constitution while its provisions are not expression of a sovereign power, but merely of a devolved autonomy. According to the Tribunal, the «Spanish people» are the sole holder of national sovereignty, whereas the «people of Catalonia» are the holder of public powers to be exercised in conformity with the Constitution and the Statute of autonomy. The decision was criticised by the independentist minority of the Catalonian Parliament for watering down the Statute.

In 2012, the Catalan authorities claimed the «right to decide» and announced Catalonia as «a new State of Europe», based on the imprescriptible and inalienable right to self-determination as democratic expression of its sovereignty as nation.[4] The claim was further articulated in a document according to which the process towards

1 Spanish Constitution, unofficial English translation available at <http://www.senado.es/web/conocersenado/normas/constitucion/index.html?lang=es_ES>. All websites last visited on 31 October 2020. The decisions rendered by the Constitutional Tribunal referred to in the article are available, in the English translation, at <https://www.tribunalconstitucional.es>.

2 Organic Act 6/2006, 19 July 2006, on the Reform of the Statute of Autonomy of Catalonia, at <https://www.parlament.cat/document/cataleg/150259.pdf>.

3 Constitutional Tribunal, Judgment 31/2010, 28 June 2010, BOE-A-2010-11409.

4 Resolution 742/IX, 27 September 2012, at <https://www.parlament.cat/document/intrade/6026>.

independence was based on «three main principles»: (a) self-determination in application of a democratic principle; (b) self-determination as an inalienable right of a national community; and (c) self-determination as the last resort to remedy an unjust situation.[5]

These were amongst the first of a long sequence of legal and political documents, most of them dismissed by the legal advisors of the Catalan Government, aimed at achieving Catalonia independence. All of them were systematically declared unconstitutional by the Tribunal Constitutional to the extent they challenged the unity of Spain and prospected the «sovereignty» of Catalonia.[6] For the Tribunal, «only the Spanish People are sovereign, exclusively and indivisibly, no other subject or State body or any part of the people can be endowed with sovereign status by a public power». The Tribunal also held that the «right to decide» cannot be considered unconstitutional if it is interpreted not as «a manifestation of a right of self-determination, or as an unrecognized attribution of sovereignty», but rather as a political aspiration in accordance with the Constitution and the principles of democratic legitimacy, pluralism and legality.[7]

In a subsequent decision, the Tribunal emphasised that Spain is a composite State, while its territorial entities enjoy political autonomy but are not subjects of international law and therefore cannot participate in international relations. Being the only subject of international law, the central government has exclusive competence it the field of international relations, as clearly provided for in Article 149.1.3 of the Constitution and reflected in the principle of unity of action abroad, which is enshrined in Law 2/2014 on External Relations.[8] The Tribunal further clarified that the exclusive competence of the central government refers to the relations between international subjects and most prominently the conclusion of treaties *(ius contrahendi)*, the external representation of the State *(ius legationis)*, as well as to the creation of international obligations and the international responsibility of the State. Yet, the Tribunal recognized the right of an Autonomous Communities to project themselves outside their territories and even abroad, provided that these activities are nec-

5 *White Paper on the National Transition of Catalonia. Synthesis* (2014), at <http://economia.gencat.cat/web/. content/70_economia_catalana/Subinici/Llistes/nou-estat/catalonia-new-state-europe/national-transition-catalonia.pdf>.

6 These decisions include Judgment 42/2014, 25 March 2014, BOE-A-2014-3885 , Ground 3; Judgment 31/2015, 25 February 2015, BOE-A-2015-2832; Judgment 32/2015, 25 February 2015, BOE-A-2015-2833; Judgment 46/2015, 5 March 2015, BOE-A-2015-3824, Ground 4; Judgment 259/2015, 2 December 2015, BOE-A-2016-308; Judgment 170/2016, 6 October 2016, BOE-A-2016-10671; Judgment 215/2016, 15 December 2016, BOE-A-2017-650; Judgment 114/2017, 17 October 2017, BOE-A-2017-13230; Judgment 124/2017, 8 November 2017, BOE-A-2017-13228.

7 Constitutional Tribunal, Judgment 42/2014, 25 March 2014, Ground 3; Judgment 46/2015, 5 March 2015.

8 BOE-A-2014-3248, available at <https://www.boe.es/eli/es/l/2014/03/25/2/con>.

essary or convenient for the exercise of their own powers and do not invade the exclusive competence of the State in matters of international relations.[9]

Notwithstanding the decisions by the Constitutional Tribunal, the Catalan authorities pursued their independence claim and organised non-binding consultations, which took place on 9 November 2014. The referendum was eventually found unconstitutional[10] and the President and some members of the Catalan Government responsible of grave contempt to the Constitutional Tribunal and banned from office by Catalan High Court of Justice and Supreme Court.

The saga continued nonetheless with the announcement of «the start of the process to create an independent Catalan State in the form of a republic», the «disconnection» with the law of the Spain and a «unilateral mechanism of democratic exercise» meant to activate the convening of the Constituent Assembly. A further resolution defined the general political orientation of the Government of Catalonia.[11]

In turn, the Spanish parliament adopted Law 15/2015 aimed at the effective enforcement of the judgments of the Constitutional Tribunal.[12] The law was considered constitutional in two appeals made by Catalonia[13] and the Basque region.[14] The Tribunal pointed out that the measures aimed at enforcing its decisions not only concerning the Autonomous Communities, but also those concerning the central authorities.

