

## **From Kosovo to Catalonia: Separatism and Integration in Europe**

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## Abstract

In July 2010 the International Court of Justice rendered its Advisory Opinion on the legality of Kosovo's declaration of independence and the Constitutional Court of Spain rendered an opinion concerning the autonomy of Catalonia. Two very different cases, from very different places, decided by very different courts. Nonetheless, they each provide insights on the issue of separatism in the midst of European integration. Does the Kosovo opinion open the door for other separatist groups? Does the process of European integration increase or undercut separatism? In addressing these questions, this article proceeds in three main parts. Part A briefly recaps the legal issues involved in the Kosovo Advisory Opinion. Part B discusses the relationship between self-determination and EU institutions and practices with a particular focus on Catalonia and the Basque country. Finally, part C assesses the seemingly contradictory impulses of separatism and European integration.

## A. Introduction: A Tale of Two Opinions

On July 10, 2010 over a million people marched in the streets of a major European city, spurred to action by the legal furor over a court case that was perceived to be about the self-determination of peoples. The city was not Belgrade or Pristina (although there had been demonstrations in those cities regarding another, better known, case), but Barcelona.

Catalonia, one of the seventeen Autonomous Communities (AC's) recognized by the Spanish Constitution, had revised its Autonomy Statute in 2006. On July 9, 2010 Spain's Constitutional Court issued an opinion striking down various expansions of authority in those revisions and finding that there was no legal basis to define Catalonia as a "nation"<sup>1</sup>. The result was many Catalonians arguing that autonomy within Spain was no longer feasible; separation was required to defend their language, their culture, their national identity.

<sup>1</sup> 'Catalan protesters rally for greater autonomy in Spain' (10 July 2010) available at <http://www.bbc.co.uk/news/10588494> (last visited 17 Dec. 2010); see also, D. Fombonne, 'Madrid 1 – Barcelona 0: Spain's Constitutional Court stops Catalan Nationalist Ambitions' (10 November 2010) available at <http://www.legalfrontiers.ca/2010/11/madrid-1-barcelona-0-spains-constitutional-court-stops-catalonian-nationalist-ambitions/> (last visited 17 Dec. 2010).

On a weekend when Spanish flags were flying high in anticipation of the July 11 World Cup final between Spain and the Netherlands, Catalanian flags were fluttered above protesters who filled block after block in Barcelona. For many Catalonians, the affront to the Catalanian region eclipsed the World Cup aspirations of the Spanish State. But, aside from a few short articles in the international press, not many people around the world took notice.

Less than two weeks later, on July 22, the International Court of Justice (ICJ) issued its Advisory Opinion finding that Kosovo's declaration of independence did not contravene international law. Although opinions of the ICJ do not often garner much attention by journalists, the Kosovo opinion was in the spotlight of the world press corps. Moreover, foreign ministries, political parties, and separatist enclaves from all around the world issued official statements concerning the opinion. Interpretations of what the opinion meant abounded: some said it made declarations of independence legal under international law; others said it was a special case that could not apply to other secessionist disputes.

While these two opinions dealt with very different situations and were issued by very different courts, there is an important overlap: they each provide insights on the issue of separatism in the midst of European integration. Does the Kosovo opinion open the door for separatist groups in Scotland, Flanders, Corsica, Catalonia, the Basque country, or elsewhere? Does the process of European integration increase or undercut separatism?

In addressing these questions, this article proceeds in three main parts. Part A briefly recaps the legal issues involved in the Kosovo Advisory Opinion. part B discusses the relationship between self-determination and EU institutions and practices with a particular focus on Catalonia and the Basque country. Finally, part C assesses the seemingly contradictory impulses of separatism and European integration.

In the end, I argue that while commentators tend to focus more on the pronouncements of the ICJ in delineating the scope of self-determination as a legal right, we are entering into an era where, at least in regards to separatist struggles in Europe, the definition and viability of self-determination norms will relate primarily to the institutional regulations and policies of the EU and other international organization. Although heralded as a right applicable to all peoples, the realities of self-determination in Europe will have more to do with bureaucratic push-and-pull among States, their regions, and Brussels and less with the decisions of the World Court.

## B. Kosovo and the Law of Self Determination

### I. Kosovo's Declaration

On February 17, 2008, members of the Assembly of Kosovo issued a statement declaring “Kosovo to be an independent and sovereign state”<sup>2</sup>. The Declaration stated: “[W]e shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244”<sup>3</sup>.

Nonetheless, Kosovo's declaration started a diplomatic firestorm. The U.S., the U.K., France, Germany, most other EU Member States, and a host of other countries recognized Kosovo as a new State almost immediately.<sup>4</sup> They were cautious to say, however, that Kosovo's declaration and the subsequent recognition did not constitute legal precedent regarding the creation of a State under international law.<sup>5</sup>

<sup>2</sup> Kosovo Declaration of Independence, 47 *I.L.M.* (2008) 1, 467, 467; C. J. Borgen, 'Introductory Note to Kosovo's Declaration of Independence', 47 *I.L.M.* (2008), 461.

<sup>3</sup> Kosovo Declaration of Independence, *supra* note 2, 468, para. 12. Security Council Resolution 1244 provided the framework for the conflict resolution process in Kosovo after the 1999 NATO air campaign.

<sup>4</sup> For an updated list of recognitions, including dates of recognition, see 'Who Recognized Kosova as an Independent State?' available at <http://www.kosovothankyou.com> (last visited 14 December 2010).

<sup>5</sup> For example, in announcing the recognition of Kosovo by the United States, Secretary of State Condoleezza Rice explained:

“The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.”

Secretary of State C. Rice, 'U.S. Recognizes Kosovo as Independent State' (18 February 2008) available at <http://kosova.org/docs/independence/United-States-Recognizes-Kosovo-1.pdf> (last visited 16 December 2010).

Moreover, in a statement to the UN Security Council following Kosovo's declaration, British Ambassador John Sawers said that

“the unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented UN administration of Kosovo make this a sui generis case, which creates no wider precedent, as all EU member States today agreed”

'Ban Ki-Moon urges restraint by all sides after Kosovo declares independence', (18 February 2008), available at <http://www.un.org/apps/news/story.asp?NewsID=25659&Cr=Kosovo&Cr1=> (last visited 14 December 2010).

However, European States that themselves had ongoing concerns regarding minority populations criticized the declaration. The Romanian Defense Minister, perhaps mindful of the ethnic Hungarian population in Transylvania, said that such a declaration “is not in keeping with international law”<sup>6</sup>. The Cypriot Foreign Minister warned against the EU “breaking international law” by recognizing Kosovo.<sup>7</sup> And, on the day of Kosovo’s declaration, Spain’s Foreign Minister Miguel Angel Moratinos said: “We will not recognise [Kosovo] because we consider ... this does not respect international law”<sup>8</sup>.

While some States were in favor of recognizing Kosovo but against enunciating a more general legal principle in support of Kosovar independence and other States were against the idea of even recognizing Kosovo, separatist groups embraced the declaration of the Kosovars. The European Free Alliance, a coalition of national independence parties in the European Parliament (such as the Scottish National Party, Plaid Cymru of Wales, and Basque and Catalan separatist parties) issued a joint declaration stating that the Kosovo declaration was a “historic event which underlines the rights of all European nations to decide freely their own futures, and which demonstrates that this right is an essential democratic principle of the European Union”<sup>9</sup>.

On October 8, 2008, at the request of Serbia, the UN General Assembly, by a vote of seventy-seven in favor, six against, and seventy-four abstaining, referred to the ICJ the following question for an Advisory Opinion: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”<sup>10</sup>

<sup>6</sup> ‘Romania not to recognize unilateral Kosovo independence, says minister’, available at [http://news.xinhuanet.com/english/2007-12/12/content\\_7231934.htm](http://news.xinhuanet.com/english/2007-12/12/content_7231934.htm) (last visited 14 December 2010).

<sup>7</sup> H. de Quetteville & B. Waterfield, ‘EU-US showdown with Russia over Kosovo’, (12 December 2007), available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/12/11/wkosovo111.xml> (last visited 14 December 2010).

<sup>8</sup> S. James, ‘EU Reactions to Kosovo’s Independence: The Lessons for Scotland’ (August 2008) available at <http://www.docstoc.com/docs/39433019/EU-Reactions-to-Kosovos-Independence-The-Lessons-for-Scotland>, 5, quoting from Spain says won’t recognize Kosovo independence, Reuters (18 Feb. 2008).

<sup>9</sup> European Free Alliance in the European Parliament, ‘Kosovo – Independence declaration welcomed’, *Press Release* (19 February 2008) available at <http://www.greens-efa.org/cms/pressreleases/dok/220/220880.htm> (last visited 16 December 2010).

<sup>10</sup> GA Res. 63/3, 8. October 2008. The voting record is as follows:

This placed the ICJ center stage in the drama that was unfolding. And yet, its dialogue would be muted, at best. Before turning to the Advisory Opinion, I will consider briefly the disagreements over how to define self-determination as a legal concept.

