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Catalonia in Spain and Europe

Is There a Way to Independence?

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Catalonia's independence – is there a way in international and European Union law?

Hermann-Josef Blanke / Yasser Abdelrehim

1. Secession movements during the transition from the 20th century to the 21st Century – the beginning of a new age?

Following the fall of the Berlin Wall in 1989, the reunification of Germany in 1990 and the end of the Cold War, Eastern Europe witnessed a wave of dissolution and emergence of new states that had not seen since the end of World War I. This disintegration process was not always peaceful, sometimes being very violent, as in the former Yugoslavia. At this time, Western Europe was celebrating the ratification of the Maastricht Treaty of 1992 (Treaty on European Union), which endeavors to strengthen the political integration between its Member States and the peoples of Europe towards an ever-closer Union.¹ In opposition to integration at the European level, there is an increasing desire for independence within many European states. Along with Eastern Europe, Western Europe is presently seeing a growing aspiration among several nationality and ethnic groups to seek independence from their mother states. These groups invoke the right to self-determination as the legal basis for their action, but instead of uniting or liberating peoples as it did in the past, self-determination in these instances might serve as “a divisive force”.²

International law is governed by fundamental principles and values aimed at establishing and maintaining peace, order, and stability between states. Since the treaties of Westphalia in 1648, the principle of sovereignty developed in parallel with international law itself as its main pillar.³ In the seventeenth century, this principle had become the backbone of the argument against the re-establishment of papal and imperial orders, and thus offered a guarantee of minimum peace and stability in those European states ruled

1 See Danspeckgruber (2002), p. 165; see also the preamble of 1949 in the German Basic Law. <http://www.digitale-schule-bayern.de/dsdaten/118/74.pdf>.

2 Cf. Tomuschat (1993), p. 4.

3 Steinberger (2000), p. 501.

by a monarchy. In contemporary international law, this principle is considered an attribute of statehood and the foundation of a number of basic principles.

The principle of sovereignty protects the territorial integrity of states and prohibits interference in their domestic jurisdiction and the threat or use of force.⁴ It is also intertwined with the principle of self-determination⁵ such that there is no fundamental contradiction between the principles of sovereignty and self-determination. The establishment of a sovereign state and the adoption of a constitution are fundamental modes of implementing the right to self-determination of a people. Defensive self-determination protects the territorial status of existing states. This means that the people of a state (the people in the constitutional sense) have the right to maintain the integrity of its territory.⁶ Although the concept of state sovereignty is becoming more permeable because of the increasing importance of international organisations, transnational co-operation and human rights, the international community still recognises that ignoring the epicenter of international law – the principle of sovereignty – could lead to chaos and ultimately be a deathblow to the framework that preserves international law as a system.⁷ It is for this reason that the international community emphasises the importance of respecting the sovereignty of states and their territorial integrity in the face of contemporary secessionist movements.⁸

Others argue that in order to overcome problems associated with the rise of secessionist movements, there is a need to abandon the traditional understanding of sovereignty and establish a new political order in which nationalities are recognised and sovereignty is shared. This means the end of state monopoly on ultimate legitimate authority. According to this conception of sovereignty, authority is not derived from a higher source and it can come from several sources.⁹ Therefore, “an entity, whether it be a people or a territorial unit, may be sovereign where it has the right to determine its own

4 See Art. 2 of the UN Charter of 1945; Hannum (1996), p. 15.

5 See also Bleckmann (1985), p. 453; Henkin (1995), p. 8 and 100; Steinberger (2000), p. 503 and 513.

6 See in this respect Vosgerau (2015 forthcoming; manuscript, p. 129 et seqq.).

7 Cf. Tomuschat (2006), p. 40; Mangas Martín (2014), p. 31, with regard to the classics of the Spanish School of International Law: “...la organización de la Humanidad”.

8 UNGA Res 68/262 ‘Territorial integrity of Ukraine’ (27 March 2014). This resolution is a recent example in this regard.

9 Keating (2012), p. 11.

future”.¹⁰ Accordingly, under this theory of sovereignty, the national aspirations of those who would otherwise see no choice but to secede from the mother state can still be satisfied without resorting to secession. The result would be the establishment of a “plurinational” state in which individuals would have multiple national identities.¹¹

1.1 The rise of the desire for independence in Western Europe

In contrast to the violent dissolution of the former Yugoslavia, the separation of Slovakia from the former Czechoslovakia in 1993 was swift and smooth. This was the result of negotiations between officials of the two states; the distribution of its assets and liabilities was provided for in the Czechoslovakian Constitution and its laws.¹² The peaceful dissolution of the former Republic of Czechoslovakia encouraged separatist movements in Quebec, Scotland and Catalonia, being considered as a model for swift secession when popular support was behind it.¹³ Although many European states with different nationalities and ethnic groups have made concessions to satisfy their national ambitions, the desire for political independence has not entirely disappeared in these states. Notwithstanding the fact that Scotland has benefited from its union with England, demands for more autonomy and even independence emerge periodically.

This has led to the Scottish devolution referendum of 1997 and the Scotland Act 1998 as an alternative to independence, in order to meet the increasing nationalist demands in Scotland.¹⁴ The Scots’ aspiration for independence from Great Britain, however, has not vanished. 2014 became an important turning point in the history of both countries as the Scottish government agreed with the British government to hold a referendum on the independence of Scotland on September 18, 2014.¹⁵ The result of the referendum showed that nearly 55% of the voters preferred unity with the United

10 Keating (2001), p. 15 and 27.

11 Keating (2001), p. 2, 19 and 166; Bourne (2004), p. 3.

12 See in this respect Hosková (1993), p. 693 et seqq. and p. 734; Saxer (2010), p. 810.

13 See Scottish Independence: Lessons from the Czech/Slovak Split, BBC News of 20 January 2013. <http://www.bbc.com/news/uk-scotland-scotland-politics-21110521>.

14 See Kellas (1989), p. 144 et seqq.; Stein and Rosecrance (2006), p. 235.

15 See Béland and Lecours (2008), p. 128 et seqq; Scottish Government, Scotland Future (Scottish Government, Edinburgh, November 2013). <http://www.scotland.gov.uk/Resource/0043/00439021.pdf>.

Kingdom. Since this majority is no guarantee of political stability or maintaining unity of the British state, the result will, as expected, constitute a starting point for wide-ranging constitutional reform in the United Kingdom in granting more powers, not only to Scotland, but also to Wales, Northern Ireland and England itself. The expected reform could generate a kind of “federalisation” of Great Britain.¹⁶ Since the adoption of the devolution system in 1998, the central structures of the state have already been fragmented by the establishment of parliaments in Scotland, Wales and Northern Ireland. These parliaments were given competences in the fields of health, education, housing, and agriculture, also including fishing, environmental protection, tourism, sport, cultural goods and economic development.¹⁷ This practice of giving greater autonomy to Scotland could serve as a model to satisfy nationalistic aspirations of other separatist movement in Europe.

Starting in 2009 a series of non-binding and unofficial referendums (“popular votes” – *consultes populars*) were held in municipalities around Catalonia. Ostensibly, it was the positive experiences in Catalonia that encouraged separatists in South Tyrol to follow suit and hold their own referendum in 2013. The region had been part of the Habsburg Empire before being annexed by Italy in 1919. To satisfy both the demands of South Tyrol separatists and resolve the conflict, which had once turned violent in the early 1960s, an autonomy statute was issued in 1972 that provided the *Regione Trentino-Alto Adige* with legislative and administrative competences.¹⁸ Nevertheless, strong voices continue to call for the right to self-determination in the region.¹⁹ The separatist movement in South Tyrol is not the only one in Italy; the region of Venice also voted for secession in an online ref-

16 See “David Cameron Statement on the UK’s Future” of 19 September 2014 (<http://www.bbc.com/news/uk-politics-29271765>); cf. also the analysis of Anderson, *Devolution in the United Kingdom: From Creeping Federalism to a Federal Union?* p. 18. Anderson assumes that “(f)ederalism ... may address some of the fundamental flaws in the British system, making for a more wholly democratic settlement, improving accountability, accommodating all nations at an equal level and reinvigorating a positive case for the union.” http://www.academia.edu/7046643/Devolution_in_the_United_Kingdom_from_creeping_federalism_to_a_federal_union.

17 See Scotland Act of 1998 and Website of the United Kingdom, *Devolution Settlement: Scotland*. <https://www.gov.uk/devolution-settlement-scotland>.

18 See the *Statuto Speciale di Autonomia per il Trentino Alto Adige* as of 31.8.1972; Blanke (1991), p. 123; Wolff (2005), p. 124.

19 See also “Heute die Krim und demnächst Südtirol?”, *Südtirol News* (17 March 2014). <http://www.suedtirolnews.it/d/artikel/2014/03/16/venetien-stimmt-ueber-abspaltung-italiens-ab.html>.

erendum held by local parties in March 2014, with 89% voting in favour of secession. Although the vote was not legally binding, it provided the momentum to those calling for an official referendum on Venetian self-determination. Supporters of independence have been inspired by the history of the Republic of Venice (*La Serenissima Repubblica di Venezia*), which had been an important commercial and cultural center from the 7th century until the 18th century (7th/8th century to 1797).²⁰

1.2 Catalonia's struggle for independence

Over the centuries, the Catalans have considered themselves a special entity distinct from the other regions of Spain, and the emergence of Catalonia as a “nationality” within the Spanish Nation (Art. 2 Spanish Constitution) is due to several historical, linguistic and cultural reasons. The roots of Catalonia as a people with a united territory and government date back to the Middle Ages.²¹ Unlike other parts of Spain, the Catalans found expression in institutions like the *Generalitat*, which was first established in 1359.²² As a consequence of the *Nueva Planta* decrees issued by the French Bourbon, Philip V (*Philip of Anjou*), the *Generalitat* was abolished.²³ These decrees removed the ancient privileges of all of Spain's medieval kingdoms, with the exception of the loyal Basque Country, but including the Crown of Aragon and Valencia (1707/11), the Principality of Catalonia and the Kingdom of Mallorca (in 1715/16). There were periodic attempts over the centuries to restore political status and re-establish the institutions of self-government in 1914 and 1932, but these were suppressed several times through

20 Veneto stimmt für Sezession, Taz.de (22 March 2014). <http://www.taz.de/!135367/>.

21 Rejsek (1996), p. 21 et seqq. For more details in this respect, see also McRoberts (2001), p. 6 et seqq.

22 In 1358/59 twelve permanent deputies with executive powers in terms of tax collection as well as several auditors for the control of the Administration were employed for the period between the convening of the *Corts*. This period is considered to be the beginning of the *Generalitat*. Its first president was *Berenguer de Cruïlles*, the bishop of Girona. See also the Preamble of Catalonia's Statute of Autonomy of 2006. http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf.