In 2017, the Catalan Parliament organised a referendum on self-determination, with no legal basis. Article 2 of Law 19/2017 proclaimed «[t]he people of Catalonia are a sovereign political subject and, as such, exercise its right to freely and democratically decide upon their political condition».[15] Law 20/2017, in turn, was adopted in order to allow Catalonia «to function immediately and with maximum effectiveness» in the transitional period between the referendum on self-determination and the adoption of the Constitution by the Constituent Assembly.[16]

Although the Constitutional Tribunal suspended both pieces of legislation, on 12 September 2017, the Catalan Parliament went ahead with the referendum, which occurred amid clashes between certain segments of the local population and the po-

9 Constitutional Tribunal, Judgment 28/2016, 22 December 2016.

10 Constitutional Tribunal, Judgment 31/2015, 25 February 2015; Judgment 32/2015, 25 February 2015.

11 See Resolution 1/XI, 9 November 2015, <https://www.parlament.cat/document/intrade/153127>; Resolution 263/XI, 27 July 2016, <https://www.parlament.cat/document/intrade/175266>; and Resolution 306/XI, 6 October 2016, Resolution 263/XI, 27 July 2016, <https://www.parlament.cat/document/bopc/182074.pdf>.

12 Adopted on 16 October 2015, BOE-A-2015-11160, <https://www.boe.es/eli/es/lo/2015/10/16/15>.

13 Constitutional Tribunal, Judgment 215/2016, 15 December 2016.

14 Constitutional Tribunal, Judgment 185/2016, 3 November 2016.

15 Law 19/2017, at <http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-19_2017-on-the-Referendum-on-Self-determination.pdf>.

16 Law 20/2017 Juridical transition and founding of the Republic, at <http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-20_2017-on-Juridical-Transition.pdf>.

lice. On 10 October, the President of Catalonia assumed «the mandate of the people whereby Catalonia becomes an independent State», but proposed the Catalan Parliament to suspend the effects of the referendum and to engage in dialogue with the central government. The same day, the MPs of the pro-independence bloc, who defined themselves as the «legitimate representatives of Catalonia», although they represented less than half of the population, issued a declaration of independence with no legal basis[17] proclaimed in a non-regular meeting outside the main room of the parliament.

The Constitutional Tribunal unanimously declared null and unconstitutional both the Law on the Referendum,[18] and the Law of Juridical Transition.[19] It held unambiguously that the Constitution *obviously* does not recognize any right to unilateral secession. Quite the contrary, the law on referendum was deemed inconsistent with several articles of the Constitution, including Articles 1.2 and 2 dealing, respectively, with national sovereignty being vested in the Spanish people, the indissoluble unity of the Spanish Nation, and the guarantee of the right to autonomy of the nationalities and regions composing Spain.

On 17 October, the central government for the first time triggered the application of Article 155 Constitution, which led to the adoption of a series of firm measures, including the dismissal of the President and the Catalonia Government. His functions were now assumed by central authorities.[20] On 27 October, the President and some members of the Catalan Government fled to Belgium, while the Vice-President and other members were arrested and charged with several criminal offences. The later were eventually found guilty by the Supreme Court of sedition and misuse of public funds.[21]

17 At <http://www.cataloniavotes.eu/wp-content/uploads/2017/10/27-Declaration-of-Independence.pdf>.

18 Constitutional Tribunal, Judgment 114/2017, 17 October 2017, at <https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20referendum%20ENGLISH.pdf>. See also Asier Garrido-Muñoz, «Prime Minister v. Parliament of Catalonia», 112 American J. Int'l L. (2018), 80–88.

19 Constitutional Tribunal, Judgment 124/2017, 8 November 2017, at <https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20transitoriedad%20ENGLISH.pdf>.

20 Order PRA/1034/2017 Section A. For a detailed treatment of the application of Article 155, see María Jesús García Morales, «Federal Execution, Article 155 of the Spanish Constitution and the Crisis in Catalonia», 73 Zeitschrift für öffentliches Recht (2018), 791–830; Manuel Cavero Gómez, «La aplicación del artículo 155 de la Constitución a la comunidad autónoma de Cataluña. Comentario a las Sentencias del Tribunal Constitucional 89/2019, de 2 de julio, y 90/2019, de 2 de julio», 107 Revista de las Cortes Generales (2019), 507–519; L. Payero-López, «Assessing the Spanish State's Response to Catalan Independence: The Application of Federal Coercion», in: A-G. Gagnon & A. Tremblay (eds.), Federalism and National Diversity in the 21st Century, Cham 2020, 73–104.

21 Supreme Court, Criminal Chamber, Judgment No. 459/2019, 14 October 2019, <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Tribunal-Supremo-condena-a-nueve-de-los-procesados-en-la-causa-especial-20907-2017-por-delito-de-sedicion>, English translation available. In literature see, amongst many, A. Bar Cendón, «El proceso independentista de Cataluña y la doctrina jurisprudencial: una visión sistemática», 37 Teoria y Realidad Constitucional (2016), 187–220; J.M. Castellà Andreu, «Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-con-

Spanish authorities also issued an arrest warrant and requested the extradition of Mr Puigdemont and other former members of the Catalan government.[22] The case got even more complicated as some of the independent leaders were elected to the European Parliament. The case of Mr. Junqueras, who has been detained since, has triggered a series of decisions before the Supreme Court as well as a preliminary ruling of the European Court of Justice.[23] Meanwhile, the Spanish Parliament had requested the European Parliament to waive the immunities of its members involved in the Catalan independence bid. Although related to the independence attempt, these developments fall beyond the scope of this article.

The Catalan declaration of independence met the firm dismissal of the European Union[24] and its members, as well as virtually all States.[25] The President of the European Parliament, in particular, defined it as «a breach of the rule of law, the Spanish Constitution and the Statute of Autonomy of Catalonia, which are part of the European Union's legal framework».[26]

III. Legal Analysis

From the standpoint of international law, the Catalonian independence question raises a series of issues related to key concepts of international law, namely: (1) territorial integrity; (2) self-determination; (3) declarations of independence; (4) secession; and (5) recognition. A concise analysis of these concepts and their impact in the present case shall now be offered.

stitucionales a un conflicto político-constitucional», 37 Teoria y Realidad Constitucional (2016), 561–592; J. De Miguel Bárcena, «El proceso soberanista ante el Tribunal Constitucional», 113 Revista española de derecho constitucional (2018), 133–166 .

