INTERNATIONAL DECISIONS

EDITED BY INGRID WUERTH

Secession—self-determination—referendum on independence—UN General Assembly Resolution 1514(XV)—territorial integrity—federalism—comparative constitutional law—Article 2 of the Treaty on the European Union—rule of law

PRIME MINISTER v. PARLIAMENT OF CATALONIA. STC No. 114/2017. Judgment on Constitutionality. *At* https://www.tribunalconstitucional.es/en/Paginas/default.aspx. Spanish Constitutional Court, October 17, 2017.

Few in Spain would have imagined two years ago that so much attention would be paid to questions such as the allocation of powers to hold referenda or the constitutional tools to enforce compliance with the 1978 Constitution (Constitution).[1] But since the celebration of a "referendum" on October 1, 2017, and the subsequent declaration of independence and immediate suspension thereof by the president of Catalonia, numerous international voices have taken a stance on Catalonia's right to unilateral secession.[2]

The October 9, 2017 judgment of the Spanish Constitutional Court (Court or Constitutional Court) in *Prime Minister v. Parliament of Catalonia* should be an important part of that debate.[3] While not the first decision dealing with the legal status of Catalonia,[4] the judgment culminates the Court's jurisprudence on matters such as the

[1] According to Article 155(1) of the Constitution, "If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws . . . the Government . . . may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations . . . ." C.E., B.O.E. n. 311, Art. 155(1), Dec. 29, 1978 (Spain) [hereinafter Constitution], *available at* https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf (in English). Only on one prior occasion had the central government invoked Article 155. It was in 1989 in relation to the refusal by the Canary Islands to comply with certain customs obligations arising from Spain's accession to the EU. An agreement was reached and that provision was never applied.

[2] These voices include heads of state and the president of the Commission of the EU. Lucía Abellán, *Merkel, Macron and May Show Support for Spain over Catalan Crisis*, EL PAÍS (Oct. 20, 2017); Emma Anderson, *Putin Accuses EU of "Double Standards" on Catalonia and Kosovo*, POLITICO (Oct. 19, 2017); Javier Casqueiro, *Donald Trump: "It Would Be Foolish of Catalonia Not to Stay with Spain,"* EL PAÍS (Sept. 27, 2017); *Juncker Says Does Not Want Catalan Independence*, REUTERS (Oct. 13, 2017).

[3] Prime Minister v. Parliament of Catalonia, STC 114/2017, Oct. 9, 2017 (ECLI:ES:TC:2017:114). All translations made in this work are by the author. On November 8, 2017, another important judgment was rendered by the Court on the legality of a Catalan "Law on Legal and Foundational Transition to a Republic" adopted on September 8, 2017. However, the references made therein to international and comparative constitutional law are more subtle. Therefore, this decision will not be addressed here (Prime Minister v. Parliament of Catalonia, STC 124/2017, Nov. 8, 2017 (ECLI:ES:TC:2017:124)).

[4] For an overview of other decisions, see A. Garrido-Muñoz, *Catalan Independence in the Spanish Constitutions and Courts*, OUP BLOG (Nov. 6, 2017).

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sovereignty of the Spanish nation and the existence of a right to self-determination of the Catalan people.

The constitutional petition was brought by the state attorney on behalf of the prime minister of Spain against Law 19/2017, which was titled "On the Referendum of Self-Determination" (the Law).[5] The preamble thereof evoked the sovereignty of the people of Catalonia and the existence of a right to self-determination of the Catalan people, as protected by, inter alia, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 1(2) of the UN Charter, and "decisions" of the International Court of Justice. Article 1 proclaimed the "binding" nature of the referendum. Article 4 formulated the question as follows: "Do you want Catalonia to be an independent state in the form of a republic?" (Article 4[2]). In case of a majority of affirmative votes, the result "would entail the independence of Catalonia" (Article 4[4]). If not, regional elections would be called immediately (Article 4[5]). Other questions regulated by the Law included the role of the regional government in the electoral campaign (Articles 10–12) and the functions of an Electoral Council (*Sindicatura Electoral*) dealing with issues of "transparency and objectiveness" (Articles 17–27).