23 The *Nueva Planta* decrees (1707-1716) by Philip V banned all the main traditional Catalan political institutions and rights and merged its administration into that of the Crown of Castile as a province. However, the Bourbon monarchy allowed for Catalonia's civil law code to be maintained.

the use of violence.²⁴ Under the dictatorship of General *Franco*, the political, cultural and linguistic identity of Catalonia was fiercely repressed by the central government in Madrid.²⁵ However, as the dictatorship came to an end, a new period of self-government in the region of Catalonia emerged.

1.2.1 Catalonia's statute of autonomy

In an attempt to reconcile the aspirations of self-determination of both the Basques and the Catalans with the principle of the indissoluble unity of the Spanish State provided for in Art. 2 of the Spanish Constitution (1978), Art. 2 also recognises and “guarantees the right to autonomy of the nationalities and regions of which it is composed”.²⁶ Unlike the French Constitution of 1958 which recognises in its preamble the right of the overseas territories to internal and external self-determination, the Spanish Constitution guarantees only the right of the nationalities to internal self-determination within Spain.²⁷ Part VIII, Chapter 3 of the constitution includes provisions regarding the conditions and procedures of the establishment of self-governing communities (*Comunidades Autónomas*), as well as the distribution of competences between the self-governing communities and the central government in Madrid.²⁸ This was the historic compromise negotiated after *Franco's* death in 1975 under severe conditions as a cornerstone of the Spanish Constitution. In response to this positive development, the region issued the Statute of Autonomy of Catalonia in 1979,²⁹ which was later reformed by Organic Law 6/2006.³⁰ The statute reform bill tried to reach a higher

24 See Coll (2009). <https://repositori.upf.edu/bitstream/handle/10230/5182/GRTPw-p4.pdf?sequence=1>.

25 Dowling (2013), p. 38.

26 See Art. 2 of the Spanish Constitution of 1978 (English translation). http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_es-pa_texto_ingles_0.pdf.

27 Paragraph 2 of the preamble of the French Constitution of 1958 states: “En vertu de ces principes et de celui de la libre détermination des peuples, la République offre aux territoires d’outre-mer qui manifestent la volonté d’y adhérer des institutions nouvelles fondées sur l’idéal commun de liberté, d’égalité et de fraternité et conçues en vue de leur évolution démocratique”.

28 See Art. 143 et seqq. of the Spanish Constitution of 1978.

29 Catalonia's Statute of Autonomy of 1979. <http://www.gencat.cat/generalitat/eng/estatut1979/>.

30 Catalonia's Statute of Autonomy of 2006.

degree of self-government for Catalonia. In addition, the reform statute sought, *inter alia*, to promote the political status as well as the national and cultural identity of Catalonia as a distinct nation within the Spanish state.³¹ Hence, the preamble of the statute defines Catalonia as a “nation” (*nació*), referring to the “ample majority ... [of] the Parliament of Catalonia in respect thereof”³² and concurrently alluding to the wording of Art. 2 of the Spanish Constitution interpreting the constitutional notion of “nationalities” (*nacionalidades*) in the sense of its recognition of the “national reality of Catalonia”.³³

Furthermore, the preamble of the statute states that Catalonia’s “inalienable right to self-government ... is founded on the [Spanish] Constitution and also on the historical rights of the Catalan people, [who] have maintained a constant will to self-government over the course of the centuries”. The Preamble also assumes that “Catalonia, by means of state, participates in the construction of the political project of the European Union”. With regard to the exercise of governmental authority, the Statute establishes self-government with wide competences. The *Generalitat* is the core institutional system around which Catalonia’s self-government is politically organised;³⁴ “its powers ... emanate from the people of Catalonia”. This not only reveals the democratic legitimation of the legislative and executive branch, i.e. of the parliament and the presidency of the *Generalitat* in Catalonia,³⁵ but also the self-conception of the Catalans as a national population within a nation-state. Moreover, the statute includes several provisions that try to protect and promote the national, linguistic, and cultural identity of Catalonia.³⁶ But the constitutionality of the Statute was challenged by one of the Spanish parties. In 2006, ninety-nine Members of the People’s Party Parliamentary Group in the Congress brought an action of unconstitutionality against a number of pro-

31 See Coll (2009), p. 15 et seqq. <https://repositori.upf.edu/bitstream/handle/10230/5182/GRTPwp4.pdf?sequence=1>.

32 See Resolutions 98/III and 679/V and Resolution 631/VIII of the Catalan Parliament.

33 Closely related to this recital of the preamble is Art. 8 of the Statute which laid down the flag, the holiday, and the anthem as “the national symbols of Catalonia, established by Article 1”.

34 See Art. 2.1 of Catalonia’s Statute of Autonomy of 2006.

35 See Art. 2.2 of Catalonia’s Statute of Autonomy of 2006.

36 See Art. 6, Art. 35, Art. 44, Art. 50 and Art. 54 of Catalonia’s Statute of Autonomy of 2006.

visions of the Statute of Autonomy.³⁷ After four years of deliberations, the Spanish Constitutional Court rendered its judgment, which was considered a turning point for many Catalans.

1.2.2 Compatibility of Catalonia's statute of autonomy with the Spanish constitution

To remove any contradiction between the Spanish Constitution and the Organic Law 6/2006 of July 19th (on the Reform of the Statute of Autonomy of Catalonia), the Spanish Constitutional Court determined in its judgment of June 28, 2010, that, with regards to the scope of self-government in Catalonia within the Spanish State, 14 articles of the statute are not compatible with the constitution and must therefore be deleted, and that another 27 articles of the statute should be reinterpreted to bring them into conformity with the Spanish Constitution. In the view of the Court, the term “nation” in the preamble and the phrase “national symbols” in Art. 8 of the Statute should be understood and interpreted in a way that does not contradict the Spanish Constitution of 1978, which is hierarchically superior to Catalonia's statute.³⁸

Catalans can continue to claim that they are a nation in respect of cultural and social reality, but this has no merit in the constitutional and legal sense.³⁹ For example, the Court also held that the stipulation in Art. 6.1 of the Statute that “Catalan is the language of normal and preferential use in public administration and bodies and in the public media of Catalonia” is unconstitutional, and thereby null and void because it implies that the Catalan language has precedence over the Spanish language.⁴⁰ It is noteworthy that the Court did not object to declaring the Catalan an official language in Catalonia, but only objected to the preferential status that the Catalan language enjoys at the cost of Spanish, which is the official language in the whole of Spain. Therefore, this position could not be compared with other

37 See Spanish Constitutional Court, Judgment of 28 June 2010 (English translation). <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JC-C2862010en.aspx>.

38 Spanish Constitutional Court, Judgment of 28 June 2010, para 12.

39 See also Nationality, Not a Nation, The Economist (3 July 2010). <http://www.economist.com/node/16490065>.

40 Spanish Constitutional Court, Judgment of 28 June 2010, para 14.

areas in the world where governments impose restrictions on the use of a minority language through, for example, banning families giving their children ethnic names, or changing the names of towns and villages written in the minority language. Such policies deprive the minority group the opportunity of protecting its cultural identity.⁴¹

The curtailment of Catalan self-government was met with indignation and anger from Catalan political parties and the populace, who accused the Constitutional Court of being politicised and not respecting the Catalan voters who had approved the Statute in an official referendum.⁴² For many Catalans, the ruling closed the door on Catalonia's integration into the Spanish State and would therefore actually encourage the separatist movement. Others expressed this simply by saying: "Spain - game is over".⁴³ Notwithstanding the fact that the Spanish Constitutional Court held that several provisions in Catalonia's Statute of 2006 are incompatible with the Spanish Constitution of 1978, the Statute includes uncontroversial provisions that guarantee a high degree of self-government and protection of the national and cultural identity of the Catalan people.

1.2.3. The Spanish government's reluctance to consent to the referendum on the political future of Catalonia

On the basis of Law 10/2014, which the *Generalitat* of Catalonia passed on 26 September 2014 on "consultas populares no referendarias" and other forms of citizen participation,⁴⁴ on September 27, 2014, the *Generalitat* issued Decree 129/2014 on the political future of Catalonia. The "consulta popular no referendaria" is defined by Art. 3.1 Law 10/2014 as a call for the persons who are eligible to participate in the vote "to manifest their opinion

41 Cf. Blanke (2014), p. 13 et seq.; Coşkun (2014), p. 92.

42 See Nationality, Not a Nation, *The Economist* (3 July 2010).

43 See Garcia-Ruiz, The Spanish Constitutional Court ruling on the Catalan Statute and its Political Implications (1 July 2010). <http://emma-col-cat.blogspot.de/2010/07/spanish-constitutional-court-ruling-on.html>.

44 "Ley 10/2014, de 26 de septiembre, de consultas populares no referendarias y otras formas de participación ciudadana", *Diari Oficial de la Generalitat de Catalunya* Núm. 6715 - 27.9.2014, p. 1 et seqq.

See also an English translation of Law 10/2014 (http://www20.gencat.cat/docs/consulta/Documents/Arxius/Llei_angles.pdf).

on a specific action, decision or public policy, by means of a vote”.⁴⁵ The aim is thus to circumvent the clear decision of the Spanish Constitution, which stipulates that in cases of political “decisions of special importance”, the king reserves the right to call all citizens in a consultative referendum (*referéndum consultivo*) “on the President of the Government’s proposal after previous authorization by the Congress” (Art. 92.1 and 92.2 Spanish Constitution). In the Decree, the *Generalitat* set November 9, 2014, as the date for the popular consultation (Art. 1 of the Decree). It also formulated the questions that the persons entitled to participate in the consultation would have to answer. The first question was supposed to be: “Do you want Catalonia to become a State?” If the answer was in the affirmative, the second question was supposed to be: “Do you want this State to be independent?” (Art. 3 of the Decree). People who were supposed to be eligible to participate were Catalan citizens, EU citizens who could prove a year of continuous residence in Catalonia immediately before the announcement of the consultation, and nationals of other countries who could prove legal residence in Catalonia for a continuous period of 3 years immediately preceding the announcement of the Consultation. The Decree also provided that persons entitled to participate must be over 16 years of age on the day the popular consultation is held (Art. 4 of the Decree).

