

Legal Aspects of State Succession

Prof. Patrick Dumberry

University of Ottawa

Introduction

- My presentation will address the following issues:
 - The legal questions that are likely to be the object of negotiation between the new State of Catalonia and Spain (I)
 - The question of the international recognition of the new State of Catalonia by other States (II)
 - The participation of the new State of Catalonia in international relations, including the questions of succession to international treaties and accession to international organizations (III)

I Negotiation between Catalonia and Spain

- After a referendum in favor of independence, the first issue which is likely to arise is the negotiation of the secession of the new State of Catalonia from Spain.
- In order to avoid any political and economical uncertainty and to prevent any legal vacuum, these negotiations should take place *soon after* a formal declaration of independence is made by Catalonia
- These negotiations will take place directly between the government of Catalonia and the central government of Spain
- One essential point is that any such negotiations will *only take place* provided that Spain recognize the result of the winning referendum and is willing to recognize Catalonia as a new State
 - The first question which will arise after a deciding vote in favor of independence is whether or not Spain will accept the result of the referendum and acknowledge the desire of the Catalonian people for independence
 - The government of Catalonia must make all possible efforts to convince Spain to rapidly recognize the new State.
 - The government of Catalonia should also try to convince other States (especially EU States as well as other powerful ones, like the United States) to put pressure on Spain to swiftly recognize the new State
 - The rapid recognition by Spain will have a great impact on all subsequent legal questions, such as recognition by other States and Catalonia's effective participation in international relations through

international treaties and international organizations (these questions will be discussed later)

- On the contrary, if Spain were *not* to recognize Catalonia rapidly (or delayed such recognition by many months), this would create a great deal of political, economical and legal uncertainty.
 - In this context, Spain would certainly *not* embark on negotiating any legal and economical issues.
- What are some of the most important legal questions that are likely to be the object of negotiation?
- The division of the Spanish national debts and assets (including embassies and consular, etc, (this aspect will be addressed by Ana Stanic)
 - Boundaries
 - Under the well-established principle of international law of *uti possidetis*, the new State of Catalonia has the right to have the same borders as those which existed for the autonomous region of Catalonia before its independence
 - In other words, the new State of Catalonia would not lose any territory; its territory will not be partitioned
 - This principle was applied in all recent cases of State succession (USSR, Yugoslavia, Czechoslovakia)
 - Another question which will have to be negotiated is the delimitation of the maritime boundary (and continental shelf) between the two States
 - Archives

- Under the 1983 Vienna Convention on State succession to State property, archives and debts (which has not entered into force), the archives related to Catalonia (and those “for normal administration of the territory”) will pass to the new State (art. 30)

- The Army
 - Will there be a new totally autonomous Catalanian army or would the new State continue to be part of an integrated defense structure with Spain ?
 - In the event that Catalonia creates an autonomous army, one question that is likely to arise in negotiation is what will happen to Spanish military bases, the equipment and military personnel that are located in the territory of Catalonia.

- Citizenship
 - The new State will have to establish a new citizenship and determine what are the criterions to establish such nationality.
 - One of the question that may be the object of some negotiation is whether Catalanian nationals will be allow to keep Spanish nationality as well.

- Some other issues will depend on whether or not Catalonia will be automatically part of the EU. These questions includes the following:
 - Which currency will be used by the new State? Can Catalonia still use the Euro if does not become automatically a member of the EU upon independence ?
 - If Catalonia is *not* automatically a member state of the EU, there should be some negotiation with Spain on a custom union (with

free movement of goods, services, capital and labor) which would apply between the declaration of independence and Catalonia's accession to the EU.

- These negotiations may take years and some of the questions will be highly complicated
- These negotiations should eventually result in a number of bilateral agreement between Catalonia and Spain on these different succession issues:
- In the meantime, i.e. during the period of negotiation with Spain, Catalonia should start right away seeking recognition from other States. Catalonia should seek such recognition as soon as possible even if Spain decides to oppose the declaration of independence and refuses to enter into negotiation with the new State.