The petition requested that the Court declare the Law unconstitutional. The petitioner referred to the "extraordinary constitutional relevance" of the case for various reasons.[6] In essence, the Catalan Parliament had disregarded basic parliamentary guarantees because it adopted the Law pursuant to a "summary" procedure without legal basis.[7] Moreover, the Law's provisions on self-determination and the sovereignty of the Catalan people violated basic constitutional principles such as the unity and sovereignty of the Spanish nation (Articles 1 and 2 of the Constitution).[8] Finally, the Law "substantially reformed" the Statute of Autonomy of Catalonia, the main law regulating that region's powers and institutions, which is part of the "constitutional block" that falls within the supervisory powers of the Court.[9]

The state attorney also advanced arguments based on international and comparative constitutional law. He claimed that international law does not protect self-determination "within a State with an entirely democratic constitutional system such as Spain."[10] Evoking resolutions of the UN General Assembly (UNGA), he relied on the principle of territorial integrity in support of the proposition that any attempt to create a state in violation of domestic law might be a violation of international law itself—as the latter requires respect for a so-called "basic principle of the rule of law."[11] While accepting "remedial" secession in cases of "peoples oppressed by massive and flagrant violations of its rights,"[12] the petition distinguished between unilateral secession and the right to "internal" self-determination of peoples living in

[5] Law on a Referendum on Self-Determination (Diari Oficial de la Generalitat the Catalunya 2017, 7449A) (Spain).
[6] Prime Minister v. Parliament of Catalonia, *supra* note 3, para. I.1.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

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democratic states—rejecting the applicability of the former to Catalonia.[13] Last but not the least, the petitioner substantiated his arguments with references to similar decisions rendered by the Canadian and U.S. Supreme Courts and the German and Italian Constitutional Courts.[14]

A final part of the petitioner's arguments referred to the standards for referenda adopted by the Venice Commission of the Council of Europe in relation to referenda, and enshrined in the Code of Good Practice on Referendums.[15] The state attorney also criticized that the Catalan "referendum" did not require a minimum turnout to validate its results and that it had been approved without a meaningful parliamentary discussion—indeed, as the petitioner explained, only eleven hours had lapsed between the initial presentation of the Law before the Catalan Parliament and its formal adoption. The respondent (the Parliament of Catalonia) appeared before the Constitutional Court but apparently did not submit any arguments in response to the state attorney.[16]

The Court's ruling began with an extensive section devoted to various preliminary considerations, some of which concerned international law. In the Court's opinion, in enacting the Law, the Parliament of Catalonia had aimed to situate itself outside the constitutional order by "search[ing] for an alleged basis and legitimation of the Law . . . on norms of international law."[17] Such norms, in the view of the Catalan Parliament, substantiated the existence of a right to self-determination as "the first one of all human rights." The Constitutional Court utterly rejected this reasoning. In its view, "none of the peoples of Spain . . . has a 'right to self-determination' understood . . . as a 'right' to promote and realize its unilateral secession from the State in which Spain has itself constituted."[18] Moreover, the reference in the preamble of the Law to certain international treaties to which Spain is a party wrongly assumed a "renunciation" by Spain of its sovereignty when it acceded to them—an impossible scenario, according to the Court.[19]

The Court next dealt with UNGA resolutions. Quoting from Resolution 1514(XV), it identified the right to unilateral secession as restricted to peoples subjected to "alien subjugation, domination and exploitation." Outside these contexts, the Court reasoned (quoting again from Resolution 1514) that "any attempt aimed at the partial or total disruption of

[13] *Id.*, with references to UN General Assembly Resolution 1514 and the judgment of the Supreme Court of Canada in *Re the Secession of Quebec* (see *infra* notes 20 and 26).