## II. International Law and Self-Determination

Although self-determination was mentioned in Woodrow Wilson's 14 Points, the U.N. Charter,<sup>11</sup> and in major human rights treaties,<sup>12</sup> jurists at

*In favor:*

Algeria, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Belarus, Bolivia, Botswana, Brazil, Brunei Darussalam, Cambodia, Chile, China, Congo, Costa Rica, Cuba, Cyprus, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, El Salvador, Equatorial Guinea, Eritrea, Fiji, Greece, Guatemala, Guinea, Guyana, Honduras, Iceland, India, Indonesia, Iran (Islamic Republic of), Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Liechtenstein, Madagascar, Mauritius, Mexico, Montenegro, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Philippines, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Timor-Leste, United Republic of Tanzania, Uruguay, Uzbekistan, Viet Nam, Zambia, Zimbabwe.

*Against:*

Albania, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, United States of America.

*Abstaining:*

Afghanistan, Andorra, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bulgaria, Burkina Faso, Cameroon, Canada, Colombia, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Grenada, Haiti, Hungary, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lebanon, Lithuania, Luxembourg, Malaysia, Malta, Monaco, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Oman, Pakistan, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Saint Lucia, Samoa, San Marino, Saudi Arabia, Senegal, Sierra Leone, Slovenia, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Vanuatu, Yemen",  
U.N. Doc. A/63/PV.22, 8 October 2008, 10.

<sup>11</sup> See Art. 1, para. 2 and Art. 55 Charter of the United Nations.

<sup>12</sup> Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *International Covenant on Civil and Political Rights*, 16 December 1966, 999

least into the 1990's have found that "international law as it currently stands does not spell out all the implications of the right to self-determination"<sup>13</sup>. At its most basic level, the right to self-determination is generally understood to be "the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups"<sup>14</sup>.

The assumption is that the choice of political system and pursuit of economic, social and cultural development would occur under the auspices of an existing State, and would not require the establishment of a new State. This conception of *internal* self-determination makes self-determination closely related to the respect of minority rights. Furthermore, modern views of self-determination also recognize the "federalist" option of allowing a certain level of cultural or political autonomy as a means to satisfy the norm of self-determination.<sup>15</sup>

As understood in the 1960s, self-determination was essentially another term for decolonization: stating that *all* peoples had a right to self-determination meant that all *colonies* had a right to be independent.<sup>16</sup> As the era of decolonization waned, the question became what effect would a right to self-determination have outside of the colonial context. There were thus two questions that needed to be resolved: (a) who has a right to self-determination; and, (b) what does the right entail outside of the decolonization context?

U.N.T.S. 171, Art. 1 para. 1; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Art. 1, para.1.

<sup>13</sup> Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1497, 1498 (1992).

<sup>14</sup> I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 580; see also D. Thurer, 'Self-Determination', in R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law* (2000), 367. I have described elsewhere how the concept of "self-determination" is used in the diplomatic strategies of great powers and how it effects the diplomatic strategies of those powers, see C. J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia', 10 *Chicago Journal of International Law* (2009) 1, 1.

<sup>15</sup> D. Thurer, 'Self-Determination, 1998 Addendum', in R. Bernhardt (ed.), 4 *Encyclopedia of Public International Law* (2000) 373.

<sup>16</sup> P. Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession*, (1996) 3-4. But see A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) 51, stating that by the time the self-determination language of Article 1 of the International Covenant of Civil and Political Rights was adopted in 1955, few States argued that the principle only applied to colonial rule.

Both of these questions were considered by the Québec Commission, a group of experts convened by a committee of the National Assembly of Québec to provide advice concerning the legal issues implicated by a hypothetical secession of Québec. The Commission found that the right to self-determination is context dependent, that different definitions of “peoples” lead to different applications of the right to self-determination, and that secession is only recognized as a remedy in the case of decolonization.<sup>17</sup>

Academic commentators, particularly Europeans, argued that in cases other than decolonization, as long as a State allows a minority group the right to speak its language, practice its culture in a meaningful way, and participate effectively in the political community, then that group is said to have *internal* self-determination. Secession, or *external* self-determination, was strongly disfavored. According to this view, a right of self-determination was not a general right of secession.<sup>18</sup>

However, commentators also explained that one cannot say that international law made secession illegal. If anything, international law is largely silent regarding secession, and attempted secessions are, first and foremost, assessed under domestic law.<sup>19</sup>

Thus, the law of self-determination, as understood after the era of decolonization, can be summarized as follows:

- Self-determination for a colonized people allows for the ability to separate the colony from the colonial State so that the colony may gain independence and become a sovereign State;
- For a State as a whole, self-determination means the right to be free from external interference in its pursuit of its political, economic, and social goals;
- For communities that are not colonies and are within existing States, self-determination means internal self-

<sup>17</sup> T. M. Franck *et al.*, ‘The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty’, in A. F. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned* (2000), 241, 248, 279–280.

<sup>18</sup> See Cassese, *supra* note 16, 40 (stating that self-determination does not mean a right to secede).

<sup>19</sup> Concerning the silence of international law, see, for example, P. Daillier, A. Pellet & N. Q. Dinh, *Droit International Public* (2002), 526, para. 344 no. 1: “la sécession n’est pas prise en compte en elle-même par le droit international,” that is, “secession in itself is not taken into account by international law”.

determination, the pursuit of minority rights within the existing State.<sup>20</sup>

However, this view was not accepted by all. Some argue that in non-colonial cases, “[a] right to *external* self-determination [...] [including at times the assertion of a right to unilateral secession] arises *in only the most extreme cases and, even then, under carefully defined circumstances*”<sup>21</sup>. The idea of secession as a right under certain circumstances has been, in the words of Professor Malcolm Shaw, “the subject of much debate”<sup>22</sup>. While the request for an Advisory Opinion related to Kosovo’s declaration of independence may have seemed like an opportunity for the ICJ to clarify and define the relationship between self-determination and secession, it actually showed the limits of ICJ adjudication in the midst of a political dispute.

### III. The ICJ and the Kosovo Advisory Opinion

The Advisory Opinion itself is misunderstood. Commentators oversimplified the opinion, saying that it found that the declaration of independence was legal. It did not quite do that. Rather, the ICJ stated that, based on the wording of the question, the answer “turns on whether or not the applicable international law *prohibited* the declaration of

<sup>20</sup> See J. Crawford, *The Creation of States in International Law*, 2nd ed. (2006), 127–128.

<sup>21</sup> *In re Secession of Quebec* [1998] 2 S.C.R 217, 126 (Canada) (second emphasis added).

<sup>22</sup> M. N. Shaw, *International Law*, 5th ed. (2003), 271 fn. 140. Jurists who interpret the law of self-determination in this way generally contend that any attempt to claim secession as a remedy must at least show that: “(a) the secessionists were a ‘people,’ (b) the state in which they are currently part brutally violates human rights, and, (c) there are no other effective remedies under either domestic law or international law.” I discuss the evolution and application of the law of self-determination to issues of secession at greater length in Special Committee on European Affairs, ‘Mission to Moldova – Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova’, 61 *Record of the Association of the Bar of the City of New York* (2006) 2, 196, 239 (hereinafter “Moldova Report”), a report of which I am the principal author, and also, generally, C. J. Borgen, ‘Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts”’, 9 *Oregon Review of International Law* (2007) 2, 477.

independence”<sup>23</sup>. The Court concluded that the historical record “does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”<sup>24</sup>.

Significantly (although rarely noted by lay commentators), the Court also found that the principle of territorial integrity is not implicated in cases of declarations of independence. Instead, it “is confined to the sphere of relations between States”<sup>25</sup>, as opposed to the actions of non-State entities.

As for whether there is a right to “remedial secession” under international law, the Court noted that there were “radically different views” among the States taking part in the proceedings regarding secession outside of the context of decolonization and, if such a remedy existed, whether it could be applied to Kosovo. But the ICJ did not further investigate this issue as it “consider[ed] that it [was] not necessary to resolve these questions in the present case”<sup>26</sup>.

The ICJ chose restraint and narrow readings. We are left with what may have been the consensus before we started: declarations of independence are primarily domestic affairs, and the UN does not condemn such declarations unless there is a separate violation of international law (such as the prohibition on the use of force).

Rather than dismissing the idea of remedial secession outright, the Court merely said it was highly contentious, and there was no need to decide the issue.<sup>27</sup> This leaves the door open that there may be a right of remedial secession, a topic that many commentators previously thought was, in effect, closed.<sup>28</sup> Whether the ICJ, as a whole, meant its opinion to have such an implication is itself an open issue.

<sup>23</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, Advisory Opinion, 22 July 2010, para. 56 (hereinafter Advisory Opinion) (emphasis added); see also C. J. Borgen, *Introductory Note to the International Court of Justice Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence of Kosovo*, 49 ILM (forthcoming 2010).

<sup>24</sup> Advisory Opinion, *supra* note 23, para. 79.

<sup>25</sup> *Id.*, para. 80. Thus, when the Security Council condemned particular declarations of independence, such as those of Rhodesia or Northern Cyprus, the issue related to an “unlawful use of force or other egregious violations of norms of international law,” in particular, *jus cogens*. *Id.* para. 81.