22 For an early reflexion, see Stefan Braum, «The Carles Puigdemont Case: Europe's Criminal Law in the Crisis of Confidence», 19 German Law Review (2018), 1349–1358.

23 Judgment of the Court (Grand Chamber), C-502/19, EU:C:2019:1115, *Junqueras Vies.* On 9 January 2020, the Supreme Court, Criminal Chamber, Special Proceedings 20907/2017, found that there were no grounds to authorise Mr Junqueras to travel to the seat of the European Parliament, to order his release, or to set aside the judgment issued on 14 October 2019.

24 See Richard Caplan & Zachary Vermeer, «The European Union and Unilateral Secession: The Case of Catalonia», 73 Zeitschrift für öffentliches Recht (2018), 767–789.

25 See, for example: State Department, Press Statement, 27 October 2017, at <https://www.state.gov/on-u-s-support-for-spanish-unity>, according to which «Catalonia is an integral part of Spain, and the United States supports the Spanish government's constitutional measures to keep Spain strong and united»; United Kingdom, Statement on UDI made by Catalan regional parliament: 27 October 2017, at <https://www.gov.uk/government/news/statement-on-udi-made-by-catalan-regional-parliament-27-october-2017>; Argentina, Situation in Catalonia, 27 October 2017, Press Release 482/17, <https://cancilleria.gob.ar/en/news/releases/argentina-and-situation-catalonia>.

26 European Parliament President statement on the situation in Catalonia, 27 October 2017.

A. Territorial Integrity

In the modern international legal order, the principle of territoriality and the surrounding legal consequences are the core elements of personal, spatial and conceptual ordering. The treaties of Westphalia (1648) can be considered as the culmination of an incremental process leading to the creation of sovereign states entitled to freely organise themselves (internal dimension) without any interference from outside (external dimension).[27] The UN General Assembly proclaimed that «any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter»[28] and «[t]he territorial integrity and political independence of the State are inviolable».[29] In the Millennium Declaration, UN member States formally declare: «we rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, [...] the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States».[30] The International Court of Justice held that respect for territorial integrity between independent States «is an essential foundation of international relations»,[31] or «an important part of the international legal order», enshrined *inter alia* in the Charter of the United Nations and in particular in Article 2, paragraph 4.[32] Importantly for the purpose of this inquiry, it also held that «the principle of territorial integrity is confined to the sphere of relations between States».[33] A non-State entity or an armed group is not bound under general international law to respect this rule. If it were otherwise, any attempt at secession would be contrary to international law. Even the altering of the constitutional asset relating to territory (e.g. concerning local autonomies) could be considered to be an attack on the territo-

27 Richard A. Falk, «The Interplay of Westphalia and Charter Conceptions of the International Legal Order», in: Richard A. Falk & Cyril E. Black (eds.), The Future of the International Legal Order, vol.1, New Jersey 1969, 32–70, 43–44.

28 GA Res. 1514, 14 December 1960, para 6. The principle was clearly reiterated in GA Res. 71/292, 22 June 2017 (Request for *Chagos Archipelago* advisory opinion).

29 GA Res. 2625 (XXV), 24 October 1970, Annex, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter.

30 GA RES. 55/2, 8 September 2000, para 4. See also GA RES. 60/1 (World Summit Outcome), 24 October 2005, para 5.

31 *Corfu Channel Case, I.C.J. Reports 1949,* p. 35.

32 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, *I.C.J. Reports 2010,* p. 403, para 80.

33 Ibidem. See also (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, *I.C.J. Reports 1971,* pp. 31–32, paras. 52–53; *East Timor (Portugal v. Australia),* Judgment, *I.C.J. Reports 1995,* p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, *I.C.J. Reports 2004,* 136, para. 88.

rial unity of the State and be proscribed. International practice shows that such extreme limitations on insurrection cannot be inferred from international law as it stands.

In the case of Catalonia, the territorial integrity principle means first of all that third States cannot intervene in the internal affairs of Spain by sustaining the secessionist process, since they would then be contributing to disrupt the principle of Spanish territorial integrity. The principle here conflates largely to the other one related to the non-intervention in internal affairs. Thus, the extreme restraint displayed by the EU in this context lives up to the principle of territorial unity and non-intervention. Second, the principle further implies that any use of force by third States in this context is all the more excluded, since such a course would violate at once the principle of territorial integrity, of non-intervention and of non-use of force. Third, although the principle does not bind Catalonia as a matter of international law, Spanish Constitution provides autonomously for the protection of Spain territorial integrity.

The concrete result is that the territorial integrity unit rests the one of Spain. In the absence of any governmental effectiveness of the purported secessionist entity, there is no new State and thus no new territorial setting. The territorial unity of Spain is consequently protected under international law against third States and under constitutional law against internal actors.

B. Self-Determination

The law on self-determination (hereafter SD) has many facts, is legally complex and in particular has a much less sweeping scope under international law than generally assumed in common parlance. This comes as no surprise: international law is made by States, and most States are reluctant to concede a broad right of SD and to possibly become entangled themselves into claims for secession and independence. Over time, a fundamental distinction has emerged between external SD (right to secession) and internal SD (human rights guarantees, minority rights). While the first type of SD is granted only in exceptional circumstances, the second is allowed on a much broader basis under the human rights pull of our days. There is thus a huge difference in the material and personal scope of application between external SD and internal SD.

1. External self-determination

The relevant UNGA resolutions on external SD reflect this state of affairs. Firstly, the right of peoples to self-determination was tightly linked with the process of decolonization, and in particular situations of peoples under colonial or other forms of alien domination or foreign occupation. Resolution 1514 (XV), in particular, expressly proclaimed «the necessity of bringing to a speedy and unconditional end colonialism

in all its forms and manifestations».[34] The limited application of the right was consistently upheld by the ICJ in a series of decisions and advisory opinions. In the *Namibia* advisory opinion, in particular, the ICJ declared the right to self-determination contained in the UN Charter applicable to all non-self-governing territories referred to in Chapter XI of the Charter.[35] In the *Kosovo* advisory opinion, it emphasized that «[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation».[36] It follows, *a contrario,* that minorities or ethnic groups do not enjoy these types of rights, culminating in separation or secession.