[14] See below for more details.

[15] The petition argued that the Catalan referendum was, inter alia, contrary to the following rules enshrined in the Code of Good Practice on Referendums: respect for the law and the Constitution and compliance with the rule of law (Rule III.1); absence of an impartial body in charge of organizing the referendum (Rule II.3.1); and absence of an effective system of appeals before an electoral commission or a court against the decisions of the organizing body (Rule II.3.3). *See* Code of Good Practice on Referendums, Mar. 19, 2007, Doc. CDL-AD(2007)008) (Spain). In support of these claims, the state attorney cited a letter dated June 2, 2017, sent by the president of the Venice Commission to the president of Catalonia. Therein, in response to a previous letter sent by the president of Catalonia informing of the celebration of the referendum, he underlined the need for such a referendum "to be carried out in full compliance with the Constitution and the applicable legislation." Letter from Gianni Buquicchio, president of the Venice Commission, to Carles Puigdemont i Casamajó, president of the Catalan government, Réf J.Dem/307 – GB/ew, *available at* http://www.venice.coe.int/files/Letter%20to%20the%20President%20of%20the%20Government%20of%20Catalonia.pdf.

[16] Prime Minister v. Parliament of Catalonia, *supra* note 3, para. I.5.

[17] *Id.*, para. II.2.A)

[18] *Id.*, para. II.2.A).b)

[19] *Id.*

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the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[20] In the Court's view, this was confirmed by the UN's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.[21] In a similar vein, the Court recalled Article 4(2) of the Treaty on the European Union (TEU), which protects EU member states' "essential State functions, including ensuring the territorial integrity of the State . . . ."[22]

With regard to the substantive provisions of the Law, the Court proceeded as follows. First, it declared that the Parliament of Catalonia lacked the power to call for referenda, including (but not restricted to) referenda on independence.[23] Second, it ruled that the Law breached the Constitution's provisions on national sovereignty, parliamentary monarchy (Spain's political system), as well as the supremacy of the Constitution over inferior laws. The Court recalled its consolidated case law, according to which

> the Constitution is not the result of an agreement among historical territories that retain certain rights preceding the Constitution that are superior thereto, but rather the norm of a constituent power that applies with full legal force within its sphere.[24]

It follows, in the Court's view, that the people of Catalonia are part of the people of Spain, which according to the Constitution is the only subject endowed with the sovereign power to decide on matters of territorial integrity. The Law also breached other legal principles, including those enshrined in Article 1 of the Constitution, which characterizes Spain as a democratic state "subject to the rule of law." The Court supported this finding with a reference to the rule of law as one of the "foundational principles" of the European Union.[25]

A final section of the judgment considered what the Court dismissively described as a "substitute (*sucedáneo*) for a parliamentary procedure." Briefly put, the Court ruled that the expeditious procedure leading to the adoption of the Law had violated basic parliamentary guarantees, as it had not respected the right of the members of the Parliament of Catalonia, inter alia, to propose full amendments to the Law (*enmiendas a la totalidad*) or to request an opinion from the legal service of the Parliament.

* * * *

[20] *Id.*, *quoting* Declaration on the Granting of Independence to Colonial Countries and Peoples, para. 6 (Resolution 1514 [XV], Dec. 14, 1960) (Spain).

[21] Self-determination "shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind." Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, para. 1, UN Doc. A/RES/50/6 (Oct. 24, 1995).

[22] Consolidated versions available at OFFICIAL JOURNAL C 326, Oct. 26, 2012, 1–390.

[23] Prime Minister v. Parliament of Catalonia, *supra* note 3, para. II.3.

[24] *Id.*, para. II.5.b, *quoting* 54 Senators v. Parliament of the Basque Country, STC 76/1988, Judgment on Constitutionality, para. II.3, Apr. 26, 1988 (ECLI:ES:TC:1988:76).

[25] See below for more details.