<sup>26</sup> *Id.*, paras 82-83.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Crawford, *supra* note 20, 247; Dailler, Pellet & Dinh *et al.*, *supra* note 19, 526, para. 344 no. 1 (“la sécession n’est pas prise en compte en elle-même par le droit international,” that is, “secession in itself is not taken into account by international

#### IV. Reactions and Implications

While the ICJ may have cleared the way for recognition, concerns over domestic separatist groups made recognition of Kosovo politically risky for many governments. Serbia's B92 radio reported that Italian Foreign Minister Franco Frattini "added that the ICJ's decision clearly states that Kosovo must remain a unique case and that it cannot cause a domino effect, since such an event would lead to a crisis of international relations"<sup>29</sup>. None of the five members of the EU who had not previously recognized Kosovo have shown a new inclination to recognize Kosovo in the wake of the ICJ opinion.<sup>30</sup> In the words of the International Crisis Group: "The cascade of post-ICJ recognitions Pristina expected has not materialized, and there is little indication that Kosovo's friends are putting great effort into persuading others to accept it as a sovereign state"<sup>31</sup>.

While States may be treating this opinion as "water under the bridge," and attempting to move on, separatists keep referring to the opinion, or at least to their interpretations of what it means. Sergei Bagapsh, the putative president of Abkhazia said that:

"The decision of the International Court once more confirms the right of Abkhazia and [fellow breakaway Georgian region] South Ossetia to self-rule. And from a historical and legal point of view, Abkhazia and South Ossetia have much more right to independence than Kosovo."<sup>32</sup>

Within the EU, national minorities argued that the opinion backed their own claims and aspirations:

law"); Franck, *supra* note 17, 248, 279–280 (stating that secession is only recognized as a remedy in the case of decolonization); Cassese, *supra* note 16, 40 (stating that self-determination does not mean a right to secede). *But see* Shaw, *supra* note 22, 271 fn. 140 (stating that a posited right of remedial secession is "the subject of much debate").

<sup>29</sup> 'Italy: Kosovo Talks Must Continue' (July 25 2010) available at [http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=25&nav\\_id=68669](http://www.b92.net/eng/news/politics-article.php?yyyy=2010&mm=07&dd=25&nav_id=68669) (last visited 16 December 2010).

<sup>30</sup> International Crisis Group, 'Kosovo and Serbia After the ICJ Opinion', Europe Report No. 206, 1 (last visited 14 December 2010) available at <http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/206-kosovo-and-serbia-after-the-icj-opinion.aspx>.

<sup>31</sup> *Id.*

<sup>32</sup> 'Reaction in Quotes: UN Legal Ruling on Kosovo' (22 July 2010) available at <http://www.bbc.co.uk/news/world-europe-10733837> (last visited 16 December 2010).

“Laszlo Tokes, an ethnic Hungarian MEP [Member of the European Parliament] from Romania compared the situation with that of the Hungarian minority in the country, saying that Hungarians should now take to the streets to demand autonomy.”<sup>33</sup>

Aitor Estaban, a representative from Spain’s Basque Nationalist Party (PNV) said that “the main consequence is that Spain cannot keep saying that the international rules don’t allow for a split of the country for a new Basque independent country into the European Union. So I think that should be already over and that’s good news for us”<sup>34</sup>. Alyn Smith, a Member of the European Parliament (MEP) from the Scottish National Party, did not go into detail concerning the situation in Scotland, but did say that the opinion set an international precedent.<sup>35</sup> Frieda Brepoels, an MEP from the New Flemish Alliance, looked forward to “the prospect of EU membership” for Kosovo.<sup>36</sup>

While the Advisory Opinion has spawned (hopeful) rhetoric from separatist groups, has it really changed anything in regards to the European conflicts? Before addressing this, I will first consider the roles of nations, regions, and States in the EU.

## C. Nationalism and the EU: Blood, Soil, and Globalization

### I. Nations and States

Nationalism has been a major force in European history. It has been the source of conflict and, more generally, of anxiety. Bruno Coppieters

<sup>33</sup> ‘Kosovo Independence No Violation of Law, Finds International Court of Justice’ (22 July 2010) available at <http://euobserver.com/9/30529> (last visited 16 December 2010).

<sup>34</sup> H. Jamar & M. K. Vigness, ‘Applying Kosovo: Looking to Russia, China, Spain, and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence’, 11 *German Law Journal* (2010) 8, 913, 925.

<sup>35</sup> ‘Court says Kosovo independence ‘not illegal’ (July 23 2010) available at <http://www.euractiv.com/en/enlargement/court-says-kosovo-independence-not-illegal-news-496583> (last visited 16 December 2010).

<sup>36</sup> Kosovo Independence No Violation of Law, Finds International Court of Justice, *supra* note 33.

contends that “[t]he EU condemns exclusive types of nationalism as morally retrograde and conducive to conflict”<sup>37</sup>. Although – or perhaps because – Europe is in the process of constructing an ever closer union, there are currently twenty to twenty-five “significant” separatist movements across the continent.<sup>38</sup> Most are non-violent political and cultural movements; some groups seek greater autonomy within an existing State, others seek outright independence. Each of these harkens back to a national community that does not currently have a State of its own.

The bomb-throwing radicals of years past are largely gone, but in some places popular support for autonomy or separation is stronger than ever.<sup>39</sup> Consider Scotland: although a 2008 opinion poll showed only about 19 percent of the population in favor of full independence, the ongoing politics makes majority support “not [...] inconceivable in the long term”<sup>40</sup>. The marriage that is Belgium is, at the time of this writing, facing the serious possibility of divorce, with Flanders and Wallonia each going their own way. In the summer of 2010 separatists from across Europe came together at a festival in Corsica called the Days of Corte to talk about... separating.<sup>41</sup>

The seeming irony that people from across Europe come together at a cook-out to talk about separating is an apt symbol for the phenomenon of local fragmentation in the midst of European integration. Some separatist movements are against both central and regional governments “but others either constitute or are part of the regional government or – in the case of *de facto* States – are in control of a population and a territory”<sup>42</sup>.

Kosovo’s declaration of independence and now the ICJ’s Kosovo opinion have been very important events for these groups. But have the

<sup>37</sup> B. Coppieters, ‘Secessionist Conflicts in Europe’, in D. H. Doyle (ed.), *Secession as an International Phenomenon: From America’s Civil War to Contemporary Separatist Movements* (2010), 237, 247.

<sup>38</sup> *Id.* 241.

<sup>39</sup> See, e.g., B. R. Barber, *Jihad Vs. McWorld: How Globalism and Tribalism are Reshaping the World* (1995), 172 (noting “In Brittany, though the old separatist bomb-throwers are gone and secession is no longer an issue, Breton cultural nationalism is probably running ‘stronger today than at any other time this century.’”).

<sup>40</sup> Coppieters, *supra* note 37, 242.

<sup>41</sup> M. Kimmelman, ‘Cultures United to Honor Separatism’, New York Times Online available at [http://www.nytimes.com/2010/11/14/arts/14abroad.html?\\_r=2&pagewanted=1&ref=todayspaper](http://www.nytimes.com/2010/11/14/arts/14abroad.html?_r=2&pagewanted=1&ref=todayspaper) (last visited 14 December 2010).

<sup>42</sup> Coppieters, *supra* note 37, 242. Regarding *de facto* States, see Moldova Report, *supra* note 22.

recognition of Kosovo by over seventy States and the ICJ's opinion actually changed the legal context for these separatist groups, or are these events just symbolically important? Before answering these questions, I will turn to the stories of the Basque country and of Catalonia as two examples of regionalism and sub-State nationalism within the EU.

## II. Many Nationalities in One Nation: Spain

Spain provides at least two different views into the issues of nationalism in the midst of integration. Despite both being within a single country, Catalonia and the Basque country have unique histories.

It has been said that many Spaniards put loyalty to the region or locality on the same level with, or above, loyalty to the country.<sup>43</sup> But such regional affinity is not the same as separatism.

Spain is a single State with at least three major languages – Spanish (Castilian), Catalan, and Basque – and a whole host of dialects. It is a country with a richness of regional cultures.

During the Franco regime (and at other times before Franco), the Spanish government treated such diversity as a threat and tried to force a linguistic and cultural uniformity on the various groups. Languages other than Spanish were not permitted and were devalorised: everyone was told to “speak Christian”.

After Franco's death in 1975, Spain reacted against the centralization of the previous decades (if not centuries). A new Constitution was drafted and came into force in 1978. Article 2 touches on the issue of peoples and nations and reads:

“The Constitution is based on the *indissoluble unity of the Spanish nation*, the common and indivisible homeland of *all Spaniards*; it recognizes and guarantees the right to *autonomy of the nationalities and regions* which make it up and the solidarity among them”<sup>44</sup>.

The question became how to square the circle of a single Spanish nation made up of autonomous nationalities. The answer, at first, was to recognize the Basque country, Catalonia, and Galicia as “historical nationalities” that had a fast track to become Autonomous Communities within the Spanish State. Other regions within Spain also had their own path

<sup>43</sup> J. Hooper, *The New Spaniards* (2006), 218.

<sup>44</sup> Spanish Constitution (1978), Sec. 2 (emphasis added).

that they could follow to become AC's. Such a community could be comprised of a single province or several neighboring provinces. Each AC would have its own president, legislature, and supreme court.<sup>45</sup> The decentralization of the State accelerated as provinces either singly or together sought AC status.