Secondly, the creation of an independent State through the detachment from the parent State was not the only option for the exercise of the right to self-determination, even if it became by far the most popular one.[37] Resolution 1541 specified three modalities for the exercise of self-determination by Non Self-Governing Territories, namely: (a) emergence of a sovereign independent State; (b) free association with an independent State: or (c) integration with an independent State.[38] Resolution 2625, further introduced «any other political status freely determined by the concerned people». Self-determination should therefore not be equated to secession. Furthermore, since the Non Self-Governing Territories enjoyed a temporary special status (until the right to self-determination has been fully exercised), it is not accurate to describe the formation of independent States as instances of secession.

Thirdly, the applicable law is fully respectful of the principle of territorial integrity. It cannot be construed as to authorizing or encouraging «any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States».[39] Quite the contrary, «[a]ny attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations»,[40] or, as recently maintained by the African Union, the right to self-determi-

34 See also *Western Sahara,* Advisory Opinion, *I.C.J. Reports 1975,* p. 12, para 55.

35 *Namibia Case,* supra n. 33, p. 31. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, 25 February 2019, esp. para 87.

36 *Kosovo Unilateral Declaration,* advisory opinion, supra n. 32, para 79. In Judgment of the Court (Grand Chamber), C-104/16, EU:C:2016:973, *Council* v. *Front Polisario,* para 88, held that the principle of self-determination is «applicable to all non-self-governing territories and to all peoples who have not achieved independence yet».

37 Theodore Christakis, Le droit à l'auto-détermination en dehors des situations de décolonisation, 1999.

38 GA Res 1541 (XV), 15 December 1960, Principle VI.

39 GA Res. 2625 (XXV). See also GA Res. 1573 (XV), 19 December 1960 and Res. 1274 (XVI), 20 December 1961 (Algeria) as well as Res. 2066 (XX), 16 December 1965, and Res. A/RES/2357, 19 December 1967, (Mauritius).

40 GA A/RES/50/6, 24 October 1995.

nation was *intrinsically* linked to the principle of territorial integrity.[41] In the *Chagos Archipelago* advisory opinion, the ICJ unambiguously held that «the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power».[42]

2. Internal self-determination

Internal SD developed more slowly: it was first occulted by the more topical and urgent situation relating to anti-colonial struggle. The UN Charter as well as several universal and regional human rights treaties, including the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,[43] and the African Charter on Human and Peoples' Rights,[44] provide for the application of the right to self-determination to *all* peoples.[45] This right has systematically been accompanied, however, by reassurances that its exercise must be respectful of the territorial integrity of States. All peoples were thus entitled to claim and enjoy the right of peoples to self-determination *within* the jurisdiction of their own State. Conversely, the right of peoples to self-determination could not be invoked to unilaterally alter international borders. Thus, the General Comment 12 by the Human Rights Committee[46] and, in even more eloquent terms, the General Recommendation by the Committee on the Elimination of Racial Discrimination,[47] have reiterated that the right of self-determination has an internal dimension, granting to all peoples the right to pursue freely their economic, social and cultural development without outside interference, as well

41 Written Statement, 15 May 2018, *Chagos Archipelago,* Advisory opinion, supra n. 35, para 181. See also the previous Written Statement, 1 March 2018, esp. paras 143–157.

42 *Chagos Archipelago,* Advisory opinion, supra note n. 35, para 160.

43 GA Res. 2200A (XXI), 16 December 1966, entered into force, respectively on 23 March 1976, 999 *UNTS* 171, and 3 January 1976, 993 *UNTS* 3. Common Article 1.1 reads: «All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development».

44 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 20.

45 See, in particular, Michael Pomerance, «The United States and Self-Determination: Perspectives on the Wilsonian Conception», 70 American J. Int'l L. (1976), 1–27; R. McCorquodale, «Self-Determination: A Human Rights Approach», 43 Int'l and Comparative L. Quarterly (1994), 857–885; M. Saul, «The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?», 11 Human Rights L. R. (2011), 609–644 .

46 Human Rights Committee, General Comment No. 12 (1984), HRI/GEN/1/Rev.9 (Vol. I). According to para 4, the realization of the right to self-determination «is an essential condition for the effective guarantee and observance of *individual* human rights and for the promotion and strengthening of those rights» (emphasis added).

47 Committee on the Elimination of Racial Discrimination, General Recommendation 21, *The Right to Self-Determination* (1996), U.N. Doc. HRI\GEN\1\Rev.6 at 209 (2003), para 4. See also In *Reference Re Secession of Quebec* [1998] 2 R.C.S., para 126.

as an external dimension, granting to all peoples in situations of colonialism, alien subjugation, domination, and exploitation the right to determine freely their political status. The jurisprudence and opinions on this internal SD make it abundantly clear that such internal SD does not allow the altering of international boundaries and secession. The practice and jurisprudence of the African Commission, for example, amply confirmed that Article 20 of the African Charter on Human and Peoples' Rights does not imply any departure from the traditional approach to self-determination, which permits secession only in the colonial context.[48] In *Congrès du people katangais* v *Democratic Republic of Congo,* in particular, the Commission held that self-determination means «independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the peoples but fully cognisant of other recognised principles such as sovereignty and territorial integrity».[49] In a more recent case, while finding that the people of Southern Cameroon can legitimately claim to be a «people» for the purpose of Article 20, the Commission felt «obliged to uphold the territorial integrity of the Respondent State» and could not «envisage, condone or encourage secession, as a form of self-determination».[50]

Outside the colonial context, the right to self-determination suffers from two serious congenital deficiencies, namely the lack of any definition of «people»,[51] and consequently the lack of criteria to identify who is entitled to represent and speak on behalf of a «people». As pointed out by the Canadian Supreme Court, there is «little formal elaboration of the definition of 'peoples' which left the precise meaning of the term» open.[52] A Group of Experts appointed by UNESCO has attempted to identify some characteristics inherent in a *description* (not a *definition*) of «people». They include: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life.[53] This opens the way for minorities and indigenous peoples. To the extent that the right does not encompass the sharp edge of secession, but only the grant of human and minority rights, the lack of a more elaborated definition is not of great harm. Indeed, it is generally accepted that the

48 African Commission, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010) para 41. See also Resolution on the situation of the North of the Republic of Mali, ACHPR/Res.217(LI)2012, 2 May 2012, points iv and ix.