II. Seeking Recognition from other States

A The Relationship between Statehood and Recognition

- There are 4 different conditions, that needs to be fulfilled by an entity in order to be considered as a State under international law (Montevideo Convention on the Rights and Duties of States, 1933):
 - An entity needs to have a defined territory
 - An entity needs to have permanent population
 - An entity needs to have an effective government which is capable of exercising its authority and maintain law and order on the whole territory
 - The entity must a “sovereign” State, i.e. be independent from other States in the conduct of its international relations and be capable, and willing, to enter into relationship with other States

- When an entity fulfills these 4 conditions, it is considered as a State under international law

- Who decides whether or not an entity does fulfill these 4 conditions?

- It is for each State individually (and unilaterally) to decide whether or not an entity fulfills these 4 conditions and whether it is willing to recognize this entity as a new State.

- As a matter of principle, an entity which fulfils the international law criteria of statehood *is already* a State.
 - A new State exists and is therefore a subject of international law
 - This means that the new State has all the rights and obligations that other (already existing) States have under international law (i.e. the right to territorial integrity, to defend itself, etc.)

- Recognition is therefore not “constitutive”, it is merely “declarative”

- Recognition is not a precondition for a State to exist. There is no need for any recognition by other States for a State to *exist* under international law.

- Recognition is ultimately a political choice. Each State is completely free to decide whether or not to recognize a new State based on subjective criteria that have sometimes nothing to do with the 4 objective conditions of statehood.
 - Ex. The reasons why Russia, China and Spain do not recognize Kosovo is not because they think that Kosovo does not fulfill the 4 conditions of statehood. Its because they do not want to encourage independent movements back home (Chechen, Tibetan, Catalans, etc.)
 - The fact that recognition is ultimately *political* explains why “real” States are still not recognized by almost anyone
 - Ex. East Germany for many years during the Cold war

- Taiwan
- The fact that recognition is ultimately *political* also explains why some entities that are clearly *not* States (i.e. they do *not* fulfill the 4 conditions of statehood) have nonetheless been recognized as independent States by many States:
 - Western Sahara (occupied by Morocco) which has nevertheless been recognized by all States of the African Union (except Morocco)
 - Palestine already recognized by more than 100 States

B The Importance of Recognition

- Even if recognition is not a legal precondition to be an independent State under international law, recognition is nevertheless of the greatest importance for a new State.
- This is so for essentially 2 reasons.
- 1st reason: Recognition is essential for any new State wishing to have normal diplomatic relations with other States.
 - Normal diplomatic relations between two States requires that both States formally recognize each others as independent States.
 - Somaliland has seceded from Somalia in 1991 and fulfils the 4 criteria of Statehood. But Somaliland is not recognized by any other States. As a result, it does not participate at all in international relations and it completely isolated.
 - Somaliland is therefore a “State” only in theory, but not in practice
- As the Supreme Court of Canada stated in the 1998 *Quebec Secession* case, while recognition is not a necessary condition to achieve statehood, it remains that “the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states.” (para. 142). Thus, according to the Court, “The ultimate success of such a secession would be dependent on recognition by the international community” (para. 155).

- 2nd reason: Recognition is necessary for any new State to become member of an international organization

- This question will be examined in details later.

- In (almost) all international organizations, statehood is an essential precondition to become a full member.
 - There are few exceptions which are clearly politically motivated (ex. Taiwan at WTO; Western Sahara in African Union, etc.)

- In order to become a member of an international organization, an entity therefore needs need to be recognized as an independent State by a qualified majority of other member States
 - But the fact that an entity is a member of one international organization does not mean that all member States of that organization wil automatically recognize this entity as an independent State.
 - Many Arab States members of the United Nations do not recognize Israel, also a member State of the United Nations

C The Relevant Factors for a new State to be recognized by other States

- Other States will be influenced in their decision to recognize or not a new State by several factors. There are at least 5 factors.

i) Is Catalonia a “State”?

- Catalonia must first show to the World that it does fulfill the 4 conditions of statehood
- In all likelihood, Catalonia would fulfill all 4 criteria of statehood upon its independence
- This 1st factor will therefore not be a problem in the context of Catalonia’s recognition by other States.

ii) Does the new State has a right to independence under International Law?