Power shifted from Madrid to the new AC's as these new sub-State governments took on greater policy responsibilities. An autonomy statute may grant to the region any competence not reserved to the national government.<sup>46</sup> Others policy areas would be under the dual responsibility of the central government and of the AC's. Once power moved from the center to the AC's, it was difficult for Madrid to regain the power as action by both the regional and the central government is needed to amend an autonomy statute.<sup>47</sup> However, the central government in Madrid would maintain exclusive authority for "foreign affairs, external trade, defense, the administration of justice, merchant shipping, and civil aviation"<sup>48</sup>.

While the government of Spain's fledgling democracy wanted to exorcise Franco's centralism from the country, they were also wary of the State flying apart. Also, none of the AC charters

"give any right of secession, much as some Basques and Catalans would like one. Words are carefully chosen: Andalusia is a 'nationality', not a 'nation'. The Catalans' charter admits that, although they think of themselves as being a nation, the rest of Spain does not."<sup>49</sup>

Madrid opposed the use of "federal" terminology in describing this arrangement of power and responsibilities as overly divisive.<sup>50</sup> Today there are seventeen AC's.<sup>51</sup> As one observer wrote in 2007:

<sup>45</sup> Hooper, *supra* note 43, 38.

<sup>46</sup> Spanish Constitution (1978), Sec. 149, (3); see also H. Hannum, *Autonomy Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1996), 271.

<sup>47</sup> Spanish Constitution (1978), Sec. 152 (2); see also Hannum, *supra* note 46, 270.

<sup>48</sup> Hooper, *supra* note 43, 38.

<sup>49</sup> 'The Spanish Centrifuge' (1 March 2007) available at <http://www.economist.com/node/8786353> (last visited 14 December 2010).

<sup>50</sup> Coppieters, *supra* note 37, 247.

<sup>51</sup> J. Bengoetxea, 'The Participation of Infra-State Entities in European Union Affairs in Spain: the Basque Case', in S. Weatherill & U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (2005), 50.

“Although the country is not a federation, it increasingly looks like one. Spain is one of Europe’s most decentralised States—more than some overtly federal ones, says Francisco Balaguer, at Granada University. The regions control some 36% of public spending. Ministries in Madrid are seeing their budgets dwindle fast.”<sup>52</sup>

As the focus of discussions on separatism turned to Kosovo in 2008, Spanish Prime Minister José Luis Rodríguez Zapatero was already four years into a program of revising the charters of the AC’s. Valencia, Catalonia, and Andalusia were the first three AC’s to have expanded powers. Prime Minister Zapatero was in favor of such an expansion of responsibilities for all seventeen regions. Once begun, decentralization had its own gravity: “The opposition is officially against, but their local chiefs, like politicians anywhere, rarely dislike extra power”<sup>53</sup>.

While the various AC’s want greater autonomy, Catalonia and the Basque country are the two that have the strongest separatist movements. If “all politics is local,” (in the words of the American Congressperson Thomas “Tip” O’Neill) then the politics of self-determination and secession are the most local of politics. To understand separatism in any given instance, one must understand the local history and lore of the persons or groups involved. While there are certain similarities that will allow for comparison – the Basque Country and Catalonia are both in Spain and each have adopted very similar governmental functions in their AC’s –<sup>54</sup> there are also striking contrasts, which will be discussed below.

## 1. The Basque Country

The Basque people are ethnically and linguistically different from the other peoples that surround them. Some anthropologists believe that the Basque predate the migrations that brought Indo-European languages to Europe 3,000 years ago.<sup>55</sup> There are references to the Basque in writings

<sup>52</sup> The Spanish Centrifuge, *supra* note 49; see also James, *supra* note 8, 5; Hooper, *supra* note 43, 43 (stating “In just over four years, one of the most centralized nations on earth had been carved into seventeen self-governing administrative units, each with its own flag and capital”).

<sup>53</sup> The Spanish Centrifuge, *supra* note 49.

<sup>54</sup> Hannum, *supra* note 46, 271, fn. 798.

<sup>55</sup> Hooper, *supra* note 43, 232.

from the Roman Empire and the end of Roman rule was the last time that all Basques were under the same political administration.<sup>56</sup> The Basque country took more or less its present form in 1530 when part of it was in the then-new Kingdom of Spain and part was across the border in France.<sup>57</sup>

Modern Basque nationalism was defined in the late nineteenth century by Sabino de Arana Goiri. Arana coined the word “Euskadi”, meaning “collection of Basques”, to refer to the Basque “nation” that exists within both Spain and France.<sup>58</sup>

By the 1930’s, the Basques were on the road to gaining autonomy like the Catalans but then the Spanish Civil War began in 1936.<sup>59</sup> While the 1930’s Basque peasantry was “deeply reactionary” and middle-class nationalists were “quasi-fascists”,<sup>60</sup> the regions of Guipuzcoa and Biscay opted for autonomy, which in effect made them supportive of the Republic. The result was the horror of Guernica and, once Franco consolidated his power, punitive decrees ending autonomy.

It should be little surprise that these regions became the birthplace of Euskadi Ta Akatasuna (“ETA”), the violent Basque paramilitary group. ETA’s history is one of factionalization and withering in which “each time the more violent, less intellectual group survived intact”.<sup>61</sup> ETA became widely condemned as a terrorist organization, responsible for killings and kidnapping. The cycle of violence, repression, radicalization, and further violence and repressions seemed endless. By the early 1970’s about one quarter of the Guardia Civil was stationed in the Basque country. Residents of the Basque country, irrespective of whether or not they were ethnically Basque or even if they were a recent “immigrant” from another part of Spain, increasingly felt that they were a separate community, held apart from the rest of Spain. Franco’s oppressive centralism spurred regionalism.

It is important to note, in this respect, that ETA should not be equated with the totality of Basque separatists. There was also a non-violent cultural resistance to Franco’s policies. In the late 1950’s, for example, the population of the Basque country founded the *ikastolas*, primary schools with education in *Euskera*,<sup>62</sup> the Basque language. Also, various Basque

<sup>56</sup> *Id.* 235.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, 242-243.

<sup>59</sup> *Id.*, 229.

<sup>60</sup> *Id.*, 244.

<sup>61</sup> *Id.*, 245.

<sup>62</sup> *Id.*, 246.

political parties took up the causes of autonomy or separatism in the political arena.

This sense of being apart from, if not in actual opposition to the rest of Spain, remained after Franco's death. The Basque country had the highest "no" vote regarding the 1978 Spanish Constitution,<sup>63</sup> possibly a sign of the Basque not wanting anything further to do with the Spanish central government or, at least, that it wanted even more autonomy than provided for in the AC-structure. Moreover, eight years later there was a sense that Spain's accession to the European Communities in 1986 "somehow pre-empted or dispossessed the [Basque Autonomous Community] of its recently assumed powers"<sup>64</sup>.

There have been periodic "cease-fires" called by ETA. However, even if the use of violence as a tactic waxes and wanes, the sense of apartness remains among the ETA: "even if the [Spanish State] were to become a model of democracy [...] it wouldn't change things as far as we were concerned. We are not, nor have we been, nor shall we ever be Spaniards"<sup>65</sup>.

Herri Batasuna, one of the major Basque separatist political parties, states that Basque goals are independence from Spain and reunification with the French Basque territory; short of that they seek the withdrawal of national security forces, integration of Navarra, amnesty for Basque "political prisoners," the legalization of separatist political parties, and the possibility of independence.<sup>66</sup> However, Herri Batasuna was declared illegal by the Spanish Supreme Court in 2003 due to its alleged political ties with ETA. This decision was further ratified by the Spanish Constitutional Court and legislature. An appeal by Herri Batasuna to the European Court of Human Rights failed, on the logic that the government of Spain acted based on a "pressing social need"<sup>67</sup>.

Basque separatism for the better part of its history conformed with common assumptions about separatism: a difficult, at times violent struggle, dotted with terrorism and atrocities from both sides. As between ETA and the Spanish government, it is a clash of absolutes. But while this oft-violent

<sup>63</sup> *Id.*, 249.

<sup>64</sup> Bengoetxea, *supra* note 51, 47, 48.

<sup>65</sup> As quoted in Hooper, *supra* note 43, 247.

<sup>66</sup> Hannum, *supra* note 46, 276-277.

<sup>67</sup> U.S. Department of State, '2009 Human Rights Country Report on Spain' (11 March 2010) available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136059.htm> (last visited 14 December 2010).

opposition exemplifies separatism's past, it is not necessarily indicative of the future of separatism in Europe.

## 2. Catalonia

Discussions of Basque separatism often emphasize the uniqueness of the Basque language and culture, the deep roots of the Basques in the land called "the Basque country," and, unfortunately, the violence of ETA. It is a story of blood (in both the ethnic and violent senses) and land. The stories that describe the Catalonian "national identity" often emphasize Catalonian pride and, related to this, whimsy. The pride is apparent: One Catalan website begins answering the questions "What is Catalonia?" by explaining "Catalonia is an old European nation. Today, Catalonia is nation [within] Spain. But in the past, Catalonia has been one of the greatest nations in the world"<sup>68</sup>. Jordi Pujol i Soley, the President of Catalonia's Generalitat from 1980 to 2003, has said that "Catalonia is as much a nation as Slovenia or Estonia"<sup>69</sup>.