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Whether one agrees or not with the reasoning (the author mostly does), the importance of this judgment cannot be exaggerated. From a political point of view, it was rendered at the apex of the Catalan crisis. From a constitutional perspective, it articulated the basic values of the Spanish democratic system as a limit to regional law-making. From the point of view of international law, the Court engaged with arguments of international and comparative law frequently raised in the context of the Catalan crisis (even if it would have been desirable for the Court to say more on these topics. The judgment is only a short sequel to the Canadian Supreme Court's *Re the Secession of Quebec*, which engaged more exhaustively with the content of the right to self-determination).[26]

I will focus here on three questions. First, I will briefly discuss the so-called "external" dimension of self-determination. Next, I will refer to certain sources (international and domestic) that the Court's decision did *not* mention. In this regard, I will underscore the tendency of constitutional courts to prioritize principled conceptions of sovereignty over contingent expressions of popular will. This reflection will connect with the final part of my analysis, in which I will elaborate on the relationship between law and *effectivités* in the Catalan context, with an emphasis on the contradiction between Catalan "unilateral" actions and European constitutionalism.

The state attorney submitted an extensive list of arguments in support of the view that international law lacks an "external" right to self-determination as defined in the impugned Law—that is, the right of a people to decide on its legal relationship with a state and eventually secede from it. Those arguments reflect a correct understanding of two intertwined aspects of customary international law: the inability of self-determination to justify an interference with the territorial integrity of sovereign states and the inapplicability of such a right to peoples of democratic states.[27] At the same time, the reasoning would have benefitted from a description of the right to unilateral secession as not applicable *in particular* to peoples of democratic states *of a federal kind* (Spain can be described as an "asymmetric federal state"). Such an argument would have reinforced the proposition, later advanced in the Court's judgment, that in Spain all peoples (including the people of Catalonia) already have the right to govern themselves by means of representative institutions.[28] The state attorney's claim that "any attempt to create a State in violation of domestic law" is a violation of international law does not have a basis in general international law: there is an obvious gap between affirming that self-determination cannot justify a particular conduct and inferring from this that such a conduct is prohibited. As I will argue below, support for the latter conclusion has to be found elsewhere.

[26] Secession of Quebec, Re, Reference to Supreme Court, [1998] 2 SCR 217 (Can.).

[27] Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal 122–24, 328 (1995).

[28] In this regard, Article 2 of the 1978 Constitution "recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed and the solidarity among them all." Constitution, *supra* note 1, Art. 2. Catalonia was one of the few regions automatically entitled to autonomy from the very adoption of the Constitution. Other regions would only acquire such status at a later stage. This is due to what Article 143(1) of the Constitution describes as "historical, cultural and economic characteristics." *Id.* Art. 143(1). Nowadays, among the seventeen regions in which Spain is divided, Catalonia has one of the most comprehensive legislative and executive apparatuses, with one important exception: national taxes, which only two historical regions (the Basque Country and Navarra) have the full power to collect and administer. Catalonia does have its own regional taxes. National taxes have caused bitter disagreements between the central and the Catalan government, even if Catalonia does have its own regional tax system. Such disagreements have not impeded, though, occasional support for the central government by Catalan nationalists in the Spanish Parliament in exchange for legislative and economic concessions.

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In its judgment, the Court recalled the abovementioned safeguard clause enshrined in relevant UNGA resolutions in rejecting the proposition that the right to self-determination is "the first human right" and trumps any consideration of territorial integrity. In my view, no other result was possible, for accepting the overreaching interpretation made in the preamble of the Law would have severe destabilizing effects over the international legal order.[29]

Other sources were left aside, however. For example, the Court did not mention Principle VIII of the Helsinki Act, which, while recalling "the right, in full freedom, to determine, when and as they wish, their internal and external political status," reaffirms the territorial integrity of states.[30] Nor did the judgment cite the other domestic authorities invoked by the state attorney. This is unfortunate, for such authorities would have enabled the Court to address in more detail the claim, often made in the Catalan context, that the right to decide on secession applies whenever there is democratic support for it.