49 Communication 75/92, 22 March 1995, para 5.

50 *Kevin Mgwanga Gunme* et al. v. *Cameroon,* Case 266/03, 27 May 2009, at <https://www.achpr.org/sessions/descions?id=189>, para 190.

51 Writing in 1956, Ian Jennings, The Appraisal of Self-Determination, 1956, 55–56, argued that «[o]n the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people».

52 *Quebec Case,* supra n. 47, para 123.

53 International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris, 27–30 November 1989, SHS.89/CONF.602/7, para 22.1.

right of peoples to internal self-determination applies «within the territorial framework of independent States»[54] and refers to the legal relationship between a State and the subject within its jurisdiction.[55]

The precise content of the rights attached to internal SD remains rather vaguely defined under current international law. Attempts by States and scholars to define internal self-determination have led to rather general assertions up to this day. In the context of the *Kosovo* advisory opinion, for instance, Germany maintained that «[i]nternal self-determination means enjoying a degree of autonomy inside a larger entity, not leaving it altogether but, as a rule, deciding issues of local relevance on a local level».[56] Scholars, in turn, have referred to «the right of people to govern, that is to have a democratic system of government».[57] In 1995, however, Cassese observed that

> both customary and treaty law on internal self-determination have little to say with respect to the possible mode of implementing democratic governance. Nor do they provide guidelines on the possible distribution of power among institutionalized units or regions. Still less do they furnish workable standards concerning some possible forms of realizing internal self-determination, such as devolution, autonomy, or «regional» self-determination.[58]

This conclusion seems to remain accurate more than 20 years later.[59]

In the context of Catalonian claims, international law related to SD is thus fairly clear. Catalonia does not enjoy a right of external SD, i.e. a right to secession. It is not a colonial unity as defined under the law of the UN or an occupied territory under some form of alien domination, again as defined in UN law, but a mere region of a State, with a minority population. As an Autonomous Community, it can only claim internal SD (internal autonomy and protection of human rights). This is a matter which is regulated by the Spanish constitution, which cannot be considered to be oppressive of such minority rights. The ECtHR has had occasion to consider human rights issues in Catalonia / Spain and its case law shows the usual pattern of situation as anywhere else in Europe. Let's not forget, in this regard, that the Autonomous Community of Catalonia has one of the most developed self-government, similar to

54 Malcolm Shaw, «People, Territorialism and Boundaries», 8 Eur. J. Int'l L. (1997), 478–507; Id., International Law, Cambridge 2017, 388, relying on the *Quebec case,* supra n. 47.

55 Rosalyn Higgins, «Postmodern Tribalism and the Right to Secession», in: Catherine Brölman et al. (eds.), Peoples and Minorities in International Law, Dordrecht u.a. 1993, 29–26, 31.

56 Written Statement, 15 April 2010, 33. According to Article 3.1 of the Council of Europe, European Charter of Local Self-Government, 15 October 1985, at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a088>, «[l]ocal self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population».

57 Allen Rosas, «Internal Self-Determination», in: Christian Tomuschat (ed.), Modern Law of Self-Determination, Dordrecht u.a. (1992), 225, 232.

58 Antonio Cassese, Self-Determination of Peoples. A Legal Reappraisal, Cambridge 1995, 332.

59 See Patrick Macklem, «Self-Determination in Three Movements», in: Fernando Tesón (ed.), The Theory of Self-Determination, Cambridge 2016, 94–119, 108, 110.

that in other territories part of many important federal states in Europe. It is also the most economically developed Autonomous Community of Spain and has co-official languages.

C. Declaration of Independence

Claims to separate from a mother State are usually exercised through a declaration of independence solemnly proclaimed in the face of the world – as in the past a declaration of war would be issued by the State desiring to create a state of war. The question of whether international law prohibits an entity within a State to issue a declaration of independence was central in the *Kosovo* advisory opinion of the ICJ in 2010. The Court held that «the practice of States does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence».[60] It also rejected the argument made by several States that «a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity as it held that the scope of the principle of territorial integrity is confined to the sphere of relations between States».[61] This conclusion is amply supported by State practice. It flows from the non-prohibition of secession under international law (below, section D).

This is not to say that any declaration of independence is lawful under international law. But this illegality does not stem from the unilateral character of its exercise. In the *Kosovo* opinion, the Court thus correctly clarified that, when unilateral declarations of independence were treated as illegal, this was not due to their unilateral character, «but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*».[62] This occurred, for instance, with regard to the unilateral declaration of independence made by a racist minority in Southern Rhodesia. The Security called upon all States not to recognize the illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to it.[63] It is not the unilateral character of the declaration or its objective that triggers the illegality of the declaration and the obligation not to recognise, but rather the violation of the right to self-determination in the colonial context.

The implication of the foregoing is that the declaration of independence of Catalonia does not violate any rule of international law, but does so for rules of constitutional law. As recently ruled by the Council of Europe on conditions to held ref-

60 *Kosovo Unilateral Declaration,* advisory opinion, supra n. 32, para 79.
61 Para 80.
62 Para 81.
63 SC Resolutions 216 (1965), 12 November 1965 and 217 (1965), 20 November 1965.

erendums in Europe, it places the constitution as the only legal framework for any plebiscite. This is very much related to the case of the illegal referendum organised by authorities of the Autonomous Community of Catalonia. International law does not prohibit such declarations, and neither allows them; it is indifferent to their utterance. As long as the declaration remains on paper and is not followed by effective independence, it will have no true consequences in international law. Third States continue to be bound by the principles of respect for territorial integrity of Spain and non-intervention. The declaration will only have political effects, trying to set in motion a chain of events. In the case of Catalonia, this completely failed to occur to this day.