But the whimsy is also displayed: in response to Franco's attempt to quash Catalonian regional affinity, a Catalonian audience at a musical performance that he attended in Barcelona regaled him with the Catalan national anthem. In a response to Spain's adoption of a silhouetted bull (originally the mark of a sherry company) as a cultural symbol, Catalans responded with the "Planta't el burro" campaign to adopt the silhouette of a donkey as a symbol of Catalonia.<sup>70</sup> And then, following the decision of the Constitutional Court concerning the Autonomy Statute, Catalonia outlawed bullfighting in the Summer of 2010, in a move that was ostensibly about animal welfare but perhaps more pointedly about cultural practices that were not native to the region. And the list goes on.

Be they serious, whimsical, or somewhere in between, the underlying discourse in all of these activities has to do with the identity of Catalans as a distinct people with its own language and culture and a heritage as a significant nation in European history. Catalans may emphasize that they are different from Castilians, but they do not equate separation with insularity. The Catalans emphasize their desire to return Catalonia to what they see as its proper place as a nation within the broader European family of nations.

<sup>68</sup> 'What's Catalonia?' (31 August 2009) available at <http://www.catalonianewstate.com/2009/08/whats-catalonia.html> (last visited 14 December 2010).

<sup>69</sup> Barber, *supra* note 39, 174.

<sup>70</sup> Hooper, *supra* note 43, 218.

Whether that means “nation” in the sense of an autonomous people within the Spanish State or “nation” in the sense of independent nation-State is a topic of debate among Catalans. Catalanism is a big tent that includes those who want autonomy within Spain as well as those who seek Statehood.<sup>71</sup> (Nor, I should emphasize, are the Basques necessarily insular, although their rhetoric historically has been less about rejoining the European community of nations and more about just being left to govern themselves.)

This essay is too short to discuss the history of Catalonia in depth. Suffice it to say that the struggle between Catalonia and central authority has been a long one, though not always successful.<sup>72</sup>

The early years of the twentieth century held some small promise for Catalonian aspirations. In 1931 the Spanish parliament allowed for “the organization of autonomous regions within the Spanish State out of provinces ‘with common history, culture and economy’”<sup>73</sup>. Catalonia assumed administrative responsibility over natural resources, certain property rights, and other issues of public policy.<sup>74</sup> There was also a complex revenue-sharing agreement. The Catalonian government was called the Generalitat.

But this was only a brief glimmer of hope. The statute was abolished by Franco in 1938. The last words of the president of the Generalitat before being executed by Franco’s men were “Visca Catalunya! (Long live Catalonia!)”<sup>75</sup>. It would be a difficult life.

However, it was not an especially violent one. Catalonia did not have a significant guerilla opposition to the Franco regime (in contrast to the Basques). Although (or perhaps because) speaking in Catalan was all but outlawed under Franco, the lifeblood of Catalan nationalism during this era flowed from the Catalan linguistic and cultural renaissance of the nineteenth century.<sup>76</sup> Already a key part of cultural identity, after the death of the dictator in 1975, promotion of the Catalan language became a central part of regional policy. In 1993 Catalonia introduced Catalan-only education for children between three and eight years old; this was upheld by the Spanish

<sup>71</sup> *Id.*, 258.

<sup>72</sup> In 1640 Catalans and Portuguese rebelled against the centralism of Castile: the Portuguese succeeded in establishing their own State, the Catalans did not. In the War of Spanish Succession, from 1702 to 1713, the Catalans sided with the losing (Habsburg) side, reprisals from the victorious Bourbons followed. *Id.*, 226-27.

<sup>73</sup> Hannum, *supra* note 46, 264.

<sup>74</sup> *Id.*, 264-65.

<sup>75</sup> Hooper, *supra* note 43, 260.

<sup>76</sup> Hannum, *supra* note 46, 267.

Constitutional Court in 1994.<sup>77</sup> At the time of Franco's death 60% of Catalonians spoke Catalan; by 2001 the percentage had increased to 76%.<sup>78</sup> Walk in the Barcelona airport and you see main signs printed in Catalan, English, and Castilian – in that order. Bookstores in Catalonia are increasing the shelf-space for books being translated into, or originally written in, Catalan. Given that one can assume that nearly everyone who reads Catalan also reads Spanish, the decision by publishing houses to put the resources into increasing their holdings in Catalan is anecdotal evidence of a sense of a continuing trend towards the use of Catalan as the primary language in Catalonia.

In the mid 1990's Benjamin Barber wrote that the Catalans viewed theirs as a different kind of separatism, “deny[ing] that there is any relationship between what they advocate and the kinds of ethnic warfare being conducted further in the east. Some see themselves as securing bastions of local democracy, seedbeds for real participation in the all-European federation that will presumably emerge”<sup>79</sup>. He continued, Catalonia “integrates itself into Europe precisely by segregating itself from Spain”<sup>80</sup>. It is not an insular separatism, but a separatism geared for an era of globalization.

### III. Kosovo (as Seen from Spain) and the Limits of the ICJ

As discussed above, separatist groups across Europe welcomed the Kosovo decision as “legalizing” calls for autonomy or independence. For its part, Spain was one of the five EU States that did not recognize Kosovo and stated that it viewed the separation as a violation of international law. In light of the preceding discussion of Catalan and Basque separatism, the arguments that Spain made in its written submission to the ICJ are instructive of the concerns of States regarding how self-determination may or may not be defined as a legal right.

Spain's original submission focused on sovereignty and territorial integrity and requested that the ICJ concludes that the declaration of independence was not in accordance with international law because it

<sup>77</sup> *Id.*, 491-92.

<sup>78</sup> Hooper, *supra* note 43, 264.

<sup>79</sup> Barber, *supra* note 39, 173.

<sup>80</sup> *Id.*, 174.

ignored Serbia's right to sovereignty and territorial integrity.<sup>81</sup> In subsequent written comments, Spain sought a statement that the acts of sub-State actors, such as independence movements, could be held to violate international law:

“the fact should not be overlooked that a violation of the principle of territorial integrity through actions carried out by domestic actors with the State will inevitably bear international consequences [...] Spain considers it untenable to reduce the principle of territorial integrity to a principle operating at an exclusively international level.”<sup>82</sup>

The ICJ ultimately disagreed with this assessment, placing the obligation to respect territorial integrity as only running between State actors.

Spain also sought a statement that a right of self-determination does not have to ultimately result in independence. It argued, that international law allows for multiple ways to express self-determination, from self-government within an existing State (essentially autonomy) to full independence. Spain argued that, as international law does not favor one solution or another, one cannot assume that independence should be the result of a self-determination claim.<sup>83</sup> Moreover, the Government of Spain also wanted to emphasize that secession “as a form of sanction or remedy [...] has no proper place in contemporary international law”<sup>84</sup>.

As described above, the ICJ was vague as to the issue of secession as a remedy, merely stating that there were radically different views on the issue and that it did not need to be decided here.

Spain and like-minded States may well be frustrated with this Advisory Opinion as it (a) declined to extend the respect of territorial integrity to sub-State actors; (b) refrained from closing the door to the possibility of remedial secession; and (c) found there was no general

<sup>81</sup> Written Statement of Kingdom of Spain on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (April 2009), 55-56, available at <http://www.icj-cij.org/docket/files/141/15644.pdf> (last visited 22 December 2010).

<sup>82</sup> Written Comments of the Kingdom of Spain on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (July 2009), 3-4, available at <http://www.icj-cij.org/docket/files/141/15706.pdf> (last visited 22 December 2010).

<sup>83</sup> *Id.*, 4-5.

<sup>84</sup> *Id.*, 5.

prohibition in international law against declarations of independence. However, this opinion has not led to a deluge of new recognitions for Kosovo. States that wanted to recognize Kosovo have done so; States that have had no interest in doing so show no change of heart.

The parties seem to have moved on, so to speak. For Serbia and Kosovo, the issue seems to no longer be what the ICJ has said, but rather what the EU will do. After Serbia submitted a failed draft resolution to the General Assembly seeking new negotiations on “all outstanding issues” concerning Kosovo,<sup>85</sup> Serbia and the EU had negotiations culminating in a new resolution with a compromise text drafted by Serbia and the twenty-seven members of the European Union.<sup>86</sup> The General Assembly passed the resolution by consensus on September 9, 2010. The released resolution draft “[a]cknowledges the content of the advisory opinion” and “[w]elcomes the readiness of the European Union to facilitate a process of dialogue between the parties [...]”<sup>87</sup>.

I have written elsewhere that the next chapter in the history of Serbia and Kosovo will likely be less about the ICJ and the UN, and more about the law and politics of EU accession for each of these aspirants.<sup>88</sup> As one ICJ observer put it, this was “an appropriate opportunity for the Court to voice its reluctance to be the receptacle of multilateral disputes that it cannot solve”<sup>89</sup>. Short of that, it was reluctant to write a grand opinion in the midst

<sup>85</sup> UN Doc. A/64/L.65, 27 July 2010. *See also* International Crisis Group, *supra* note 30, 4.

<sup>86</sup> General Assembly, ‘Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue’, *U.N. Press Release GA/10980* (September 9 2010), available at <http://www.un.org/News/Press/docs/2010/ga10980.doc.htm> (last visited 14 December 2010) [hereinafter GA Consensus Resolution Press Release].