The reaction of the Spanish government to these plans and calls for separation was, and remains, complete rejection of the idea of holding such a referendum considered unconstitutional. The Spanish Prime Minister, *Mariano Rajoy*, opined that Catalonia should remain in Spain, a Catalonia outside Spain being unimaginable.⁴⁶ The Spanish Government’s positions aims to prevent the balance between national unity and a partial political decentralisation from failing. On September 28, 2014, the *Consejo de Estado* issued its Opinion 965/2014, in which the Council held that the planned popular consultation is a violation of unity of the Spanish nation (Art. 2 Spanish

45 Art. 3.1 Law 10/2014: „1. Se entiende por *consulta popular no referendaria* la convocatoria efectuada por las autoridades competentes, de acuerdo con lo que establece esta ley, a las personas legitimadas en cada caso para que manifiesten su opinión sobre una determinada actuación, decisión o política pública, mediante votación.” See also an English translation of Decree 129/2014 (http://www20.gencat.cat/docs/consulta/Documents/Arxius/DECRET%20129_ENG.pdf).

46 Ministerpräsident Rajoy: Katalonien außerhalb Spaniens ist „unvorstellbar“, Handelsblatt (8 April 2014). <http://www.handelsblatt.com/politik/international/ministerpraesident-rajoy-katalonien-ausserhalb-spaniens-ist-unvorstellbar/9736156.html>.

Constitution); only the Spanish people as the holders of sovereignty are entitled to decide on this matter (Art. 1.2 Spanish Constitution). On September 29, 2014, on the basis of Opinion 964/2014, the Spanish Government, represented by the *Abogado del Estado*, appealed to the Spanish Constitutional Court to declare Decree 129/2014 unconstitutional, null and void, and to repeal the norms of this statute and suspend its execution (Art. 161.2 Spanish Constitution). That same day, and in accordance with Art. 161.2 of the Spanish Constitution, the Spanish Constitutional Court suspended the contested Decree until a final decision could be made on its legality within 5 months (Art. 161.2 Sentence 1 and 2 Spanish Constitution).⁴⁷ With an estimated turnout of 36% of voters in an *unofficial* survey on November 9, 2014 (“9N”) that was declared part of a “participatory process” and tolerated by the Spanish Government, 81% of the participants (in the sense of Art. 4 of Decree 129/2014) answered these questions affirmatively.

A unilateral separation of Catalonia from Spain is inconsistent with the principles of international and European law, linked since the time of *Jean Bodin* to the principle of state sovereignty (discussed below, see sub B and C). However, it would be increasingly difficult for Spain as a state to maintain Catalonia within its borders if the vast majority of Catalans consistently push for political independence from Spain. In view of the unresolved issues concerning Catalonia and the skilled tactics of its political elite, there is the notion that an independent Catalonia would have to undergo a serious constitutional and political evaluation. This is crucial when we consider that as in federal systems like Germany, and its institute of federal obligation (Art. 37 of the Basic Law) that regards the use of coercive measures of the federation against the individual states as possible in the event of an attempted secession. In a situation of clear political opting-out, there would be no other rational choice for Spain than an agreed exit of the Autonomous Community of Catalonia, which would then have to struggle for recognition as an independent state in the international community.

2. *The right to self-determination in international law*

Through its autonomy statute, the Catalans are striving for “self-government”, which is the key issue in this paper. The Catalans are once again

47 Spanish Constitutional Court, Case 5830-2014 (Decision of 29 September 2014).

asserting their right, which over the past few years has turned into a claim for self-determination following the perpetual historical and always mainly subliminal aspiration of the Catalans to revisit the status of independence that it enjoyed before the reign of the *Reyes Católicos*. Catalonia is one of the more prosperous regions of Spain, and it is likely that Catalans want to relish this wealth for themselves. Given the exploding debt of the Spanish regions following the economic crisis in Spain since 2011, this point is important in the expected negotiations on the financial relations between the state and the Autonomous Communities. Those who want the right to secession are not claiming a right to the usual democratic state, but rather are striving for a new type of democracy, namely a smaller, more manageable community whose members are presumably more similar to another than those of the former larger state. Therefore, a referendum on the statehood of Catalonia would not be a democratic, but rather a meta-democratic process, that would determine afresh who is allowed to have a say in the democratic society, thus making the unreasonable demands of a mass society a little more bearable.⁴⁸ This process could be endless; however, a right to opt out with a few like-minded people does not exist.⁴⁹

The principle of territorial integrity enshrined in Art. 2.4 of the UN Charter, viewed as a limit to the right of self-determination, protects state borders and permits territorial changes only under exceptional circumstances. International documents that support the people's right to self-determination include parallel statements that call for the preservation of the political unity and territorial integrity of states. Thus, "[the] principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states".⁵⁰ The right to self-determination first emerged during the Age of Enlightenment, when it was considered a democratic expression of the will and the sovereignty of peoples.⁵¹ Until the 1960s, the nature of the principle of self-determination was still a subject of debate among states because they were at that time far from agreeing on the existence of this right. The end of colonialism was linked to the principle of self-determination. The resolution of the UN General Assembly No. 1514 (XV) on the

48 Cf. the analysis of Dahms, *Kein Grund für ein unabhängiges Katalonien*, Frankfurter Rundschau (7 April 2014).

49 Dahms, *Kein Grund für ein unabhängiges Katalonien*, Frankfurter Rundschau (7 April 2014).

50 Supreme Court of Canada, *Case Quebec* (Decision of 20 August 1998), para 127.

51 See in this respect Ambruster (1962), p. 251; Thüerer (1996), p. 37.

Granting of Independence to Colonial Peoples of 4 December, 1960 was a landmark in the history of the United Nations.⁵² Thanks to this resolution and other similar UN resolutions in the 1960s, the right of colonial peoples to exercise their right to self-determination is now undisputed.⁵³ Resolution No. 1514 refers explicitly in paragraph 2 to this right as a right of “all peoples”. Thus, the right to self-determination could never be seen as “an exclusive right of colonial peoples”. In its advisory opinion of 1971 on Namibia as well as in its opinion of 1975 on Western Sahara, the International Court of Justice (ICJ) referred to the increasing importance of the principle of self-determination which has become with the development of international law a legal right and not just a guiding principle.⁵⁴ With the passage of time, the right to self-determination has been so widely accepted and promoted by the international community that it has become a part of customary international law and even *ius cogens* rule.⁵⁵ However, its content and scope remain as controversial as when the principle was proclaimed by President *Woodrow Wilson* and others at Versailles.⁵⁶

Catalans supporting future statehood of Catalonia argue that they have a right to secession according to Art. 1 of the UN Human Rights Pacts of 1966, and that the Spanish Constitution does not contradict this Article.⁵⁷ In outlining the basic aspects of the right to self-determination, let us first refer briefly to its doctrinal basis as defined in the UN Human Rights Pacts of 1966 and the UN Declaration of Friendly Relations of 1970, both of which are often invoked by separatist movements, not only in Catalonia, but in other parts in the world as a legal basis for the right to secession.

52 See UNGA Res 1514 (XV) ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (14 December 1960).

53 Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 132.

54 International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion of 21 June 1971), I.C.J. Reports 1971, para 52; International Court of Justice, Western Sahara (Advisory Opinion of 16 October 1975), I.C.J. Reports 1975, para 54 et seqq.

55 See also Thürer (1984), p. 113; Kadelbach (1992), p. 257 et seqq.

56 See Thürer (1984), p. 113; Kadelbach (1992), p. 257 et seqq.; Brühl-Moser (1994), p. 23; Manela (2007), p. 15. et seqq.

57 Edward (2013/14), p. 10.

2.1 Right of self-determination and Art. 1 of the UN pacts of 1966

With the establishment of the United Nations, the principle of self-determination turned from a philosophical and political principle into one of the main legal principles of international law.

Art. 1.2 and Art. 55 of the UN Charter take into account that respect for the principle of equal rights and self-determination of peoples is the basis for the development of friendly relations among nations. With the ratification of the UN Human Rights Pacts of 1966, the principle became a collective right of peoples. Common Art. 1.1 of both the UN Human Rights Pacts stipulates that “[a]ll 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”. The UN Pacts make the right to self-determination a basic human right, or rather a condition for the enjoyment of human rights. In contrast, the UN Charter considers that the enjoyment of human rights is also a condition for the enjoyment of the right to self-determination. This illustrates clearly the interdependence and indivisibility of human rights as recognised at the Vienna Conference of 1993 on Human Rights.⁵⁸ Applying the principle of self-determination requires full observance of human rights and vice versa.

The right to self-determination includes political, economic, social, and cultural aspects. The right to decide freely on political aspects or status includes not only the free determination of the internal status (the right to choose the constitutional status and government form), but the external status, which necessarily includes the right of secession.⁵⁹ The latter is one of the most controversial issues in international law, because the majority of the international community is not ready to accept secessionist interpretations, or calls for secession, that encourage state disintegration as this could lead to the spread of secessionist tendencies and increase of factionalism in the world.⁶⁰ The danger of chaos and fragmentation led former UN Secretary-General Boutros Boutros-Ghali to warn in his report entitled “An Agenda for Peace” submitted to the UN Security Council on June 17, 1992, of the misuse of self-determination. He wrote that “[i]f every ethnic, religious or

58 Maertens, EU Presidency Statement in the United Nations about the right to self-determination, EU Delegations to the United Nations (31 October 2001); see also Thürer (1984), p. 113; Kadelbach (1992), p. 257 et seqq.

59 Murswiek (1993), p. 21; Tomuschat (1993), p. 22.

60 Cárdenas and Cañas (2002), p. 102.

linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult to achieve".⁶¹ The right to self-determination of people provided for in Art. 1.1 of the UN Human Rights Pacts is the right of a "people" to freely decide. Therefore, the question is: Who is entitled to decide and are the Catalans a subject of this right?

2.2 Are the Catalans a subject of the right to self-determination?

This question relates to another about whether the Catalans are considered a people in the sense of Art. 1 of the UN Human Rights Pacts, because only a people, in the sense of international law can be entitled to exercise the right to self-determination. No doubt the Catalans share characteristics, e.g. a common history, language, and culture, and these characteristics make them culturally and linguistically distinct from the rest of Spain. Moreover, Art. 2 of the Spanish Constitution of 1978 recognises the existence of different nationalities like the Catalans and the Basques. In this sense, they are peoples, but at the same time, they remain a part of the Spanish People. Therefore, the question now is: Does the term "people" in the sense of common Art. 1 of the UN Human Rights Pacts mean only the entire population of a state or does it also cover part of a state population, as in the case of the Catalans and the Basques?