D. Secession

Secession may be a fact or a legal entitlement. In fact, it consists of violent action by an armed group, fighting to obtain the separation from a mother State and eventually obtaining that result. Third States must respect the territorial integrity and must not intervene in this process as long as the new State has not established effectively. On the other hand, secession may flow from a legal entitlement to separate from a State. This is the case mainly in the colonial context: the colonised peoples have a right to secede (as one of the options to exercise their right to self-determination), and third States have thus rights and obligations to sustain that search for independence. Secession can be defined as «the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter».[64] It is undisputed that parts of the territory of a State (i.e. a province or a region) may depart from the parent State with the consent of the later and provided that the decision reflects the genuine will of the majority of the population involved and is consistent with human rights. This is done by way of agreed separation. This is how Montenegro became a State in 2006.

a) Whether a *right to unilaterally secede* – intended as a «positive entitlement»,[65] «legally enforceable entitlement»,[66] or simply a «legally protected entitlement» – exists outside the colonial context requires an inquiry on State practice in search of a permissive customary rule,[67] while keeping in mind that customary international rules are created and evolve through «a process of continuous interaction, of contin-

64 Marcelo Kohen, «Introduction», in: Marcelo Kohen (ed.), Secession. International Law Perspectives, Cambridge 2009, 1–20, 3.

65 *Kosovo Unilateral Declaration,* advisory opinion, supra n. 32, p. 56.

66 Report by Thomas Franck, «Question 2», in: Anne F. Bayefsky (ed.), Self-Determination in International Law. Quebec and Lessons Learned, The Hague 2000, 75–84, para 2.1.

67 Since there are no applicable treaty rules. It is not sufficient that international law does not prohibit secession, since from an absence of prohibition no *right* to do something can be derived.

uous demand and response». [68] What matters, in other words, is to determine whether some States have put forward a sufficiently articulated legal claim about the legality of unilateral secession and how other States have reacted to such a claim. State practice indicates that a legal claim on unilateral secession outside the colonial context has not been clearly articulated by a significant number of States and has even less attracted the critical mass of acceptance, or at least acquiescence, indispensable to create a customary rule. Quite the contrary, States have consistently and massively opposed the invocation of self-determination outside the colonial context (or the quasi-colonial context of racist regimes and foreign occupation) as legal basis to alter territorial integrity – with the only and still rather controversial issue of remedial secession.[69] The statement made by the Canadian Supreme Court in the *Quebec* case, according to which «[i]t is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their ‹parent› state»,[70] reflects existing law. Likewise, the Independent International Fact-Finding Mission on the Conflict in Georgia held that «[o]utside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in [the] form of a secession is not accepted in state practice».[71]

b) What remains then is secession as a *matter of fact*. International law does neither prohibit it nor authorize it. As we have already seen, internal actors are not bound under general international law (but can be bound by particular international law such as a Security Council resolution) by the principle of territorial integrity and cannot by definition intervene in internal affairs (since they are themselves an internal actor). The international community of States has consequently accepted as fait accompli the unilateral secession of a not insignificant number of States. Secession occurred in the context of internal conflicts and possibly in the context of State dissolution or dismemberment – as in the case of former Yugoslavia – or following external military intervention – as in the case of Bangladesh. No right to secede was

68 Myres S. McDougal, «The Hydrogen Bomb Tests and the International Law of the Sea», 49 American J. Int'l L. (1955), 353–361, 354.

69 Amongst the authors supporting a right to remedial secession, see Allen Buchanan, Justice, Legitimacy and Self-Determaination, Oxford 2004, Chapter 8; Christian Tomuschat, «Secession and Self-Determination», in: Kohen (ed.), supra n. 64; Cedric Ryngaert & Christine Griffioen, «The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to Agora Papers», 8 Chinese J. Int'l L. (2009), 573–587, 581; Peter Hilpold, «Secession in International Law. Does the Kosovo Opinion Require a Reassessment of the Concept?», in: Peter Hilpold (ed.), Kosovo and International Law. The ICJ Advisory Opinion of 22 July 2010, Leiden/Boston 2012, 47–78. *Contra,* Katherina Del Mar, «The Myth of Remedial Secession», in: Duncan French (ed.), Statehood and Recognition, Cambridge 2013, 79–108; Simone F. Van Den Driest, Remedial Secession. A Right to External Self-Determination as Remedy to Serious Injustices?, Cambridge 2013, Chapter 6.

70 *Quebec Case,* supra n. 47, para 111.

71 Report, vol. II (September 2009) 141.

implied or recognized in these cases. The issue was only the recognition of a state of affairs, of an effectiveness.

There is another important practical reason why States have adamantly opposed the right to secede. It is extremely difficult to identify the holder of the right to secession and there is thus a risk of opening a Pandora box. Practical problems are manifold in this context. For example, why should the territorial entity breaking away, possibly on the basis of some historical claims, be allowed to secede from the parent State, but not a minority within that entity which would prefer to remain within the jurisdiction of the parent State or wishes to establish its own independent entity? Why should Croatia make a claim against former Yugoslavia and not the Krajina region against Croatia itself?[72] Within the context of the claim of independence of Quebec, the aboriginal people Crees challenged the right of Quebec to secede not only because there is no such right under international law, but also because the independence of Quebec would violate the self-determination of the Crees.[73]