Authorities were not lacking. In the seminal *Re the Secession of Quebec* case, the Canadian Supreme Court affirmed that

> Quebec could not, despite a clear referendum result, purport to invoke a right to self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law . . . or the operation of democracy in the other provinces or in Canada as a whole.[31]

In *White v. Texas*, the U.S. Supreme Court ruled that

> [i]t is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country . . . . The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution, or through consent of the States.[32]

The decisions of the German Bundesverfassungsgericht and the Italian Corte Constituzionale are even more pertinent, as they dealt with proposals by regional entities to hold referenda on independence. In relation to Bavaria, the former ruled that

> [i]n the Federal Republic of Germany, as a national state based on the constitutional power of the German people, the states are not "masters of the Constitution." There is no room for secessionist aspirations of individual states (*Länder*) under the Basic Law. They violate the constitutional order.[33]

[29] CASSESE, *supra* note 27, 288–89,

[30] Final Act of the Conference on Security and Cooperation in Europe, at VIII, Aug. 1, 1975, 14 ILM 1293 (1975).

[31] Secession of Quebec, Re, *supra* note 26, para. 151.

[32] Texas v. White, 74 U.S. 700, 720, 725 (1868).

[33] BVerfG, Beschluss der 2, Kammer des Zweiten Senats vom 16, Dezember 2016 - 2 BvR 349/16, *at* http://www.bverfg.de/e/rk20161216_2bvr034916.html (Ger.).

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The latter reasoned, with regard to Venetto, that "pluralism and autonomy do not allow regions to qualify themselves in terms of sovereignty, do not allow that their organs of government are assimilated to those endowed with national representation."[34]

One common element of these decisions is their rejection of unilateral secessionist claims on the basis of constitutional *rules*, not on the basis of the *will* of a majority of the population of the regional entity expressed at a specific moment. Only the judgment in *Re the Secession of Quebec* showed concern for popular support in calling for unconditional negotiations on constitutional reform, provided that there is a *clear* majority in favor of secession. But even in that case, the Canadian Supreme Court denied the possibility of unilateral solutions.[35]

This leads to a final aspect of the Spanish decision that I will address in some detail: the alleged irrelevance of law (particularly constitutional law) in the Catalan context. It has been argued that, as a matter of international law, constitutions do not have much to say on the legality of claims for independence and eventual secession. What matters is success in establishing a new state, which is a purely factual question.[36] Support for this view has been found in the *Kosovo* advisory opinion of the International Court of Justice (ICJ), in which the ICJ affirmed that the declaration of independence by the "Assembly of Kosovo" did not violate the Constitutional Framework adopted by the special representative of the secretary-general on behalf of UN Mission in Kosovo because the authors of the declaration aimed to break with the framework of the interim administration in their capacity as representatives of the people of Kosovo.[37]

While the principle of effectiveness is well-established in the context of the law of statehood, the abovementioned reasoning does not appear conclusive when applied to the Catalan context. First, it is questionable that the ICJ's reasoning was intended to apply outside the specific question posed by the UNGA in relation to Kosovo. Second, effectiveness is a problematic principle when the date of the commencement of a new state is contested.[38] In this respect, *as a matter of fact,* international law may not be fully indifferent to domestic rules in relation to declarations of independence as "preparatory acts" of unilateral secession.[39] Since the authors of such a declaration need to speak on behalf of a people, it appears unlikely

[34] President of the Council of Ministers v. Region of Venetto, No. 118/2015, Apr. 29, 2015, para. 7.2, *at* https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=118.

[35] "The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces of the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. . . . There would be no conclusions predetermined by law on any issue." Secession of Quebec, Re, *supra* note 26, para. 151.

[36] Marc Weller, *Secession and Self-Determination in Western Europe: The Case of Catalonia*, EJIL:*Talk!* (Oct. 18, 2017).