In international law there is no agreement on the meaning of the term "people".⁶² In his commentary on the UN Charter, Hans Kelsen argues that the term "people" means states.⁶³ According to a minority view, the principle of territorial integrity is directed against other states and not against a state's own people. The right to self-determination implies a right to secession that can be exercised by a part of the population of a state under all circumstances and not just as an exception or a last resort. The exercise of this right depends on the will and desire of that part of the population wanting secession, and not on the will of the whole population, who may when in majority, frustrate

61 Boutros-Ghali, *An Agenda for Peace* (1989–1992 11th Supplement) *Repertoire of the Practice of the Security Council*, para 17.

62 See Rumpf (1984), p. 47; Doebling (1995), p. 63; Vosgerau (2013), p. 96.

63 Kelsen (1951), p. 51 et seqq.

the separatist aspirations of the minority.⁶⁴ In the view of a number of legal writers, the term “people” mentioned in Art. 1 of the UN Pacts covers only the colonial peoples and the entire population of a state, and not groups or parts of the population.⁶⁵ Such a restrictive definition of the term people corresponds to the prevailing trend in practice and literature, which denies minorities and ethnic groups the right to secession except in cases in which it is considered a last resort.⁶⁶ But this restrictive definition is hard to accept in light of the cultural or linguistic realities which make a minority or an ethnic group distinct from the rest of the state where it lives. In line with the prevailing trend, it could be therefore more suitable to adopt a wide interpretation of the term “people” which recognises a people in the cultural sense also as a people in the legal sense, and to work parallel to avoid the dangerous legal consequences which may result from such recognition.⁶⁷ If we follow this opinion that adopts a wide interpretation of the term “people” and takes the view that this term does not necessarily mean the entirety of a state’s population, the Catalans are considered a subject of the right to self-determination.⁶⁸ But this does not mean that the Catalans have a right to secession from Spain according to Art. 1 of the UN Human Rights Pacts. The right to secession is recognised only as a last resort and under exceptional circumstances, as will be shown below (B.V.1).

2.3 The right to self-determination and the UN Declaration of Friendly Relations of 1970

The Declaration of Friendly Relations of 1970 has been characterised as “the most authoritative statement of the principles of international law relevant

64 Dumbery (2006), p. 432; Ott (2010), p. 425 et seqq.; Quaritsch (2013), p. 131 and 132.

65 See Tomuschat (1993), p. 16. Another view is represented by Murswiek who defines the term “people” not restrictively but he differentiates between the term “people” and the term “minority”. In his view, only peoples and not minorities are subjects of the right of self-determination, Murswiek (1993), p. 37; Cassese (1995), 141 et seqq.

66 Kadelbach (1992), p. 262.

67 See Tomuschat (1993), p. 16; Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 124.

68 Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 124.

to the questions of self-determination and territorial integrity”.⁶⁹ The Declaration provides that “[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people”. The Declaration refers explicitly to the people’s right to establish an independent and sovereign state, which means necessarily the right to secession.⁷⁰ However, it warns against interpreting the Declaration as authorising or encouraging actions that would imperil the territorial integrity or political unity of sovereign states as long as these states have a government “representing the whole people belonging to the territory without distinction as to race, creed, or colour”.⁷¹ Although the formulation of this paragraph seems to imply that it would give legal justification for secession in case of the underrepresentation of a national minority in the state government or of discriminatory policies against this minority as to race, creed, or colour, the practice of the United Nations before and after issuing the Declaration of Friendly Relations does not support this interpretation.⁷² Also in state practice there is a point of view which considers that this paragraph serves as a guarantee of territorial integrity of states. This provision may authorize secession under certain circumstances that should be confined to extreme circumstances as in the case of an armed attack by the mother state against the people in question and which threatens the very existence of this people.⁷³

Under all circumstances, it could be concluded from this formula that the right to self-determination – more precisely, the right to secession – could not be exercised against states whose governments conduct themselves in

69 UNGA Res. 2625 (XXV) ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ (24 October 1970); International Commission of Jurists, East Pakistan Staff Study, International Commission of Jurists Review (1972), 8, p. 44; see also Raic (2002), p. 317.

70 See also UNGA Res. 1514 (XV) ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (14 December 1960).

71 See also the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights (25 June 1993), A/CONF.157/24; UNGA Res 50/6 ‘Declaration on the Occasion of the Fiftieth Anniversary of the United Nations’ (9 November 1995).

72 Thürer (1984), p. 129; Perea Unceta, *El derecho internacional de secesión* (Universidad Complutense de Madrid. Facultad de Derecho, 2008).

73 See the written statement by the Russian Federation of 16 April 2009 during the proceedings before the ICJ in the case of Kosovo, para 88.

compliance with the right to self-determination, because the people of such a state, including all different nationalities or minorities, already exercise the right to self-determination through their participation in the government on the basis of equality. Such a state is entitled to the preservation of its territorial integrity according to international law, and no claim of self-determination can legitimately be made. Hence, the Declaration of Friendly Relations made a link between internal self-determination and external self-determination. Implicitly it calls on states to respect human rights and to refrain especially from committing grave violations of human rights against minorities. It also includes a safeguard clause against secession for those states that comply with the right of internal self-determination.⁷⁴ The Declaration seeks thereby to strike a balance between the principle of territorial integrity of states and the principle of self-determination of peoples.⁷⁵ Applying the foregoing to the case of Catalonia, the conclusion can be drawn that, as long as Spain respects the collective and individual rights of the Catalans as a nationality or an ethnic group, they can enjoy their protection within the Spanish state and cannot invoke the right to secession (B.V. 1).⁷⁶ Accordingly, the Friendly Relations Declaration as Annex of the Resolution 2625 (XXV) does not constitute a legal basis for the independence of Catalonia as long as Spain conducts itself in compliance with the right of internal self-determination.

2.4 Autonomy statutes as a form of self-determination

The external right to self-determination, i.e. to secession, is required and justified under certain circumstances. The right to self-determination (external and internal) aims essentially at creating the conditions under which peoples can freely, and without foreign influence, determine their political, economic, social and cultural status, and living conditions in line with their aspirations and desires. However, if a people have the possibility to determine their own affairs and protect their own cultural identity, there will be

74 Rozakis (2000), p. 818; Raic (2002), p. 321; Crawford (2006), p. 119; Hilpold (2012), p. 64; Quaritsch (2013), p. 120; see also Mangas Martín, *Humanización, Democracia y Estado de Derecho en el Ordenamiento Internacional* (Real Academia de Ciencias Morales y Políticas, 2014), p. 102 et seq.

75 Quaritsch (2013), p. 120.

76 Cf. Kimminich (1993), p. 92.

no strong need to secede from the mother country. Many states that experience ethnic problems refuse to recognise an ethnic group as a people or give it the right to actual self-government for fear that such a step may lead to the separation of the group from the mother state. However, many cases show that giving minorities or different nationalities the right to self-government in the form of a federal state, or through autonomy statutes, satisfies the national demands of minorities and ethnic groups, thereby preventing the disintegration of the state.⁷⁷ This is also viewed as a suitable alternative to independence, especially when the disintegration of the state is likely to create new conflicts. The creation of a (new) state should lead to the improvement and not to the worsening of the situation of human rights. To this end, the new state should prove that it will respect and protect the rights of the minority or minorities living on its territories.⁷⁸ In contrast to Serbia, which abolished Kosovo's autonomy, Catalonia's Autonomy Statute of 2006 guarantees the *Generalitat* those strong competences mentioned above (1.2.1). But if the Catalans insist on declaring their independence from Spain, although they enjoy autonomy within the Spanish state, the question may arise as to what extent this position would be compatible with the principles of international law and state practice. The international community's responses to attempts at secession can provide more insight on the question of whether Catalonia has a right to statehood and sovereignty.

2.5 Secession in international law

2.5.1. State practice and the position of the United Nations on cases of secession

The international community is composed of states whose main interest is to maintain their statehood and protect their territorial integrity. A close look at state practice in previous decades shows that states generally favour the principle of sovereignty and territorial integrity of states when it conflicts with the right to self-determination.⁷⁹ There are also concerns that the dis-

77 See Tomuschat (1993), p. 14; Kimminich (1993), p. 97; Carley (1996), p. 2; Gutiérrez Espada (2000), p. 93 et seqq.; Cárdenas and Cañás (2002), p. 108; Pazartzis (2006), p. 360.

78 Hilpold (2013), p. 1083.

79 Murswiek (1993), p. 36.

integration of a state may lead to violence or further disintegrations inside the new entity that has declared itself an independent state. These concerns compelled some to call for restricting the right to self-determination in favour of the right of individuals and minorities to be treated equally within the borders of the existing state.⁸⁰ For these reasons, states usually ignore cases in which the national ambitions of groups striving for independence could be fulfilled by other means, even if those ambitions could not be completely satisfied. This solution would at least maintain stability and avoid risks that could arise from opening the door to attempts at secession that could go on indefinitely.