- In general, States are more likely to recognized a new State if it has a “right” to become an independent State under international law.
- Only very few national constitutions recognize the right to secession for a province or an autonomous region. In almost all cases, an unilateral secession will therefore be illegal under *domestic* law.
- Under *international* law, the right to *external* self-determination (i.e. independence) is only reserved for *certain groups* of “peoples”:

- A people under colonial rule (Ex. African States before their independence in the 1960s)
 - Peoples that are subject to alien subjugation, domination or exploitation (ex. Palestine, South Rhodesia)
 - A third category was hypothetically mentioned by the Supreme Court of Canada: “where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.” (para. 138).
 - The Supreme Court refused to determine whether this is a new category of peoples that have a legal right to secession under international law (because Quebec clearly did not fall into this category). The International Court of Justice in its advisory opinion on Kosovo also refused to examine this question (para. 82, 83)
- In any event, Catalonia does not fall under any of these categories.
- Therefore, the people of Catalonia do not have any *right* under international law to secede from Spain and to become an independent State
- The people of Catalonia only have a right for *internal self determination* (political, economic, social and cultural development) *within Spain*
- But the fact that a new State does not have a right to become an independent State under international law *does not* mean that a secession cannot be successful anyway.
- Even if international law does not recognize *a right* for Catalonia to secede, it *does not* prohibit secession either. This is the conclusion reached by the International Court of Justice in the Kosovo case: « The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases » (para. 79)

- Although Catalonia has no *right* to secession under international law, its secession could nevertheless ultimately be successful if it were to be recognized by a large number of States
- The fact that Catalonia has no right to secession is *not* likely to be a determinant factor in terms of international recognition. In other words, other States will decide whether or not to recognize the new State of Catalonia based on *other factors* than the question of its right to self-determination under international law.
 - o But if a State does not want to recognize a new State it may use the question of the legality of secession as an excuse for not recognizing it (ex. the reaction of Spain to the secession of Kosovo)

iii) The general perception of Catalonia as a new State

- In order to become a member State of the United Nations, Art. 4 requires that a new State be peace-loving, accepts its obligations under the Charter and be able and willing to do so.
- In the context of the dissolution of the USSR and other East European States, the European Community adopted the *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, under which member States of the EU had to ensure before recognizing a new State that it be a peace-loving country, be a democracy, it respects the rule of law, human rights and minority rights, etc.
- Some States have not recognized Kosovo, because they think that it will be an unstable, undemocratic and corrupt State

- The perception of Catalonia as a new State is likely to be very positive and should not be a problem in terms of recognition
 - But the government of Catalonia should, well before independence, undertake some important lobbying efforts towards other States to convince them in advance to eventually recognize this new State
 - Ex. Before the 1995 referendum the government of Quebec had convinced France and the majority of African francophone States to eventually recognize a new independent State of Quebec

iv) The position of Spain towards the new State of Catalonia

- Other States are *more likely* to recognize the new State of Catalonia if Spain has also first recognized it as a new State.
 - o In fact, most cases of secession since the Second World War have occurred in the context of no opposition from the “parent State” (ex. Singapore from Malaysia; Montenegro from Serbia, etc.)
- On the contrary, it will be *more difficult* for Catalonia to get recognized as a new State if Spain is opposed to this secession.
- But that does *not* mean that recognition is *impossible* (ex. Bangladesh was recognized by other States even if Pakistan opposed its secession)
- Spain does *not* have a right of veto over the question of recognition of the new State of Catalonia. In other words, other States may recognize Catalonia *even if* Spain objects.
- This is clear from the recent example of the secession of Kosovo.
 - Serbia was strongly against secession
 - Serbian pushed other States at the ICJ to render an advisory opinion on the legality of Kosovo’s unilateral declaration of independence
 - This opposition by Serbia did not prevent some 81 States to formally recognize Kosovo as an independent State after it made its unilateral declaration of independence.
 - For instance, Canada recognized Kosovo even if Serbia is strongly against secession