<sup>87</sup> UN Doc. A/64/L.65/Rev.1, 8 September 2010. Serbia’s Foreign minister described the resolution as a “status-neutral” document. General Assembly, *supra* note 86. The United States also welcomed the adoption of the resolution, emphasizing, for its part, that the ICJ’s opinion was clear that the declaration did not violate international law.

<sup>88</sup> Borgen, ICJ, *supra* note 23.

<sup>89</sup> J. d’Aspremont, ‘The Creation of States Before the International Court of Justice: Which (Il) Legality?’, in *The International Court of Justice and Kosovo: Opinion or Non-Opinion?*, Amsterdam Center for International Law, 3 (September 28 2010) available at [www.haguejusticeportal.net/eCache/DEF/12/079.html](http://www.haguejusticeportal.net/eCache/DEF/12/079.html) (last visited 14 December 2010).

of a “universal multilateral political dispute that the international community had not been able to settle itself”<sup>90</sup>.

Inasmuch as the ongoing viability of Kosovo – and Serbia – is related to their relationships to the EU, it will be the EU more so than the ICJ that will be the key norm-maker concerning self-determination in Europe. But, unlike the ICJ, the norm-setting powers of the EU will rarely be through juridical opinions, as opposed to the ongoing discursive practice of EU politics.

#### IV. The EU and Conflicting Nationalisms

##### 1. The Evolution of Regions

The relationship of EU institutions and of the process of European integration to separatist movements is complex. It is overly facile to say that European integration helps or hurts secessionism by national groups within current or aspirant EU Member States. What can be said is that European integration “will not necessarily resolve [secessionist disputes], but it will affect how the parties to a conflict perceive their own interests and identities”<sup>91</sup>. This next section will consider some of the ways in which EU institutions and the politics of accession affect claims of self-determination.

In considering the role of sub-State regions within the EU institutional structure, one should keep in mind that regions are being used here as proxies for “peoples” or “nations.” EU regional policy has become the stalking-horse for discussions about autonomy or self-determination of sub-State groups. Neil McCormick, an alternative representative to the Convention on the Future of Europe and a Scottish nationalist, noted that it was inappropriate to use the general term “regions” for some sub-State entities that are better termed nations; he attempted to put “Stateless nations” on the agenda.<sup>92</sup> He did not succeed.

<sup>90</sup> D’Aspremont, *supra* note 89, 2.

<sup>91</sup> Coppieters, *supra* note 37, 243.

<sup>92</sup> S. Weatherill, ‘The Challenge of the Regional Dimension in the European Union’, in S. Weatherill & U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (2005), 22.

Regions have historically had two basic responses to the EU: “Let us in” or “Leave us alone”.<sup>93</sup> The first response is a call for allowing regions to become greater policy-making participants, while the second seeks to minimize the effects of EU policy-making on autonomous sub-State regions. Each response has been affected by, and has affected, the EU’s institutional structure.

In order to provide official status for regions, a Committee of Regions was established by the Treaty of Maastricht. However, its function was only advisory, leading one commentator to conclude in 2005 that while there was much talk of a “Europe of the Regions,” the reality was that it was still a “Europe of the States”.<sup>94</sup> States were the negotiators at the Commission level. The Committee of the Regions was weak, rife with structural problems.<sup>95</sup> Regions had no veto and only had as much real say as their State allowed. Even worse:

“The result is a potential disempowering of the regional level of governance to the advantage of the EU level, and it is at the EU level that the central authorities of the State are themselves directly involved in law-making. The implication will frequently be that a State is induced to centralize power within its domestic order so as to secure an effective platform for engaging in negotiation and securing subsequent compliance at the EU level.”<sup>96</sup>

The Regions lost policy prerogatives and were left to implement directives that they had no say in negotiating. The “Europeanization” of policy areas that had previously been the competence of a region could lead to tension between the regional leadership and the national government.<sup>97</sup>

Brussels was late in appreciating the differentiation among types of regions across EU Member States. Some regions had very little power within their State. Others, like Catalonia and the Basque country, had significant legislative capacities. Separatist groups existed across different types of regions, but it was the leadership of the regions with legislative

<sup>93</sup> C. Jeffery, ‘Regions and the European Union: Letting them In, and Leaving them Alone’, in S. Weatherill & U. Bernitz (eds), *The Role of Regions and Sub-National Actors in Europe* (2005), 34, 35, citing to the nomenclature of Ivo Duchacek.

<sup>94</sup> Weatherill, *supra* note 92, 2; 19.

<sup>95</sup> Jeffery, *supra* note 93, 36.

<sup>96</sup> Weatherill, *supra* note 92, 7.

<sup>97</sup> See, e.g., Weatherill, *supra* note 92, 9.

capabilities that were especially affected by the State-centric policy-making process of the EU and the weakness of the Committee of the Regions. In response, they formed the unofficial REGLEG (“Regions with legislative power”) network.<sup>98</sup> As of this writing, there are 73 EU regions with significant legislative power spread across eight Member States: Austria, Belgium, Finland, Germany, Italy, Portugal, Spain, and the UK.<sup>99</sup>

REGLEG has grafted an informal, non-hierarchical network onto a pre-existing formal hierarchy. Such networks “are designed both to share information among like-minded sub-State actors as well as allowing collective action designed to increase the chances of extracting a more vigorously influential role before EU institutions”<sup>100</sup>. The European Free Alliance (EFA) is another such network, this one made up of sub-State national parties in the European Parliament and in national parliaments.<sup>101</sup> Between 2004 and 2009, EFA member parties had six MEPs (Scottish, Welsh, Basque, Catalan, Latvian, and Transylvanian) and a broad network across national parliaments.<sup>102</sup>

While REGLEG and EFA were *ad hoc* attempts to give regions increased say in the corridors of power in Brussels or Strasbourg (and, arguable in EFA’s case, within the home countries of its members), they could not make up for the structural weakness of regions in the Maastricht formulation of the Committee of the Regions. The Treaty of Lisbon, which

<sup>98</sup> Weatherill, *supra* note 92, 20.

<sup>99</sup> ‘About Regleg’, available at [http://www.regleg.eu/index.php?option=com\\_content&view=section&layout=blog&id=2&Itemid=2](http://www.regleg.eu/index.php?option=com_content&view=section&layout=blog&id=2&Itemid=2) (last visited 14 December 2010).

<sup>100</sup> Weatherill, *supra* note 92, 21.

<sup>101</sup> Members include: Alands Framtid, Bayernpartei, Bloque Nacionalista Galego, Chunta Aragonesista, Die Friesen, Enotna Lista, Esquerra Republicana de Catalunya, Eusko Alkartasuna, Fryske Nasjonale Partij, Libertà Emiliana-Nazione Emilia, Liga Repubblica Veneto, Ligue Savoisiene, Lithuanian Polish People’s Party, Mebyon Kernow, Moravana, Mouvement Région Savoie, Omo Ilinden Pirin, Partei der Deutschsprachigen Belgier, Partido Andalucista, Partit Occitan, Partit Socialista de Mallorca i Menorca Entesa Nacionalista, Partito Sardo d’Azione, Partitu di a Nazione Corsa, Plaid Cymru-the Party of Wales, Rainbow-Vinozhito, Scottish National Party, Silesian Autonomy Movement, Slovenska Skupnost, Sociala Liberale Partij, Strana regionov Slovenska, Süd Tiroler Freiheit, Union Démocratique Bretonne, Union du Peuple Alsacien, Unitat Catalana.

European Free Alliance (EFA), ‘Manifesto for the June 2009 European elections: Vision for a People’s Europe’, available at <http://www.e-f-a.org/efactive.php?id=124> (last visited 14 December 2010).

<sup>102</sup> *Id.*

entered into force on December 1, 2009, was avowedly an attempt to make real the idea of a Europe of the Regions. According to the EU's own description, the treaty gives more weight to local councils, county councils, and regional parliaments who must be consulted when new EU legislation is drafted. The Committee of the Regions can now challenge new EU laws in the European Court of Justice when it believes that those laws violate the subsidiarity principle. The Commission, Council, and the Parliament are required to consult the Committee of the Regions and if the Committee is not consulted, it can involve the ECJ. The treaty recognizes local and regional autonomy.<sup>103</sup>

In particular, Article 2 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, reads:

“Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.”<sup>104</sup>

Whether and how much this empowers the regions remains to be seen. In considering the effects of regional policy on self-determination claims within the EU, one needs to consider two scenarios. In the first, regions remain comparatively weak in the policy process and, in the other, the Lisbon Treaty truly empowers regions, making them significant participants in EU policy-making, along with States and EU decision-makers.

If regions remain relatively weak, dissatisfaction with the EU among the regions is likely to grow and further strengthen the more separatist elements within the regions. Frustration with distant/culturally insensitive decision-makers is fodder for separatists. Such frustrations would not necessarily be aimed at the EU, but at the national government for refusing to represent regional interests in Brussels. However, if regions remain weak,

<sup>103</sup> European Union: Committee of Regions, ‘The Lisbon Treaty: More Democracy for Europe’, available at <http://www.cor.europa.eu/pages/DecentralizedDetailTemplate.aspx?view=detail&id=939712e9-6c54-4f49-a1fd-9cd610bdb57b> (last visited 14 December 2010).

<sup>104</sup> European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Art. 2.

separatists will increasingly argue that their region should seek Statehood in order to have a seat at the bargaining table.