The UN has adopted a similar position regarding the right to secession. Although it was strongly involved in defending the right to self-determination in the 1960s, during this period it began taking a very different view towards attempts at secession by entities outside the colonial context. This view finds expression in the statement of the then UN General-Secretary *Sithu U Thant* who said, “as far as the question of secession of a particular section of a Member State is concerned, the United Nation’s attitude is unequivocal... [It] has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State”.⁸¹

However, in several cases serious violations directed against a definable group within the state as to race, language or religion present a major challenge for the international community and require its intervention. The state is not an objective in itself, but has functions and duties that it must fulfill in order to serve the interests of its citizens. Therefore, when a state fails to fulfill its duties, it puts the legitimacy of its existence into question. One of these basic functions is the protection of the right to life and the physical integrity of its citizens. When a state turns itself into a band of assassins who targets and persecutes a specific group of the state population, in this case it becomes difficult to demand that the targeted group remains loyal to the state. The state that commits, for instance, the crime of genocide against an ethnic group within the state, forfeits its right to territorial integrity.⁸² Resorting to secession is also justified in cases of intolerable discrimination that may lead to the destruction of the identity of a people, e.g. where these

80 Falk (2002), p. 38.

81 U. Thant, Secretary-General’s Press Conference, UN Monthly Chronicle (1970) 7, p. 36 and 39; Ott (2008), p. 232.

82 See Tomuschat (1993), p. 9.

people are not allowed to use their own language.⁸³ In contrast, there are authors who opine that a general right to secession outside the colonial context and cases of occupied territories could not be proved or not easily be proved. In his view, the existence of a right to self-determination as a right to self-defence (right to remedial secession) in cases of severe violations of human rights is not evident.⁸⁴

State practice includes several examples of unsuccessful attempts at secession. Katanga, Biafra, Republika Srpska, Somaliland, Quebec and other secessionist attempts in republics of the former Soviet Union such as in the case of Transnistria which declared with the support of Russia in 1991 its independence from the Republic of Moldova, are just a few examples.⁸⁵ In all these cases, the international community's response was the rejection of the secession, and the emphasis on the sovereignty and territorial integrity of the states concerned.⁸⁶ For our discussion, the case of Quebec enjoys a special place of importance. Quebec and Catalonia are similar in many respects, both perceiving themselves as stateless nations, and both enjoying a high degree of autonomy. The decision of the Canadian Supreme Court in 1998 sheds much light on the interpretation and application of the principle of self-determination. Therefore, the Court's opinion contains much interest for multinational states suffering from secessionist movements.⁸⁷ The Court held that a people has a right to internal self-determination, and when a people is blocked from a meaningful exercise of this right, it is entitled as a last resort to exercise it by secession.⁸⁸ The Court noted that:

[International law] only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to

83 See Art. 27 UN Pact on Civil and Political Rights of 1966. According to this article, states are obliged not to deny persons belonging to ethnic, religious or linguistic minorities the right to enjoy their own culture, to practice their religion and to use their own language. See also Murswiek (1993), p. 27.

84 See e.g. Hilpold (2012), p. 56; Hilpold (2013), p. 1062.

85 See also Ott (2008), p. 294.

86 Cf. Pazartzis (2006), p. 368.

87 Walters (1999), p. 372 et seqq.

88 Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 134.

a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.⁸⁹

If we adopt this view, then secession of a region from the mother state is justified from the perspective of international law only under exceptional circumstances, which seemingly does not apply either in the case of Quebec or Catalonia.⁹⁰

In contrast to cases in which the international community may favour the maintenance of the territorial integrity of the state concerned, there are situations in which the international community has no issue in accepting and recognising secession when it occurred as the result of an agreement between the parties concerned, the dissolution of Czechoslovakia being a good example. This occurred in 1992 upon the agreement and consent of the governments of Czech and Slovakia. Through this peaceful dissolution, the former Republic of Czechoslovakia as a subject of international law ceased to exist as a state as of December 31, 1992. According to Art. 1.2 of the Constitutional Act on the Dissolution of the Czech and Slovak Federal Republic of November 25, 1992, the Czech and Slovak Republics would be the successor states of Czechoslovakia. Therefore, other states had no quandary concerning the recognition of the new state because in such cases its independence reflected an undisputed right to self-determination.

Nevertheless, there are other cases in which restoring and maintaining peace can only be reached by territorial alterations and the acceptance of new entities as new states, as in Kosovo. According to the Yugoslav Constitution of 1974, Kosovo was one of the eight political entities of which the former Federal Republic of Yugoslavia comprised.⁹¹ Abolition of the autonomous status at the hands of former President Milosevic spurred the Kosovars to declare their independence from Serbia in 1991, which was met with force by the Serbs in an attempt to prevent the Kosovars from gaining their independence.⁹² At the same time, the states did not respond positively to the independence declaration of Kosovo. In the first years of the conflict in Kosovo, states (with the exception of Albania) did not recognise Kosovo's independence. There was a desire by the international community to respect

89 Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 138.

90 Cf. Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 138.

91 Hasani (1996), p. 232 and 235 et seqq.

92 Ott (2008), p. 332 et seqq.

the territorial integrity of the Federal Republic of Yugoslavia. This desire found expression in the UN Security Council Resolution No. 1244 of 1999, which affirmed the commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.⁹³ At that time, these states believed that peaceful coexistence between Albanian Kosovars and Serbs within the borders of the Serbian state remained possible. But this position changed as a result of the severe violations of human rights committed by the Serbian government, as well as the continuation of the conflict for many years without reaching a peaceful solution acceptable to both sides of the crisis. After a year of negotiations with the Serbian government and the Albanian Kosovars, UN Special Envoy *Martti Ahtisaari* submitted his report in 2007, in which he recommended that Kosovo should be an independent state. *Ahtisaari* justified his recommendation by saying that “[re]integration [of Kosovo] into Serbia is not a viable option”. The conflict between the two sides created a history of enmity and mistrust that makes peaceful coexistence between Kosovo’s Albanians and Serbs unlikely. For this reason, he concluded that “[i]ndependence is the only option for a politically stable and economically viable Kosovo”.⁹⁴

Hence, in light of the above, the special case of Kosovo cannot serve as a precedent for Catalonia or other separatist movements in Europe.⁹⁵ Whereas states were reluctant in the beginning of the crisis in Kosovo to recognise it as an independent state, they immediately recognised Slovakia and Czech Republic because the dissolution was a product of a negotiated agreement between both countries. Only in certain cases does the people’s right to self-determination take precedence over the state’s right to territorial integrity. Thus, the right of secession is not applicable to all situations where a people

93 On 10 June 1999, the UN Security Council issued the Resolution No. 1244 which established an interim administration in Kosovo under the supervision of the United Nations for the purpose of maintaining order in Kosovo until political settlement on the final status of Kosovo is reached. See Website of the United Nations. [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244\(1999\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244(1999)).

94 Report of the Special Envoy of the Secretary-General on Kosovo’s future status of March 2007. <http://www.unosek.org/docref/report-english.pdf>.

95 This meaning was also expressed by former US Secretary of State Condoleezza Rice on 18 February 2008 on the occasion of the recognition of Kosovo by the United States. See statement of former US Secretary of State Condoleezza Rice on 18 February 2008. http://tirana.usembassy.gov/08pr_0219.html.

or a group aspires for political independence, but rather functions only as a last resort.⁹⁶

There are exceptions – or at best 3 situations – where a people have the right to exercise external self-determination and secede.⁹⁷ These exceptions do not apply to Catalonia, as mentioned above; it is an autonomous community within the Spanish state and is recognised as a nationality according to Art. 2 of the Spanish Constitution (which concurrently prohibits secession of any of the regions belonging to the Spanish territories.) Thus, it could not be claimed that the Catalans have been denied the ability to internally exert their right to self-determination. Not even the positive outcome of a referendum on the question of the desire for sovereignty, unilaterally held in that part of a state whose population strives for independence, can compensate the lack of the above-mentioned exceptional circumstances of last resort.⁹⁸ As the UN General Assembly has put it in Resolution No. 68/262 with regard to the "Territorial integrity of Ukraine" such a referendum "(has) no validity" if it is "not authorized" by the responsible institutions on the national level.⁹⁹ Accordingly, the Spanish state is entitled to preserve its territorial integrity and political unity according to international law, and the Catalans do not have the right to secede from Spain without having an agreement with the general government in Madrid.¹⁰⁰

96 Rosas (1993), p. 238.

97 Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 138.

98 For an apparently differing view on this key issue see Pons Rafols (2013) who refers to the reference jurisdiction of the Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), to underline the principle of democracy, the fundamental rights of the citizens and the rule of law as the decisive aspects for a political solution of the conflict due to the Catalans search for independence.

99 UNGA Res. 68/262 'Territorial integrity of Ukraine' (27 March 2014), 7th indent of the preamble and para 5.

100 Cf. Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 136.

2.5.2 Advisory Opinion of the ICJ in the Case of Kosovo as an Encouraging Factor for Catalonia's Independence?

In its advisory opinion regarding the legality of Kosovo's unilateral declaration of independence of 2008, the International Court of Justice determined that the declaration did not violate the rules of international law. The ICJ's advisory opinion on the declaration of independence was rejected not only by Serbia, but by other states, such as Spain, concerned that the ICJ's advisory opinion may encourage separatist movements to follow suit and unilaterally declare independence in the regions that they represent, as long as such an act does not violate international law. At first glance, it would appear that the ICJ's advisory opinion encourages separatist movements, which in fact it does not. The Court reached this conclusion because international law does not contain any guarantee against the disintegration of states. The ICJ noted that "general international law contains no applicable prohibition of declaration of independence".¹⁰¹ Although the ICJ referred to the importance of the principle of territorial integrity of states, it rejected the claim that a prohibition of unilateral declarations of independence could be derived from this principle. The Court also rejected the invoking of the UN Security Council resolutions that condemned declarations of independence in Southern Rhodesia, Northern Cyprus and the Republika Srpska as evidence for the prohibition of unilateral declarations of independence. The Court justified the Security Council's condemnation of these declarations by saying that they were connected with the unlawful use of force or egregious violations of *ius cogens*.¹⁰²

The ICJ's holding is not unique. In its decision in the case of Quebec on August 20, 1998, the Canadian Supreme Court noted that "[i]nternational law contains neither a right of unilateral secession nor the explicit denial of such a right".¹⁰³ The ICJ's Advisory Opinion also could not be interpreted to mean that international law prohibits a state from declaring itself in its

101 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion of 22 July 2010), I.C.J. Reports 2010, para 84.

102 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion of 22 July 2010), I.C.J. Reports 2010, para 80 and 81.