- Spain has not recognized Kosovo because it says that it is against international law and that there was a need for an agreement by all sides (i.e. by Serbia)
- But a strong objection by Spain about the secession of Catalonia and a firm refusal to recognize the new State and to enter into any negotiations with it will certainly have a negative effect on other States' willingness to recognize the new State
 - This is the strategy used by the Canadian federal government in the context of the eventual secession of Quebec.
 - The Federal Clarity Act passed by the Government of Canada indicates that the federal Government would *not* negotiate with the new State of Quebec if the referendum question is not clear and if the majority of yes-voters is not strong enough.
 - The message sent to Quebec by the Canadian federal government is that if we do not recognize Quebec's independence and refuse to negotiate any succession issues..... no other States will recognize this new State.
- Even if Spain's eventual refusal to recognize Catalonia as a new State may not prevent other States to recognize it as a new State, this is likely to have another important impact. Such refusal would make it much more difficult for Catalonia to be admitted in international organizations.
- Thus, no entity attempting to secede unilaterally has been admitted to the United Nations since 1945 against the wishes of the government of the State from which it was trying to secede.
- But there are *practical* difficulties. There are *no legal rules prohibiting* the accession of a new State to an international organization when the parent State objects.

v) The process by which Catalonia becomes an independent State

- Does it matter how independence is achieved?

- According to the Supreme Court of Canada, one important aspect in one State's decision to recognize or not another one is the "legitimacy of the process" of secession. In other words, it would matter for other States whether the secession was achieved legally in accordance with the law of the state from which the territorial unit seceded

- What would be a legitimate process anyway?
 - It would certainly involve a democratic and fair vote taken in the context of a referendum.

 - In the context of Quebec, the Supreme Court of Canada speaks of "clear expression of a clear majority" of the population of Quebec "on a clear question to pursue secession" (paras. 92, 93). In other words, the referendum results "must be free of ambiguity both in terms of the question asked and in terms of the support it achieves" (para. 87).

- For the Supreme Court of Canada, the legitimacy of the process by which a new State has become an independent State is no less than a "*precondition* for recognition by the international community" (para. 103).
 - Thus, a new State that does not respect such obligations under domestic law "can potentially expect to be hindered by that disregard in achieving international recognition", while, on the contrary, compliance by the

new State “with such legitimate obligations would weigh in favour of international recognition.” (143)

- There is no doubt that the procedure by which a State achieved independence is an element which other states will undoubtedly take into account in their political decision whether or not to recognize the new state (ex. a fair and democratic vote in the context of a referendum is more convincing of the desire and willingness of a people for independence than a unilateral declaration of independence made soldiers following a bloody coup d'état...)
- But the “legitimacy of the process” of secession, as important as it may be, is certainly *not* a “precondition” for international recognition as the Court is suggesting.
- It is simply *not true* that other States will refuse to recognize Catalonia for the simple reason that it made an unilateral declaration of independence which is contrary to Spanish domestic constitutional law
- State will decide whether or not to recognize Catalonia based on many other factors

III The participation of Catalonia in international relations

- Once Catalonia has been recognized by a significant number of States, it will want to fully participate in international relations
 - The reason why Kosovo is at the moment not fully participating in international organization (it is a member of only very few international organizations, including the IMF and the World Bank) is because it has been recognized by some 90 States (which is only half of the States in the World)

- Spain will continue to exist after the independence of Catalonia (but with a smaller territory)

- Catalonia is therefore a case of *secession* (it is not a case of “dissolution” of State like ex-Yugoslavia) whereby Spain will be considered as the “continuator” State.

- Specific rules of State succession applied to situations of secession

- We will examine the most 2 important issues:
 - Succession to treaties
 - Succession to international organizations

A. Succession to Treaties

- In order to become an active member of the international community, Catalonia will want to become party to already existing international treaties, including those to which Spain was a party before secession
- For treaties to which Spain was not a party before independence, Catalonia simply needs to seek adhesion by fulfilling the accession rules provided for under each treaty
- What happens to treaties to which Spain was a party before Catalonia's independence?
- There is no doubt that Spain will remain a party to the treaty.
- The question is whether or not the new State of Catalonia will automatically become a party to those treaties.
- Older cases of secession (USA, 1776, Spanish colonies from Spain in the 19th century), support the principle of *tabula rasa*.
 - A new State is *not* automatically bound by international treaties to which the parent State was party before secession
 - A New State is therefore free to determine which treaties it wants to become party.
- Modern cases of secession after WWII (Pakistan, Singapore and Bangladesh) also support the principle of *tabula rasa*.