Once more, it would be inexact to state that the process of secession, as a matter of fact, is not regulated by international law. It is one thing to say that the law neither prohibits nor allows secession, and it is another to say that the process leading to secession cannot give rise to international illegalities. Various legal consequences may be attached to violations of international law committed during the process leading to secession. As held by British Government in relation to the *Kosovo* advisory opinion, «there can be cases where separation or secession from a State raises issues of illegality under international law; indeed such cases can involve issues of fundamental concern. They may involve external aggression or intervention, or widespread violation of basic human rights».[74] But the illegality does not relate to the claim of secession itself, but rather to the conduct the outcome of which is secession. Thus, secession may be upheld by a use of force of a third State; it is then this use of force which makes the process illegal and prompts a duty of non-recognition.

c) In our context, it is manifest that Catalonia has no right to secede from Spain. We are indeed not situated in the colonial or occupational context as defined by UN law. As long as Catalonia is incapable of creating an effectively independent entity, no secession can take place. Thus, the principles of territorial integrity and non-intervention continue to apply for third States, which are e.g. not entitled to recognise Catalonia as an independent State. For Catalonia itself, for the time being, its subjection to the Spanish constitution has not ceased and therefore the secessionists can be called to answer for their deeds in front of Spanish courts.

72 Thomas M. Franck, «Fairness in the International Legal and Institutional System», 240 Recueil des Cours (1993), 9, 136.

73 *Factum of the Grand Council of the Crees (Eeyou Istchee),* in: Bayefsky (ed.), supra n. 66, 351.

74 Written Statement, 17 April 2009, para 5.34.

d) There remains the vexed issue of so-called *remedial secession*. The main point revolves around the idea that when a certain threshold of oppression and human rights violations (atrocity crimes) is reached, a minority can no longer be expected to live together with the oppressing majority and obtains a right of (remedial) secession. The argument relies on the so-called «safeguard clause» which has been inserted in Resolution 2625[75] as well as in the 1993 Vienna Declaration[76]. The clause has been interpreted *a contrario* as admitting unilateral secession – and therefore the alteration of international borders – when the parent State does not comply with the principle of equal rights and self-determination of peoples.[77] This reading of the resolution was shared in the context of the *Kosovo* advisory opinion by several States, including Switzerland,[78] the Netherlands[79] as well as Judge Yusuf.[80] The literal argument based on the «safeguard clause» is far from convincing. As clearly pointed out by Arangio-Ruiz, the clause

> is meant to protect the political unity and the territorial integrity of all the parties duty-bound under this principle, namely all States, whether possessed of colonies or similar overseas territories or not; whether multi-national or multi-racial; whether monolithically compact in the ethnic composition of their peoples or ruling also over minority groups of different origin, culture, or creed.[81]

This interpretation has unambiguously been shared by several States in the *Kosovo* proceedings.[82] It would be strange if a radical consequence, such as the one flowing from the recognition of a right of secession, was conceded tacitly by some *a contrario* acrobatics linked to an ambiguous text. This conclusion would all the more be ques-

75 Principle 5, para. 7. The clause reads: «Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour».

76 World Conference on Human Rights, Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Point I.2.

77 Lee C. Buchheit, The Legitimacy of Self Determination, New Haven/London 1978, 93.

78 Written Statement, 25 May 2009, para 61. It was argued that «the right of peoples to self-determination cannot be interpreted as authorising secession if the state concerned conducts itself in accordance with the principles of equality before the law and right of peoples to self-determination, and if the government represents the whole population within its territory, regardless of their race, religious beliefs or colour».

79 Written Statement, 17 April 2009, para 3.7.

80 Separate Opinion, para 12.

81 Gaetano Arangio-Ruiz, The UN Declaration on Friendly Relations and the System of the Sources of International Law, Alphen aan den Rijn 1979, para 80. According to Claus Kress, «Major Post-Westphalian Shifts and Some Important Neo Westphalian Hesitations in the State Practice on the International Law on the Use of Force», 1 J. on the Use of Force and Int'l L. (2014), 11–54, 17, «states were extremely reluctant to activate the UN General Assembly 1970 Friendly Relations Declaration's potential for a right of non-colonialised peoples to '???????remedial secession».

82 See, for instance, Argentina, Written Statement, 17 April 2009, para 97.

tionable when considering that the Resolution 2625 was adopted by a community of States which was primarily attached to the protection of territorial integrity.

Since there is no conventional basis for such a right, State practice and *opinio juris* must be assessed with a view of determining, from the standpoint of customary international law, the existence of a generally accepted legal claim to remedial secession. State practice is not dense and generally offers only marginal references to the right to secede and no legal claim seems to have been clearly articulated.[83] It is impossible to infer the existence of a customary rule providing an entitlement to secession in such cases (what remains is the fallback position that secession can be exercised as a fact). The Independent International Fact-Finding Mission on the Conflict in Georgia rightly held that

> a limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial ‹right› or allowance does not form part of international law as it stands. The case of Kosovo has not changed the rules.[84]

If admitted, the right to remedial secession will pose considerable challenges. What is the meaning of «people» in this context? Who can legitimately claim to represent such «people»? How to define and apply the criteria indispensable to set the threshold of violation of fundamental rights – in terms of gravity, extension and duration? How to determine in which forms other States and International Organizations may assist the effective exercise of such entitlement? Can it be countenanced that claims to remedial secession are made years after the purported oppressive events (as occurred with Kosovo in 2008, with respect with the oppression in the 1990ties)? Is it proportional to plead for an eternal separation of territory in case of temporary oppression under some autocratic government? What if there are counter-minorities which now feel oppressed by a new majority having remedially seceded? Must a new remedial secession be granted? The law risks here to become gravely entangled into political struggles and swamps.

What is sure is it that if a right to remedial secession exists, it can only be exercised in extreme circumstances, as systematically and unambiguously indicated by the States supporting it. While taking a quite sympathetic stand, the Supreme Court of Canada emphasized that «[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances».[85] Even the most cursory analysis of the enjoyment of human rights, rule of law and democratic governance in Catalonia would demonstrate that the situation is not

83 For a full analysis of these cases, see John Dugard, «The Secession of States and their Recognition in the Wake of Kosovo», 357 Recueil des Cours (2013), Chapter IV. See also Antonello Tancredi, La secessione nel diritto internazionale, Padova 2001.