103 Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998), para 112; Bothe (2010), p. 837.

constitution to be indissoluble, as Spain does in Art. 2 of the Spanish Constitution.¹⁰⁴ The constitutional status of a state, including the form of the state and the government, is left to the free determination of the people of the state. Spain is not the only state whose constitution includes a provision on the indissolubility of the nation. Notably, the French Constitution of 1958 stipulates in Art. 1 that “La France est une République indivisible”. The ICJ’s advisory opinion could still be criticised, however, because the ICJ missed the opportunity to interpret several disputed questions relating to the principle of self-determination.¹⁰⁵ The ICJ did not answer the question regarding the extent of the right to self-determination and the existence of “remedial secession”, but rather recognised that there are different views on this issue. The ICJ also left open the question of whether the mother state is entitled to prevent a secession or not. It also left open the question of whether states are required to recognise the newly-born state (in the Kosovo case) because independence is an expression of the right of self-determination.¹⁰⁶ Moreover, the Court did not take a position on the effectiveness of declarations of independence proclaimed by non-state actors.¹⁰⁷

2.6 Recognising Catalonia as a state against the will of Spain

The question arises: How would matters be if the Catalans insisted on independence and the Spanish government maintained its opposition to Catalonia’s independence, insisting by legal means of preserving the territorial integrity and political unity of the Spanish state (A.II.3)? As mentioned above, the Catalans have no right under the Spanish Constitution or international law to secede unilaterally, although a unilateral declaration of independence cannot be ruled out from the perspective of international law. Yet from the perspective of Spanish law, a unilateral declaration of independence would be unconstitutional because it expressly violates Art. 2 of the Spanish Constitution of 1978. According to some opinions, a declaration of secession without this right violates international law by infringing the principle of territorial integrity of states and even the principle of self-de-

104 Another opinion is represented by Jamar (2010), p. 923.

105 Cf. López-Jurado Romero de la Cruz (2011), p. 17 et seqq.; Perea Unceta (2011), p. 134 et seqq.

106 See also Muharremi (2010), p. 867.

107 See Libarona (2012), p. 123.

termination (which includes the right to secession only as a last resort.)¹⁰⁸ But this opinion was refuted by the ICJ in the case Kosovo as already discussed (B.V.2).¹⁰⁹ Secession of a region from the mother state in violation of the constitution does not necessarily mean that this non-constitutional act also violates international law, because the latter as a law of coexistence between states constitutes an autonomy norms order vis-à-vis national constitutions.¹¹⁰ Accordingly, a unilateral declaration of secession by Catalonia without the consent of the general government of Spain would not constitute a violation of international law. Nevertheless, irrespective of the constitutional legality or illegality of a unilateral declaration of independence by a political entity, it would be difficult to justify such a declaration before international law, which considers secession a last resort. Sovereignty, being the cornerstone in international law, protects the territorial integrity of states in order to maintain peace and stability,¹¹¹ which could be endangered if the principle of self-determination is given priority at the expense of the principle of territorial integrity of states. A unilateral secession as a last resort is an expression of the rule of proportionality, which is considered one of the principles of international law. It creates a balance between the principles of sovereignty and territorial integrity of states on the one hand, and the principle of self-determination of peoples on the other hand, as basic principles of international law. In essence, it prevents misuse of the right of self-determination.¹¹²

In the case of secession, it is also not enough that the new entity declares its independence to become a state. The entity must also show that it has sufficient and real independence from the mother state, which means that it is not subject to the authority of any other state.¹¹³ In the case of declaring independence, therefore, Catalonia must show sufficient independence from Spain. The state practice since the secession of the American colonies from Great Britain indicates that the condition of sufficient independence is ful-

108 Raic (2002), p. 419; Ott (2008), p. 464.

109 See International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of 22 July 2010), I.C.J. Reports 2010, para 84.

110 Saxer (2010), p. 169. Galán Galán (2013) concludes that international public law refers this issue to the law of the European Union, p. 106; see also Medina Ortega (2014), chapter VI.

111 Steinberger (2000), p. 513.

112 Ott (2008), 462.

113 Crawford (2006), p. 63 et seqq.

filled when the government of the new entity controls its territory effectively and with sufficient stability. Unlike national law, international law lacks a central authority for enforcing rights and duties. Therefore, individual factual situations are important. The existence of an *effective government* in the entity striving for independence is crucial for proper assessment of its legal position and the extent of third-party states' willingness to recognise it as a new state.¹¹⁴ However, the extent of the new regime's effectiveness does not play a decisive role in cases where the secession took place with the consent of the previous sovereign, and the required degree of effectiveness could be reduced in secession movements that are based on the right of self-determination.¹¹⁵ In general, in order to become an internationally recognised state, the government of the new entity must exercise an effective control over a particular population within a particular territory. Without an effective government, the new state will be incapable of enforcing individual rights and duties at the internal level, and of guaranteeing the observance of international duties. Therefore, the establishment of a new state and its recognition by the international community is contingent on this prerequisite. The recognition by states of an entity that lacks an effective government may constitute a wrongful act.¹¹⁶ However, there is no duty under international law to recognise a new entity just because its government sufficiently controls its territory. Recognition of states is an optional and political act; when it occurs, it resolves uncertainties regarding the status of the new state.¹¹⁷ Nonetheless, non-recognition of an entity as a state does not mean that other states should neglect having any relation with it. In some cases, states may find that it is necessary to distinguish between the external and internal consequences of non-recognition and recognise the *de facto* status in order to achieve hu-

114 Verdross (1959), p. 80; Doehring (1995), p. 44.

115 Haverland (2000), p. 356 et seqq.

116 Doehring (1995), p. 45.

117 Crawford (2006), p. 25.

manitarian goals or avoid causing damage to individuals.¹¹⁸ As to the question of the membership in the United Nations, it is noteworthy that, since its establishment in 1945 and except for situations relating to former colonies, the United Nations have been reluctant to admit a seceding entity to membership without the consent of the mother state.¹¹⁹ As a result, it is very probable that most, if not all, states would be reluctant to recognise Catalonia as an independent state, not only because state practice favours the preservation of the territorial integrity of the existing states, but because the recognising states might through an early recognition of Catalonia violate the principle of non-intervention in the internal affairs of states, according to Art. 2.7 of the UN Charter.¹²⁰

The Catalans recognise that they would face obstacles if Catalonia unilaterally declared its independence from Spain; e.g. the Catalan government would have to decide whether to replace Spanish documents with ones in the Catalan language. However, to avoid causing damage to individuals in the event that independence is declared without a previous agreement with the central government in Madrid, states may recognise the status quo in Catalonia and recognise acts issued by Catalonian authorities, including marriage, employment contracts or even passports. Foreign courts may recognise the laws of Catalonia, even if the state where the court is located

118 After the collapse of the government of President Mohammad Said Barre in 1991 and the spread of chaos in Somalia, the north of Somalia declared its independence following an assembly of clans in the region and established the "Republic" of Somaliland. Although Somaliland has a government that exercises its functions in the territories and maintains public services in the region and although its government has managed to maintain its de facto independence for decades, and has contacts and visits with the foreign world, no state has recognised Somaliland as an independent state. The Port of Berbera, which lies in Somaliland, was used frequently to send international aid to Ethiopia; see Crawford (2006), p. 18 and 414. In 2003, a German court ruled that the Republic of Somaliland is a "state" for purposes of asylum law; see Hesse Administrative Court, Kassel, 4 UE 4952/96 (Judgment of 30 October 2003).

119 See in this respect Crawford (2006), p. 417.

120 Cf. the positions taken by states in the case of Katanga which declared in 1960 its independence from the Congo, in the case of Biafra which declared its independence in 1967 from Nigeria, in the case of Chechnya which declared its independence from the Russian Federation in November 1991 and in the case of Republika Srpska during the war in the former Yugoslavia in the 1990s. See in this regard Crawford (2006), p. 406 – 408; Ott (2008), p. 222. See also Art. 1 of the General Framework Agreement for Peace in Bosnia and Herzegovina initialed in Dayton on 21 November 1995 and signed in Paris on 14 December 1995.

has not recognised Catalonia as an independent state. Yet, there will be states which might refuse to recognise acts issued by Catalonian authorities after a secession. This would cause damage to individuals, if some states refused to recognise, for example, Catalonian passports or qualifications and documents about periods of study and training. In the end, this would still equate with a high degree of legal uncertainty for the people of Catalonia.

3. Catalonia's independence as a challenge for the European Union

3.1 Catalonia as a constituent of a "Europe of the regions"

The regional blindness that existed in the Treaties of Rome (1957/58) has been replaced by the Treaty of Maastricht (1992/93) through the federal dimension of a "Europe of the Regions".¹²¹ At the institutional level, the Committee of the Regions, which consists of representatives of regional and local bodies, participates in reaching the goal of a united Europe. The Committee should guarantee the regional features, diversity, and competition in the institutional framework of the treaties in accordance with the principles of the European Union (hereafter the Union or EU), such as the principles of proximity to citizens, subsidiarity, and respect for the national identity of the Member States. In the sense of the vertical distribution of competences, the Committee should represent an effective counterbalance against tendencies of centralization at the level of the Union. The underlying idea is that national states are too small to solve big problems and too big to solve small problems.¹²² In the Spanish Delegation, Catalonia is represented by two members in the Committee of the Regions.

The Treaty of Lisbon (2007/09) stipulates in Art. 4.2 TEU that the Union has to "respect the national identities [of the Member States]." This provision both reflects and strengthens the notion that "[fundamental structures] of the Member States, both political and constitutional, inclusive of regional and local self-government" should be seen as inherent elements of national identity. This was the first instance in which the Union had been expressly defined as a multi-level governance system comprised of regions and munic-

121 Cf. Blanke, in Grabitz et al. (2011), Art. 300 AEUV para 57 et seqq. ("Das Europa der drei Ebenen").

122 Cf. D. Bell, cited by Teufel (1992), p. 2.

ipalities, the Member States, and the Union.¹²³ However, specific regional or local identities comparable with what the Treaty recognises as national identities are not protected.¹²⁴ The integration of the third level can also be seen in other parts in the treaties. In the context of the exercise of competences under the principle of subsidiarity, not only are possibilities for achievement at the central national level taken into account, but at the regional or local level (Art. 5.3 [1] TEU). The Committee of the Regions is also invested with the right to instigate proceedings in case of alleged infringements of the principle of subsidiarity (Art. 263.3 TFEU; Art. 8.2 of Protocol No. 2 TEU). Moreover, regional ministers are allowed to participate in the Member States delegations (Art. 16.2 TEU). This provision, introduced in 1992 in the Maastricht Treaty at the request of the German Government to enable ministers from the German *Länder* to participate in Council meetings, empowers members of state governments in federal or semi-federal states to be the representatives of the Member State, providing that the minister in question is competent to bind the Member State as a whole.¹²⁵

Spain as a regional and not a federal state is represented by the national government in the Council of the European Union according to its constitution, which accords the central government the competence in the field of international relations (Art. 149.1 [3] Spanish Constitution). Since 2004 a representative of the autonomous regions can join as a member the Spanish delegation when the Council is dealing with matters that affect regional interests. This question is regulated by an agreement between the central government and the regional bodies.¹²⁶ Giving Catalonia, like all the other Spanish regions, the opportunity to participate effectively in the Spanish delegation and in the decision-making process in the EU may contribute to satisfying the Catalans' national aspirations and prevent conflicts between

123 Also Schink (2005), p. 865, says that (with regard to the equivalent provision of the Constitutional Treaty) "local self-government will become a building block of the European multi-level governance system and will form part of the fundamental political and (especially!) constitutional structure" of the Union (our translation). Cf. Pernice (2009), p. 372 et seqq.