- The *Vienna Convention on State succession to treaties* was adopted in 1978 and came into force in 1996.
 - The Convention has been ratified by only 22 States. Spain is not a party.
 - The Convention was mainly adopted to deal with the question of succession in the context of “newly independent States” arising from decolonization

- Art. 34 of the *Vienna Convention* indicates that in situation of secession (as well as that of dissolution) the principle of *continuity* applies.
 - A new State is *automatically bound* by international treaties to which the parent State (here Spain) was party before secession
 - The Convention explains that there are 2 exceptions to this principle:
 - If the parties (Catalonia and Spain) decide to apply instead the principle of *tabula rasa*
 - When the automatic application of the treaties to the new State would be “incompatible” with the object and the goal of the treaty or would “radically change” the condition of execution of the treaty.

- It is clear that when Article 34 was adopted in 1978 to cases of secession, the solution of continuity did not represent State practice, which on the contrary supported the position that the principle of *tabula rasa* was applicable to cases of secession.

- It is for *political reasons* that the solution of continuity was adopted for secession. The aim was to apply to new secessionist States a regime of continuity of

treaties which was then considered *unfavorable* to new States. At the time (1970s), new States (emerging from years of decolonization) *did not* want to be party to the old treaties of the colonial States. The goal of the Convention was to impose on secessionist new States an unfavorable legal regime that would therefore discourage secessionist movements from wanting to become an independent State.

- Things have changes since the 1970s!
- New States now *want* to become party to the treaties to which the parent State was a party before secession. New States want the principle of continuity to apply...not the *tabula rasa* principle.
- Art. 34 of the *Convention*, which applies the principle of *continuity* to situation of secession, is not considered as a codification of customary international law, which imposes legal mandatory obligations on States.
- Art. 34 of the *Convention* is formally binding only on the 22 States which are party to the treaty.
- Art. 34 of the *Convention* is therefore *not* binding on a new State, like Catalonia, unless Catalonia becomes a party to the *Convention* upon its independence.
- There is therefore *no mandatory rule* of international law dictating a legal solution to the question whether Catalonia will automatically become a party to all treaties which had been entered into by Spain.
- Catalonia can do what is wants!
- Art. 34 of the *Convention* only serves as useful “guidelines”

- I believe that the principle of continuity set up at Art. 34 of the Convention is the proper rule in the context of modern secession.

- There is a *presumption* to the effect that a new State is *automatically* bound by “multilateral treaties” to which the predecessor State (Spain) was party before secession.
 - I now only refer to “multilateral treaties”... I will make further distinction later.

- This *presumption* should exist because this solution is the best one for the perspective of the *new State*. Nowadays (in the post-colonial context), new States want (in almost all cases) to become party to all multilateral treaties.
 - This is for instance the position adopted by governments in favor of secession: Quebec, Scotland,

 - This is also the position which was adopted by Montenegro following its secession

- The presumption is also the best solution from the general perspective of the international community. This situation is favorable for the stability of treaty relations in international relations. In any event, other States party to a treaty will almost never object to a new democratic State like Catalonia becoming a party.

- How would this presumption work in practical terms?

- Even if the continuity of the application of the treaties is “automatic”, the new State must make a “declaration of continuity”. It should first notify in writing the depository of the treaty (i.e. an international organization or a State) that it will “continue” to be bound by a treaty.
 - Because it is only a presumption, a new State will also be free to decide not to succeed to an international treaties to which the predecessor State (Spain) was party before secession.
- This is the situation prevailing for *multilateral* treaties
- Different types of solution will apply to other kinds of treaties.
- Under international law, the principle of *continuity* will apply to the following different situations:
- Treaties establishing an international border between two States
 - Treaties establishing territorial regimes (for instance, treaties establishing a demilitarised zone, servitude, treaties dealing with pollution over rivers)
 - Treaties for the protection of human rights
 - Treaties on disarmament
- The situation is different with respect to other types of treaties where the principle of *tabula rasa* applies:

- Treaties concluded with a limited number of States (ex. regional treaties, treaties for economical integration, like NAFTA)
 - Bilateral treaties
 - “Political” treaties (ex. military treaties like NATO or friendship treaties)
 - Treaties in the context of international organizations
- In these situations, succession will not be automatic,
- A new State will have to submit a formal demand of adhesion and follow the procedure set up under each treaty for ratification.