But let us assume that the Lisbon Treaty (and/or other reforms) empowers regions into being significant brokers in the policy process. One possibility is that this will undercut the rhetoric of separation by strengthening the legal guarantees and political power of the minority group.<sup>105</sup> As a legal matter this would weaken claims for external self-determination (if one even accepts the claim that such a remedy may exist) and may, as a political matter, make separatist rhetoric more difficult to justify.

A second possible result, though, is that empowered and networked regions will effectively out-negotiate their central governments at the EU level. More direct ties between Brussels and the empowered regions could make the States seem increasingly irrelevant. Financial ties between the regions and Brussels already exist through programs such as the European Regional Development Fund.<sup>106</sup> If EU institutional reform results in national governments having less of a mediating role in financial transfers between Brussels and the regions, then,

“there is ever more pressure on central governments to justify their existence.

A complex circle, one sees ever more demands for regional autonomy. Autonomous regions demand more subsidies and transfer payments. Oft blackmailing already broke central governments with the threat of untying.”<sup>107</sup>

This empowered autonomy may actually spur claims for more independence and, ultimately, separation.<sup>108</sup>

<sup>105</sup> Coppieters, *supra* note 37, 254-255.

<sup>106</sup> See, e.g., ‘Regional Policy – Operational Programme ‘Catalonia’’ available at [http://ec.europa.eu/regional\\_policy/country/prordn/details\\_new.cfm?gv\\_PAY=ES&gv\\_reg=576&gv\\_PGM=1114&gv\\_defL=9&LAN=7](http://ec.europa.eu/regional_policy/country/prordn/details_new.cfm?gv_PAY=ES&gv_reg=576&gv_PGM=1114&gv_defL=9&LAN=7) (last visited 14 December 2010) and ‘Regional Policy – Operational Programme ‘Basque Country’’ available at [http://ec.europa.eu/regional\\_policy/country/prordn/details\\_new.cfm?gv\\_PAY=ES&gv\\_reg=ALL&gv\\_PGM=1113&gv\\_defL=7&LAN=7](http://ec.europa.eu/regional_policy/country/prordn/details_new.cfm?gv_PAY=ES&gv_reg=ALL&gv_PGM=1113&gv_defL=7&LAN=7) (last visited 14 December 2010).

<sup>107</sup> J. Enriquez, *The United States of America: Polarization, Fracturing, and Our Future* (2005), 217.

<sup>108</sup> See, e.g., E. Jenne, ‘National Self-Determination: A Deadly Mobilizing Device in Negotiating Self-Determination’, in H. Hannum & E. F. Babbitt (eds), *Negotiating Self Determination* (2006), 7 noting: “a history of autonomy and military support are

While States will remain the main actors in the EU in the medium term, one can see that the discourse over a “Europe of the Regions”, and the institutional reforms that will or will not occur, may have a significant effect on the arguments over the scope of what can be expected in terms of self-determination. If expectations are raised as to the “regionalization” of Europe and this does not occur, the rhetoric of frustrated self-determination will likely be amplified. If, on the other hand, regions are increasingly empowered, then one possible result is that the legal and political bases for arguing for separation will be undercut. Another result, though, is that increasing the institutional power of regional governments may allow them to continue exacting ever greater concessions from their central governments, a situation which may largely gut the central governments of any significant power over those regions.

## 2. EU Membership and Separatist Aspirations

The politics of recognition and accession to the EU are other areas that can affect the efficacy of secession as a remedy. Policies of recognition and accession have already played an important role in the entry of the new States formed from the dissolutions of Yugoslavia and the USSR, as well as in the democratization of the former Warsaw Pact countries.<sup>109</sup> These issues would be as – if not more – important in the case of a separatist region seceding from an EU Member State, yet these are issues that are often ignored.

Recognition of Statehood or EU membership cannot be assumed by any secessionist region.<sup>110</sup> Kosovo’s track record on recognition demonstrates that EU members that themselves have sub-State groups with claims of inadequate respect of the rights of self-determination have been reluctant to recognize Kosovo’s independence, even if the majority of their

the strongest predictors of minority claims to self-determination and, second, that wars over national self-determination are both bloodier and more protracted than other internal wars”.

<sup>109</sup> See, Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) 31 I.L.M. 1485 (1992); Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991) 31 I.L.M. 1486 (1992).

<sup>110</sup> See J. A. Frowein, ‘Non-Recognition’, in R. Bernhardt *et. al.* (eds), 3 *Encyclopedia of Public International Law* (1992), 627. Recognition itself is not a formal requirement of Statehood. Rather, recognition merely accepts a factual occurrence. Thus recognition is “declaratory” as opposed to “constitutive.” Nonetheless, no State is required to recognize an entity claiming Statehood.

EU colleagues have. Whether Kosovo will be successful in entering the EU, when five Member States do not as of yet recognize it as a State, also remains to be seen. Article 237 of the Treaty of Rome requires unanimity of current Member States for the admission of a new State to the Union.

Nonetheless, regions within the EU that are contemplating secession rarely discuss the hurdles of recognition and accession. To the extent that they do, they do not see them as hurdles. The Scottish National Party (SNP), for instance, asserts that, if Scotland becomes independent, it will “automatically remain part of the EU”; they base their argument on Vienna Convention on State Succession in Respect to Treaties (VCSS).<sup>111</sup> As a matter of public international law, that argument is difficult to sustain. The VCSS may be in force, but there are only twenty-two parties, no large EU States, but for Poland,<sup>112</sup> and it is not widely accepted. As a simple matter then, it is not binding as a treaty on most of the members of the EU. Moreover, there is no strong argument that the VCSS has become customary international law.

Furthermore, the VCSS is not applied if it would be “incompatible with [the] object and purpose of the treaty”<sup>113</sup>. The SNP’s argument would allow the VCSS to circumvent the Treaty of Rome’s requirement for

<sup>111</sup> James, *supra* note 8, 1; Vienna Convention on State Succession in Respect to Treaties 946 U.N.T.S. 3; 17 I.L.M. (1978), 1488. Scottish nationalists (and other separatist groups) have extended this argument to apply to other international organizations. The Scottish executive wrote:

“3.22 With independence, Scotland would become a full member of the United Nations and other international bodies, such as the Commonwealth, the World Health Organization, the Organisation for Economic Co-operation and Development and the World Trade Organisation. This would give Scotland its own voice on the international stage, allow the distinctive views of its people to be expressed on the range of issues facing the world today, and allow Scottish Ministers to argue for Scottish interests in international negotiations directly affecting the interests of the nation (for example, on international trade)”.

‘Choosing Scotland’s Future – A National Conversation: Independence and Responsibility in the Modern World’, para 3.22 (14 August 2007) available at <http://www.scotland.gov.uk/Publications/2007/08/13103747/0> (last visited 20 December 2010). Quebecois nationalists have also argued for Quebec’s automatic succession to NAFTA.

<sup>112</sup> See, United Nations Treaty Collection Database, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXIII-2&chapter=23&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en) (last visited 14 December 2010).

<sup>113</sup> Vienna Convention on State Succession in Respect to Treaties, *supra* note 111, Art 34.

Member State unanimity, arguably frustrating an object or purpose of that treaty.<sup>114</sup>

Based on these arguments, it is clear that if a region of an EU Member State secedes, it will not only have to seek recognition as a State, but also apply to re-enter the EU, this time as a Member State. This makes outright separation less attractive than may have been assumed. While the power of regions within the EU may be increasing in relation to existing States, once a region secedes, thus leaving the EU, that region's bargaining power is greatly decreased in comparison to the pre-existing State, whose acquiescence is needed for any accession bid. In short, secession removes one from the bargaining table and reduces one to almost being a supplicant.<sup>115</sup>

Another scenario should be considered though, one that is more like the Kosovo scenario and less like Catalonia: the case of the separatist region in a State that is not as of yet a Member State of the EU, but hopes to accede in the short to medium term. This could apply to the "frozen conflict" States of Moldova (with Transnistrian separatism), Georgia (South Ossetia and Abkhazia), and Azerbaijan (Nagorno-Karabakh) as well as other potential aspirants. In these cases, the strategy is to use the possibility of EU accession as a carrot for a peaceful resolution of the dispute. In the case of Cyprus, the EU tried to use the possibility of a reunified Cyprus being the only way that Northern Cyprus would enter the EU as an inducement to settle the conflict. While the prospect did help the Northern Cypriots sign-on to a UN peace plan, the Greek Cypriots scuttled the deal, thus showing the fragility of such techniques. It may have worked if it was used as both a carrot and a stick, stating that the only way either part of the island would be allowed into the EU was if they resolved their conflict.

In the case of Kosovo and Serbia, although the separation has already occurred, the prospect of EU accession for each State seems to be a bargaining chip that is being used by EU negotiators to lead to better relations between the two parties. It has at least resulted in Serbia withdrawing its first post-Advisory Opinion resolution in favor of a compromise resolution with the EU. Where these negotiations may go from here remains to be seen. Ultimately, EU membership for both a pre-existing State and its former region provides a "common framework for [the] two

<sup>114</sup> James, *supra* note 8, 2.

<sup>115</sup> See, James, *supra* note 8, 13.

sovereign states, facilitating the process of reconciliation within a multilateral framework”<sup>116</sup>.