124 Cf. Blanquet, in Burgogue-Larsen et al. (2007), Art. I-5 para 4, 14.

125 Edjaharian, in Blanke and Mangiameli (2013), Art. 16 para 33.

126 Cf. the agreement of the "Conference for EC-Related Affairs" of 9.12.2004 (now called "Conference for EU-Related Affairs" - CARUE - http://www.seap.min-hap.gob.es/en/areas/politica_autonomica/participacion-ccaa-eu/ccaa_y_ue/CARUE.html).

the *Generalitat* and the central government in Madrid. The initial refusal of the Spanish government to involve a representative of the *Comunidades Autónomas* (*un consejero autonómico*) in the Spanish delegation to the EU Council was one of the reasons for Catalans' dissatisfaction.¹²⁷ Indeed, European integration contributed to creating a process in which power is shared across multiple levels of government in Spain.¹²⁸

3.2 EU's core values and the right to self-determination of Catalonia (Art. 2 TEU)

As Spain's representation in the Council of the Union shows, Catalonia's status as an autonomous region within the Spanish regional state remains low in its relations with the EU. This is undeniable in comparison with the status of the regional entities in federal states, such as Germany, Belgium and Austria. But does this justify a region's right to secession within the EU? This would be the case if Spain does not comply with the fundamental rights of minorities as set out also in relevant European conventions, and thereby violates the core values of the Union (Art. 2 TEU).¹²⁹ These catalogues provide for the right to internal self-determination for national and ethnic minorities *within* the national state. This right is recognised explicitly by the Union, which confirms in Art. 2 TEU to have "respect for human rights, including the rights of persons belonging to minorities". Beyond this article, the Union's dedication to human rights is apparent not only from legal texts, but from the positions it has taken on several occasions, and from statements made by the officials on behalf of the Union in international forums.¹³⁰

The Framework Convention for the Protection of National Minorities, which was signed by Member States of the Council of Europe in 1995, stipulates in its preamble that "the protection of national minorities is essential for stability, democratic security and peace" in Europe. It also emphasises that "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but create appropriate conditions enabling them to

127 Bourne (2004), p. 12.

128 Roller (2004), p. 88.

129 Medina Ortega (2014), chapter IV.

130 Maertens, EU Presidency Statement in the United Nations about the Right to Self-determination, EU Delegations to the United Nations (31 October 2001).

express, preserve and develop this identity". These principles emphasising protection of minorities may be considered structural principles of the EU.¹³¹ The Convention transfers the principles mentioned in various documents of the Organisation for Security and Cooperation in Europe (Helsinki Final Act of 1975, as well as Final Act of the Copenhagen Meeting of the Conference on the Human Dimension and "Charter of Paris for a New Europe" both of 1990) into legally binding provisions. It requires states to guarantee every person belonging to a minority group fundamental human rights, such as freedom of thought, belief, association and expression, violation of which would be based on race, religion or language. According to Art. 4 of the Convention, states are required to "guarantee to persons belonging to national minorities the right of equality before the law" and to prohibit "any discrimination based on belonging to a national minority". Art. 5 of the Convention requires States "to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage". However, the provisions enshrined in the Convention constitute only programme-similar principles that could be considered minimum standards that states have to guarantee to persons belonging to minority groups.¹³² Therefore, states are required to ensure greater protection for minorities according to their national laws.

If we examine the extent to which Spain respects these standards in Catalonia as an autonomous region, we shall come to the following conclusion: Ten million Catalans living in the northeast of Spain have, according to the Spanish Constitution of 1978 (Art. 3.2 and 3.3), everything that numerous linguistic minorities in other states could only dream of. The Catalans have their own schools, media, literature and public institutions. The Spanish Constitution provides that Catalan as "[another] language of Spain ... is recognised as official in the respective Self-governing Communities in accordance with their Statutes". This constitutional guarantee became a political reality in Catalonia. This compliance with the Union's values and principles should help reduce tensions and promote integration between "the peoples of Spain" (Preamble, 4th indent of the Spanish Constitution), including their nationalities. However, Catalans aspirations for "autonomy" go far beyond the right to self-government within a nation-state. Like other

131 See also Mangiameli, in Blanke and Mangiameli (2013), Art. 2 para 34.

132 See Article 22 of the Framework Convention for the Protection of National Minorities.

separatist movements in Europe, the Catalans may argue that the will of the majority should be respected if it voted for independence, which is considered in this case a collective reflection of the aspiration of the Catalans for self-government within a national state. This aspiration for independence is consistent with the Union core values, which include respect for human dignity, freedom and democracy.¹³³ In any event, Art. 2 TEU cannot be interpreted in isolation from other principles of the Union, which also include respect for the territorial integrity of the Member States (Art. 4 TEU).

3.3 Would an independent Catalonia have membership in the EU?

3.3.1. The principle of territorial integrity as a legal condition of European integration

According to Art. 4.2 TEU, the Union respects not only the national identity of the Member States, but “essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”. These elements constitute the “essential conditions for the enjoyment of national sovereignty”.¹³⁴ The legal order of the Union is based on international law, and obligates the Union in its relation with the Member States (as well as the Member States in their relation with each other) to behave in a manner consistent with international law (Art. 4.3 TEU).¹³⁵ Observance by Member States of territorial integrity in their relations with each other and within their national borders is an essential condition to achieve peaceful integration and establish an area of peace, security and justice. This is politically characterised by ensuring the absence of internal border control and framing a common policy on asylum, immigration and external border control (Art. 67.2 TFEU). Therefore, the principle of territorial integrity of a state as one of the basic principles of international law provides Spain with an inherent right that enables it to make the required decisions to preserve its territorial integrity and political unity without any

133 Cf. Scottish Government (2013), *Scotland in the European Union*, p. 2 and 81. <http://www.scotland.gov.uk/Resource/0043/00439166.pdf>.

134 French Constitutional Council, Decision No. 2004-505 DC, *The Treaty Establishing a Constitution for Europe* (Decision of 19 November 2004), para 24.

135 Medina Ortega (2014), chapters II and V.

alien interference from any source, including the EU. Thus, the principle of sovereignty and territorial integrity of the Spanish state would serve as a safeguard against possible Union pressures on Spain to compel acceptance of the secession of Catalonia. The Union would also be required to respect the Spanish state's right to maintain law and order, and ensure internal security in Catalonia.¹³⁶

3.3.2 Accession of Catalonia to the European Union after its secession from Spain

In an effort to quell some of the Catalans' fears, the government of the region voiced its opinion that Catalonia would remain in the EU if it ever seceded from Spain. In its view, independence of part of an EU Member State is unprecedented; it holds therefore that it is "untrue to declare that Catalonia would cease to be an EU member." In its opinion, such suggestions are "designed to scare Catalan voters away from supporting independence".¹³⁷ This point of view is similar to the one adopted by the Scottish government during its campaign supporting independence from Great Britain before the referendum of September 18, 2014.¹³⁸ In contrast, the position of both the Spanish and British governments is that secession from the mother state portends an exit from the Union.¹³⁹ Since EU treaties contain no provision on the legal consequences of independence of parts of a Member State, and due to the absence of a legal precedent in this regard, every party has asserted the correctness of its position. However, the point of view of the central governments is supported by statements of EU officials.

According to the former vice-president of the European Commission, *Joaquín Almunia*, "[i]f one part of a territory of a Member State decides to

136 Blanke, in Blanke and Mangiameli (2013), Art. 4 para 75.

137 See Website of the Government of Catalonia, President Artur Mas explains the process of how to decide the future of Catalonia (2 January 2014). http://premsa.gencat.cat/pres_fsvp/AppJava/notapremsavw/detall.do?id=239550&idioma=0.

138 Scottish Government (2013), Scotland in the European Union. <http://www.scotland.gov.uk/Resource/0043/00439166.pdf>.

139 HM Government (2014), Scotland Analysis: EU and International Issues. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271794/2901475_HMG_Scotland_EUandInternational_acc2.pdf; see website of BBC News Europe, Scottish or Catalan Vote 'Torpedoes EU', Says Spain's Rajoy (17 September 2014). <http://www.bbc.com/news/world-europe-29234242>.

separate, the separated part isn't a member of the European Union".¹⁴⁰ The former President of the European Commission, *José Manuel Barroso*, and the former President of the European Council, *Herman Van Rompuy*, both expressed this same view. At the European level, there are obviously fears that secessionist movements would feel emboldened if seceding parts of Member States were allowed to remain in the Union.

Almunia's statement is supported by international law and state practice. At first glance, one may think that the opposite is true. Art. 34.1 (a) of the Vienna Convention on Succession of States in respect of Treaties of 1978 stipulates that "any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed". This means that the newly-born state also takes on some of the obligations (and privileges) of the predecessor state.¹⁴¹ However, Art. 4 of this Convention includes a restriction regarding the continuation of a treaty, which is the constituent instrument of an international organisation. Art. 4 stipulates that:

The present Convention applies to the effects of a succession of States in respect of:

(a) any treaty which is the constituent instrument of an international organisation without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organisation.

In its commentary on Art. 4 of the Convention, the International Law Commission justified this restriction in Art. 4 by saying that "[i]nternational organisations take various forms and differ considerably in their treatment of membership".¹⁴² Admission to membership of an international organisation is subject to specific conditions that should be fulfilled before the applicant

140 Nielsen, EU Commission: Catalonia must leave EU if it leaves Spain (17 September 2013). <http://euobserver.com/enlargement/121466>. In a reply to a parliamentary question in 2004, the EU Commission stated that when a part of the territory of a Member State ceases to be a part of that state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory. Parliamentary Questions of 1 March 2004. <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2004-0524&language=EN>.