B Succession to International Organizations

- The continuator State (Spain) will continue to be a member of each international organization
- Will Catalonia automatically become a member of each of the organizations to which Spain is already a member State?
- The question must be decided by each organization under its own rules.
- The Vienna Convention on succession to treaties does not apply to the “constituent instrument of an international organization” (Art. 4). The rules that must be applied are those that exist under these instruments. In other words, the rules of continuity applicable under Art 34 of the Convention to cases of secession cannot override the specific rules existing in each organization.
- In general, rules of international organizations are silent on the question of State succession. The rules that will find application are those rules for the admission of new members.
- In the vast majority of international organizations, there is no “automatic succession” (the only exceptions being WIPO and financial institutions such as the IMF and the World Bank).
- In almost all cases, a new State needs to formally apply for membership under the existing rules for each organization.
 - This is, for instance, the situation prevailing at the United Nations (Art. 4)

- The only (rare) exception was for “new” states which had been independent States in recent past (ex. Syria, 1961)

- There exist no legal rules which give any right of veto to the parent State on the accession of the new State to an organization (one exception is at the Security Council of the United Nations). In other words, the opposition of Spain to Catalonia’s independence cannot prevent Catalonia from becoming a member State of an organization

- But in practice, no entity attempting to secede unilaterally has been admitted to the United Nations since 1945 against the wishes of the government of the state from which it was trying to secede.

- The opposition of Spain to Catalonia’s independence may therefore be problematic for Catalonia seeking to becoming a member State of organizations

C. Succession to the European Union

- The EU is an international organization (Art. 1, 47 Treaty of the European Union).
But it is one organization that is considered *sui generis* because it involves some elements of federalism.
- The question whether or not Catalonia will become a member of the EU is not governed by the Vienna Convention; it must be decided under the EU Rules.
- There is no precedent of the “internal enlargement” of the EU in case of secession (the case of Greenland withdrawing from the EU in 1985 and that of the enlargement of the territory of Germany in 1990 are not applicable).
- There are basically 2 options that are at the extreme of the spectrum :
 - 1st option: A new State that is part of an existing member State would automatically become a member State of the EU.
 - 2nd option: The new State would be treated just like any other applicant State seeking membership under Art.49 of the TEU
 - The solution is probably in between ...
- On the one hand, accession to the EU will *not* be automatic for Catalonia (this is the position adopted by the European Commission about Scotland in 2007).
This is because the addition of a new State to the Union is a modification the EU treaty.
- But on the other hand, the existing mechanism under Art. 49, which exists for “real” new applicants (whose territory has never been within the EU), would

probably *not apply* in the context of Catalonia. In other words, Catalonia would not be treated just like Croatia or Serbia.

- This is because Catalonia has been under EU laws for more than 20 years and its laws do not need any reforms in order to comply with EU standards. There is also no doubt that Catalonia would fulfill the “Copenhagen” criteria to become a member State

- Catalonia would certainly not enjoy the exact same sets of benefits at the EU that it presently enjoys as part of Spain. Many issues will therefore have to be the object of negotiation. These questions include negotiation on voting rights in the different EU organs, question of subsidies received by the EU, etc. But these negotiations would be accelerated and less complicated than for “real” new applicants (i.e. those from outside the EU).

- These negotiations would be very political. In theory, Spain would have a veto over the question of Catalonia’s accession to the EU since the agreement between the EU and Catalonia on accession would have to be ratified by the Spanish parliament according to Spanish constitutional law. Also, other EU member states (which have substantial minorities) may want to impose some sort of conditions (or even a veto) to the admission of Catalonia in the EU just to discourage any separatist sentiments back home (ex. Cyprus, Slovakia, Romania, Greece).