84 Report, vol. II (September 2009) 141.

85 *Quebec Case,* supra n. 47, para 126.

even remotely comparable with what is required to invoke remedial secession. To start with, the record of Spain with regard to compliance with the European Convention on Human Rights denotes a rate of condemnations which is absolutely incompatible with the situation of massive and egregious violations of human rights that could trigger a plea of remedial secession. The argument is even more compelling considering the absence of any intra-State complaint filed against Spain. Further, violations on the scale required to justify remedial secession would certainly have led to the activation of the mechanism foreseen in Article 7 of the Treaty of the European Union.[86] Thus, on any standard, the level of oppression required to allow a purported remedial secession would not be reached. If one argued for the contrary, there would be only very few States indeed, where the remedy of secession would not be available as a right of a minority. This is an absurd conclusion as to international law as it stands today.

E. Recognition

Catalonia has reached out to obtain recognition as an independent State. Can it be recognised by such States in the present state of affairs or would that amount to a violation of international law? Recognition is a legal act through which a State, in face of certain facts of international life, declares that it will take these facts as basis for its legal relations. The facts are thus regularised, they are considered lawful and the basis from which legal relations will arise.[87] The recognition of such facts (in particular of a new State) is bound at its minimum to rules of international law and is otherwise a matter of discretion. To recognise a new State, such a new State must exist as a matter of effectiveness, i.e. there must be a territory, a population and an effective government able to exercise sovereignty.[88] As long as this is not the case, recognition by third States is unlawful because it wrongfully intervenes in the internal affairs of the State. There is thus a settled rule of international law prohibiting «premature recognition» when the new entity has not yet established a sufficiently stable and effective government of its own, and is thus not yet really independent.[89] The issue arises mainly in the context of secession. In contrast, from the moment

86 Article 7 reads: «1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure».

87 Cf. Jean Salmon (ed.), Dictionnaire de droit international public, Brussels 2001, 938.

88 See James Crawford, The Creation of States under International Law, 2nd ed., Oxford 2006, 37 ff.

89 See Robert Jennings & Arthur Watts (eds.), Oppenheim's International Law, 9th ed., Harlow 1992, 143 ff.; Joe Verhoeven, La reconnaissance dans la pratique contemporaire, Paris 1975, 566 ff.

there is an effective new State entity, recognition becomes possible under general international law but is not mandatory (it is rather discretionary). The very fact that States have sometimes imposed conditions on the granting of recognition confirms that they did not feel obliged to recognise the new entity merely because of the existence of an independent and effective government.[90] However, once again recognition can be unlawful if it runs counter to an obligation under a source of particular international law (a treaty) or to a restrictive rule of general international law (such as the duty not to recognise States or territorial situations flowing from an unlawful use of force under international law).[91]

Recognition has important legal effects. In the first place, it certifies the perception by the recognising States on the statehood of the newcomer and contributes to stabilise the legal situation.[92] Recognition also paves the way to the establishment of diplomatic and treaty relations. It renders the new situation opposable to the recognising State,[93] especially with regard to possible territorial claims or internal lawsuits. In the context of such specific legal positions, recognition is «constitutive». Thus, when considering the question under the double lens of statehood and of the specific legal positions of the new entity, recognition is declaratory in certain respects and constitutive in other ones.[94]

The attempt made by the Catalan authority to detach recognition from statehood, in the sense that recognition could be sought before the definitive acquisition of international legal personality, is unpersuasive. The EU, its member States, as well as virtually all other States, correctly refrained from considering the recognition of Catalonia as a newcomer in the international community. Most of the declaration declining to recognise the independence of Catalonia emphasised the imperative need to respect the territorial integrity of Spain. Yet, even before any consideration on territorial integrity, the evident absence of any independent (sovereign) and effective Catalan government instantaneously ruled out any possibility of granting Catalonia international recognition. This is not even a question of premature recognition. The question is that there was no entity at all to recognise. A hypothetical recognition would have been deprived of any legal effects from the standpoint of the relationships

90 European Community, *Declaration on Yugoslavia and on the Guidelines on the Recognition of New States,* 16 December 1991, 31 *ILM* 1485 (1991). See also Danilo Turk, «Recognition of States: A Comment», 4 Eur. J. Int'l L. (1993), 66–71.

91 See e.g. John Dugard, Recognition and the United Nations, Cambridge 1987, 81ff.; James Crawford, supra n. 88, 96 ff.

92 In *Quebec case,* supra n. 47, para 155, Canadian Supreme Court observed that «the ultimate success of a secession would be dependent on recognition by the international community».

93 See Jean Charpentier, La reconnaissance internationale et l'évolution du droit de gens, Paris 1956, 217 ff.

94 See Karl Zemanek, «The Legal Foundations of the International System», 266 Recueil des Cours (1997), 82–83.

between the recognising State and the entity recognised. It would also have amounted to an intervention in the domestic affairs of Spain.

IV. Conclusion

From the standpoint of international law, the Catalonian claims to independence do not give rise to complicated legal problems to this day. Under international law (1) the territorial integrity of Spain must be respected; (2) Catalonia does not enjoy a right of external self-determination but, as any Autonomous Community of Spain, only rights under internal self-determination (human rights and minority rights non-arguable in the present case); (3) Catalonia's declaration of independence, as in any other democratic territory, does not violate international law, but is deprived of any concrete legal effects; (4) there is no right to secession for Catalonia, not even under the – still disputed – doctrine of remedial secession. A satisfactory solution between the government of Spain and the authorities of the Autonomous Community of Catalonia may be achieved along the lines indicated by the Constitutional Tribunal. If it is agreed, then it must be acknowledged that sovereignty rests on the people of Spain and that the Spanish constitution must be reformed beforehand.