141 See Chamon (2013), p. 613 et seqq.

142 International Law Commission, Yearbook of the International Law Commission (1974), II (Part One), p. 177.

state becomes a member of the organisation. The practice of the United Nations shows that new states have been regarded as entitled to membership in the UN by *admission* and not by succession. The leading precedent in this regard was the case of Pakistan after it had separated from India and established an independent State in 1947. As Pakistan wanted to be a member, the UN Security Council, acting upon advice from the UN General Assembly, treated India as a continuing member and recommended that Pakistan applied for UN membership as a new state.¹⁴³

Ultimately, the EU is also an association of like-minded and sovereign states, and there are certain conditions that every applicant state has to fulfill before it becomes a member. The EU is conceived as “a new legal order”, creating rights and obligations not only for its Member States, but for its citizens. Therefore, in case of a conflict, EU law, and not the rules of international law related to succession regarding membership of international organisations, would apply to the case of an independent Catalonia.¹⁴⁴

However, like the UN Charter, the EU treaties are silent as to what should happen when a part of a Member State decides to secede and establish a new state. The silence of the EU treaties in this regard is also similar to the situation that existed in the Union before the ratification in 2009 of the Lisbon Treaty, which provides the Member States in Art. 50 TEU the possibility of withdrawal. Before this treaty, the EC/EU treaties did not include an explicit provision on this case. This led at the time to different interpretations about the permissibility of withdrawal from the EC/EU. The absence of a provision explicitly permitting the withdrawal from the EC/EU did not prevent the emergence of attempts at withdrawal, as happened with the United Kingdom when it conducted a referendum in 1975 on remaining in the European Community. The attempt was not opposed by other Member States as being a violation of the European Community (EC) Treaty. However, some authors considered that Member States might not withdraw because they no longer had this right. According to this view, “individuals became the new subjects of the Community”.¹⁴⁵

Using a literal interpretation of Art. 50 TEU, only Member States would be entitled to withdraw from the Union. However, it could be argued that

143 International Law Commission, Yearbook of the International Law Commission (1974), II (Part One), p. 178.

144 See European Court of Justice, Case 26/62, Van Gend en Loos (1963), ECR, p. 12; see also Blanke, in Blanke and Mangiameli (2013), Art. 1 para 31.

145 See Wyrozumska, in Blanke and Mangiameli (2013), Art. 50 para 1, 2 and 3.

Art. 50 TEU might be interpreted in light of its purpose as permitting the withdrawal of parts of states. However, the view that, if Catalonia decided to separate from Spain, it would have to leave the EU is supported by Art. 52 TEU on the territorial scope of the treaties. This article mentions the official names of the Member States. EU law applies to Catalonia because it is constitutionally a part of Spain as one of the Member States mentioned in the list provided in Art. 52 TEU. In the event that Catalonia became an independent state, it would cease to be part of Spain. Consequently, Catalonia would also exit automatically from the Union if it were to become independent.¹⁴⁶

The fact that the EU Treaties are silent as to the legal consequences related to the independence of a part of a Member State applies also to the question of the allocation of seats at the EU Parliament. However, and in spite of the principle of degressive proportionality (14.2 TEU), the number of seats allocated to Spain in the EU Parliament would need to be adapted in the event that Catalonia became an independent state.

Regardless of the legal reasons that may speak for or against Catalonia's retaining Union membership, the Union would be reluctant to give separatist movements in Europe an encouraging signal through the permissive continuation of an independent Catalonia as an EU Member State without going through the admission process provided for in Art. 49 TEU. Therefore, it is probable that the EU would follow an approach similar to that of the UN concerning the membership of a new-born state after a separation from the mother state. This conclusion is consistent with Art. 52 TEU, and with statements on this matter by Union officials. Hence, it is expected that an independent Catalonia would be required to apply for EU membership as new states have done if it wishes to become a Member State. But this does not mean necessarily that Catalonia would exit automatically after independence. An automatic exit would have several implications not only at institutional level, but for individuals. The Catalans have already become Union citizens, and Catalonia has already applied the law of the EU and uses its

146 See in this respect Quesada, in Blanke and Mangiameli (2013), Art. 52 para 4; see also Galán Galán (2013) who thus excludes the applicability of Art. 50 TEU, p. 110 et seqq. and p. 115.

currency.¹⁴⁷ The admission process can take years. The accession application of Catalonia must also be approved unanimously by the European Council, which consists of governments of the Member States. Spain or any other Member State can effectively veto the Council's consent.

3.3.3 Preference for a smooth transition

In the event that Catalonia were to declare its independence, it would therefore be very probable that the Union's institutions would enter into negotiations with Catalonia and Spain to avoid problems and complications that would result. An example of these problems includes issues such as Erasmus students studying in Catalan universities being reclassified as foreign students. Catalans working in other Member States such as Germany or France would lose their rights under EU law. Therefore, it is not out of the question that the Court of Justice of the European Union might be involved in this matter and not allow the Council to expel Catalonia after a secession automatically from the European Union since this would violate the individual rights of current Union citizens. This scenario is possible if, for example, an individual argued before a Spanish court that some measure by the Spanish government connected with Catalonia's independence violated EU laws, and as a result the court made a preliminary referral to the Court of Justice of the EU.¹⁴⁸

In any event, if Catalonia were to declare its independence, negotiations between the Union institutions, Member States, Spain and Catalonia would be necessary. Negotiations based on good faith and sincere cooperation would be required under EU law to find a solution consistent with the core values, spirit and objectives of the Union.¹⁴⁹ Such negotiations might aim at helping relevant parties reach a political solution concerning Catalonia's status in its relations with Spain or the EU. They might also seek to agree on a transition period and transitional arrangements. During this period, EU

147 See Catalan Government's Advisory Council: an independent Catalonia would not be excluded from the EU. <http://www.catalannewsagency.com/politics/item/catalan-government-s-advisory-council-suggests-that-an-independent-catalonia-would-not-be-excluded-from-the-eu>.

148 See O'Neill (2011), *A Quarrel in a Faraway Country?: Scotland, Independence and the EU*. Eutopialaw. <http://eutopialaw.com/2011/11/14/685/>; Crawford and Boyle (2012), p. 104 et seq; cf. Tierney (2013), p. 4.

149 Cf. Edward (2013/14), p. 20.

laws would apply to Catalonia until negotiations had been concluded.¹⁵⁰ The reason for determining this transition period is, as in the case of the withdrawal of a Member State according to Art. 50 TEU, to overcome the complications and problems arising out of Catalonia's exit from the Union.¹⁵¹ Hence, the negotiations and proposed transition period would be in the interest of Catalonia, all Member States, EU citizens and the Union in general.¹⁵²

Thus, it could be argued that – contrary to the opinions of *Almunia*, *Barroso* and *Van Rompuy* – Catalonia's exit from the Union would not be automatic if it declared its independence from Spain. Indeed, the legal situation is far from clear, and the solution would be political rather than legal. This state of uncertainty demonstrates that there is a lacuna in EU law regarding the legal consequences related to the independence of part of a Member State. This also explains why the Union welcomed the result of the Scottish referendum.¹⁵³ Like European governments, the Union also thinks that the rise of secessionist movements in various European states not only constitutes a threat to the territorial integrity of Member States, but also goes against the spirit of European integration.

4. Conclusion

International law, as it currently stands, does not spell out all the implications of the right to self-determination. However, it is well established that international law permits – whatever the circumstances – secession only in certain situations, none of which are applicable in the case of Catalonia. Neither international law nor EU law guarantees an overall right to secession. The Catalans as a people and nationality are entitled to exercise internally the

150 Cf. Murkens (2001), p. 10; Scottish Government (2013), *Scotland in the European Union*, p. 81. <http://www.scotland.gov.uk/Resource/0043/00439166.pdf>; *Enlightening the Constitutional Debate* (2014), *Scotland and the EU* (Walker's opinion), The Royal Society of Edinburgh, p. 30. <http://www.royalsoced.org.uk/series-book>.

151 Edward (2013/14), p. 19.

152 Cf. Scottish Government (2013), *Scotland in the European Union*, p. 81. <http://www.scotland.gov.uk/Resource/0043/00439166.pdf>.

153 See: *No! Schotten stimmen gegen Unabhängigkeit*, *Frankfurter Allgemeine* (19 September 2014). <http://www.faz.net/aktuell/politik/referendum-in-schottland/ergebnis-des-referendums-no-schotten-stimmen-gegen-unabhaengigkeit-13161748.html>.

right to self-determination. Accordingly, the Catalans are entitled to all the rights accorded to minority and ethnic groups under international law and EU law.

Moreover, integration at the level of the EU provides Catalonia and other stateless nations and minorities with different opportunities to have their voices heard. Giving regions stronger competences will not only promote the political idea of subsidiarity, helping decision-making in the Union to become more democratic, more transparent, more efficient and closer to citizens. It may also contribute to satisfying the national demands of regions aspiring for greater autonomy, as the case of Scotland. Accordingly, Spain is entitled to protect its territorial integrity and political unity. Other states and the Union are required to respect the sovereignty, and in particular the territorial integrity of the Spanish state, as long as the Spanish government conducts itself in compliance with the right of self-determination. The Union is, as the German Federal Constitutional Court described it, "an association of sovereign states".¹⁵⁴ Despite the conferral of some sovereign powers by the Member States upon the Union, the vast majority of sovereign rights, including those related to the essential functions of the state, remain with the Member States. Since an independent Catalonia after secession from Spain would be outside the EU in the medium-term, it would be required to apply for Union membership as new states do and to go through the admission process as provided in Art. 49 TEU.

However, this does not necessarily mean that Catalonia would automatically exit from the Union if it declared its independence from Spain. There would have to be negotiations between the EU, Member States, Spain and Catalonia. Therefore, the relevant parties might agree on a transition period to overcome the complications that would arise from Catalonia's exit. The fact that EU law contains no provision on the legal consequences related to the independence of part of a Member State leaves a state of uncertainty, revealing a legal lacuna in this respect.

Since Catalonia has only a right to internal self-determination and no right to secession, conducting a referendum on independence against the will of the Spanish government would not be justifiable from the perspective of international and Union law, not to mention the Spanish Constitution of

154 Federal Constitutional Court of Germany, 2 BvE 2/08, Lisbon Case (Judgment of 30 June 2009), para 249; French Constitutional Council, decision No. 2004-505 DC, The Treaty Establishing a Constitution for Europe, (Decision of 19 November 2004), para 5.

1978, which stipulates in Art. 2 that the unity of the Spanish nation is indissoluble. Therefore, if the Catalans insist on independence, there would be no way fully compatible with international law and Union law to achieve it, other than reaching a negotiated agreement with the Spanish government. The consent of the Spanish government is indispensable not only to avoid troubles that may arise if the Catalans unilaterally declared their independence, but for recognition by the international community and membership of international organisations. Without the consent of Spain, most, if not all states, would be reluctant to recognise Catalonia as an independent state. With respect to membership in the UN and the EU, it would be difficult if not impossible for an independent Catalonia to be a member state of these organisations against the will of Spain. Therefore, the way to Catalonia's independence, if constitutionally admissible and politically unavoidable, would necessarily be through Madrid.

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