Whether this technique may be useful regarding the frozen conflicts is related to how credible an aspirant each State is for membership in the EU. If a State is considered to be unlikely to be accepted into the EU, then trying to entice a separatist region to resolve a conflict so that it may enter along with the parent State is not a strong bargaining position. What this shows, at least, is another bargaining possibility in which EU accession policies may be used to help resolve separatist conflicts not only in the EU, but in the European neighborhood.

#### D. Separation in an Age of Integration (and Vice Versa)

The process of European integration has affected the interests and strategies of sub-State groups seeking greater autonomy and independence, and it has affected the States that are responding to such groups. Neither these putative nations nor the States in which they exist use purely local strategies. Transnational networks of regions and of States jostle for advantages at both the local and the European level. For local advantage, one must build global networks. And in the international competition for power, you need to be mindful of constituencies within your own State. The local and the global conflate. All politics is *glocal*.

As such, there are at least two “europeanizations” of regional issues. One strengthens national governments by providing a means to undo domestic political bargains between a region and a central government by making the central government the sole negotiator with Brussels and the other central governments. Another aspect of this State-supporting Europeanization is by defining separatists as terrorists and then addressing separatist conflicts “only under the auspices of antiterrorist cooperation”<sup>117</sup>.

Another form of Europeanization empowers the regions *vis-a-vis* the national governments. This is the Europeanization where regions are given a seat at the bargaining table or direct access to supranational policy-makers in Brussels. To a certain extent, this is also the bootstrapping of regions into greater political power through the use of informal transnational networks. This version of Europeanization is still nascent. Article 2 of the Lisbon Treaty allows for greater consultation and for rights of action before the

<sup>116</sup> Coppieters, *supra* note 37, 254-255.

<sup>117</sup> Coppieters, *supra* note 37, 252.

European Court of Justice, but the preponderance of power still lies with the States. Over time, the interplay of informal networks, and the kernels of possibilities embedded in the Lisbon Treaty may grow into a more robust Europe of the Regions. Some have argued that this is the trend in European politics as there is an unstated alliance between supranationalists who want strong European institutions and separatists, who want increased regional power. Both parties have an interest in weakening the State. In the short to medium term, they can do this by increasing regional prerogatives and increasing the direct dialogue between regions and Brussels.<sup>118</sup>

Of what purpose is separation when many separatists also claim to be ardent Europeanists? Two issues seem to recur. One is a sense that local cultures and languages will be better respected via European institutions than by their own States. Maite Goientxe, a Basque representative at the Days of Corte, noted:

“Like all cultural questions, language is ultimately a political matter. Basque is not permitted today in my part of France, *which means Basque representatives from my region can speak Basque at the Parliament in Brussels, but not back home*. From our perspective that’s discrimination. Critics say separatists promote division and exclusion, but we say independence movements are about the opposite of exclusion. We want to get rid of the exclusion we feel today.”<sup>119</sup>

The irony is that while the prospect of constructing a supranational Europe, rather than homogenizing, say, Basques and Occitanes, into undifferentiated “Europeans”, has helped these movements to define themselves more clearly. At one time, this may have been due to founded or unfounded fears of homogenization spurring a group to action (or at least to a sharper sense of self-definition). Think of the Basque reticence to Spain’s accession to the EC. But the effect of Europeanization seems to have changed the strategy of nationalists into an appreciation of the advantages of a supranational Europe. Perhaps more so than the much-anticipated ICJ Advisory Opinion on Kosovo, EU policies towards language rights and

<sup>118</sup> See, e.g., Barber, *supra* note 39, 172-173 (arguing that some see in the work of the Western European Language Bureau, a group that encourages the use of regional languages, “a subtle strategy of national deconstruction by which the European whole nurtures the subnational fragments, all the better to undercut the resistance to wholeness on the part of the nation-states”).

<sup>119</sup> As quoted in Kimmelman, *supra* note 41.

cultural diversity will likely be important factors in framing the ongoing push-and-pull between national minorities and national governments in the EU. If the Days of Corte are any indication, linguistic and cultural politics (more so than ideological or ethnic politics) will likely remain the central issues in this debate.

Besides language and culture rights, a second reason driving separatist politics within a framework of European integration is economics. Various secessionist movements had elements of “tax exits” or resource control struggles in which the separating group wanted to stop paying rents to the central government and/or wanted to keep resources within their own territory for themselves. The Transnistrian, Slovenian, and Croatian separations or secessions all had elements of tax exits.<sup>120</sup> Separatist conflicts and insurgencies in East and Central Africa are in part over the control of diamond mines and other valuable resources. While tax exits or resource control may not be the only (or even the main) reason motivating calls for separation, the availability of local resources is an important aspect in the viability of such claims for separation.<sup>121</sup> The economic advantages of separation (for both Catalonia and the EU) has not been lost on the Catalans; Catalan MEP Oriol Junqueras has said:

“There is a growing body of academic research which supports the assertion that smaller nations are better equipped to deal with economic difficulty in the longer term. This is particularly relevant during this current time of economic difficulty when we see how, for example, the size of the Spanish state has not helped avoid recession. Catalonia is netly contributing 10% of its GDP to Spain each year and yet the state has hugely increased its debt, threatening the euro and Euro stability. Catalan independence is clearly in the EU interest.”<sup>122</sup>

<sup>120</sup> P. Collier & A. Hoeffler, ‘The Political Economy of Secession’, in H. Hannum & E. F. Babbitt (eds), *Negotiating Self Determination* (2006), 46 (concerning Slovenia and Croatia). But see Slovakia as a counter-example, where maintaining federation would have been more economically advantageous, *id.*, 50-51.

<sup>121</sup> See, *e.g.*, Collier & Hoeffler, *supra* note 120, 37, 46 (arguing “secessions depend upon the invention of an imagined political community and that natural resources will often be instrumental in transforming this invention from the pipe dream of a handful of romantics to the reality of a large political or military organization.”).

<sup>122</sup> European Free Alliance, ‘EU must be ready for enlargement from within’ (16 Nov. 2010) available at <http://www.e-f-a.org/news.php?id=583> (last visited 14 December 2010).

This economic logic for separation from a current State and then reintegration in the EU is common. Juan Enriquez wrote:

“Given that Europe, in 1500, had approximately five hundred political entities, and that the EU umbrella greatly reduced the cost of independence, the unwinding of existing countries might continue for a long time [...] Think about what would happen should the Basques become a sovereign country. No need to establish a new currency. They’d keep the euro. Nor would they need to build up a large army. Got NATO to protect them. EU passport allows them to trade, work, and travel anywhere in Europe. Not surprisingly, Europeans with separatist agendas, like Basques and Catalans, tend to be among the most supportive of EU integration.”<sup>123</sup>

But while this may point to certain economic and administrative advantages, it misses the legal and political reality that these benefits of EU (and NATO) membership are predicated on first achieving recognition and actual membership, an issue which is not a foregone conclusion if the pre-existing State is already a member of these institutions and unhappy about the secession of its former territory. Bargaining over international organization membership is likely to become one of the key areas of disputation related to separatism in and around the EU.

The aftermath of the ICJ Advisory Opinion may be to show the limited relevance of that opinion and perhaps, more broadly, of the ICJ in relation to secessionist issues in Europe. The locus of norm-making has moved from the United Nations and its various organs to the EU. The key debates are no longer over the broad political-juridical issues such as “what is self-determination” but rather over narrower topics such as “what are the scope of language rights within the EU” or “how may one regulate cultural practices”. Self-determination, in the sense of minority rights, is a given; the debate has moved on to implementation.

Related to this, the ongoing evolution of the power of regions within the EU will affect whether national aspirations will be realized within existing States or by attempted separations. In the case of attempted secession, the relevant issues now include questions of accession and succession to international organizations such as the EU (above and beyond the issue of recognition). Consequently, the technical body of laws

<sup>123</sup> Enriquez, *supra* note 107, 216.

concerning international organizations, as well as the internal regulations of the relevant organizations, may have as much – or even a greater – effect on the claims of (and the viability of) nationalist movements as the holdings of cases like the Kosovo Advisory Opinion. The Kosovo opinion has seemingly had little impact in terms of increasing recognition for Kosovo; had the opinion explicitly said Kosovo's declaration was illegal, one can be skeptical that any State that had previously recognized Kosovo would have withdrawn its recognition. But, whether a national group seeking separation will find itself without any recognitions or the ability to join a key regional trade group or a security alliance may affect whether or not that group even claims a right to secede. Moreover, the rules that may affect accession to these international organization may affect how a nationalist group makes its claims and how a State may respond to those claims. Thus, the administrative and organizational regulations of international organizations such as the EU may do more to frame national claims, at least in particular cases, than the opinions of the World Court. And, in doing so, new habits of State practice begin.

These developments may be viewed as the maturing of international law as a legal system, at least within one region. It may also mark the relative depth of regional norm-creation in contrast to the difficulty of global norm-creation. Within Europe (and to a lesser extent within other regions), policy-makers are moving from largely philosophical questions to more precise issues of implementation and administration. This may be a promising development. But then again, the devil is in the details: It remains to be seen whether this move from the aspirational rhetoric of self-determination to the technical language of organization will actually assist in conflict prevention or resolution.