[37] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ Rep. 403, para. 109 (July 22).

[38] James R. Crawford, The Creation of States in International Law 651–64 (2d ed. 2006)

[39] The formal act of declaring independence and proclaiming a new constitution may be of special relevance in determining the date when a state comes into existence. In relation to the dissolution of the former Socialist Federal Republic of Yugoslavia, the International Court of Justice found that the new Federal Republic of Yugoslavia (predecessor of the current Republics of Serbia and Montenegro) came into existence on April 27, 1992, namely the day when its constitution was formally adopted and the new state proclaimed. It did so despite the fact that little—if nothing—was left of the old Yugoslav federation after the proclamation of Bosnia's independence on March 3, 1992 and the previous secession of the Republics of Slovenia and Croatia (see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 ICJ Rep. 52, para. 104 (Feb. 3)).

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that such representativeness can be achieved in disregard of basic parliamentary guarantees that enable discrepant (Catalan) voices to be expressed, as was the case of the process leading to the adoption of the Law discussed here. The same is true of the subsequent declaration of independence, which was based on the results of a "referendum" that did not comply with basic standards set by the Venice Commission.[40] Moreover, the "representativeness" of the president of Catalonia was dependent on the electoral and parliamentary rules of the existing legal order—as the parliamentary majority supporting his acts was not accompanied by a majority of votes of the Catalan people.[41] Outside this legal framework, the capacity of the president of Catalonia to act on behalf of the Catalan people fell not only in a legal void, but also in a gray factual area.

But even in case of a clearly expressed majority supporting secession in Catalonia, the resulting act of secession should not be assessed in pure terms of black and white *effectivités*. In a European Union (EU) rooted in the foundational values of constitutionalism, federalism and the rule of law, unilateral acts of secession are contrary, perhaps not to the letter of specific provisions, but definitively to the spirit of EU law. Admittedly, the latter has nothing to say on the manner in which member states organize internally (from this perspective, the reference by the Court to TEU Article 4(2) as supporting per se the territorial integrity of Spain appeared excessive).[42] But EU law is not indifferent to acts which disregard the basic principles of the rule of law, parliamentary democracy, and federalism.[43] The actions of the Catalan government vis-à-vis the Spanish Constitution and its own regional law can hardly be justified in an EU that has defined many tenets of its legal order by reference to the constitutional values of its member states.[44] Compliance with obligations arising from EU law (including judgments of the European Court of Justice as the constitutional court of the EU) does not depend on eventual majorities in national or regional parliaments.[45] Loyal cooperation with EU institutions and other member states is unconditionally

[40] *See supra* note 15.

[41] In the elections held on Sept. 27, 2015 (deeply polarized over the celebration of the referendum and Catalonia's independence), pro-independence forces received 47.74% of votes. Due to the rules on geographical distribution of seats in the regional Parliament, this number nonetheless represented a majority of seats (72 over 135). Mr. Puigdemont's final appointment as president of the Catalan government was the result of post-election negotiations amongst pro-independence forces. He did not run as a candidate (Ashifa Kasam, *Catalan Separatists Win Election and Claim It as Yes Vote for Breakaway*, GUARDIAN (Sept. 28, 2015)).

[42] A different question is whether such a provision contains an obligation to respect Spain's territorial integrity *addressed to EU institutions*. *See* José Martín y Pérez de Nanclares, *Legal Considerations Regarding a Hypothetical Unilateral Scenario of Independence by Catalonia: A Legally Unfeasible Political Scenario*, 19 SPAN. Y.B. INT'L L. 52–54 (2015).

[43] Although only applicable to breaches by EU member states, it is to be recalled that Article 7 of the Treaty on the European Union envisages a sanctioning mechanism for "serious and persistent" breaches of the values enshrined in TEU Article 2. Treaty on European Union, Arts. 2, 7, Feb. 7, 1992, 1992 OJ (C 191) [hereinafter TEU]. Such a mechanism has recently been activated in relation to Poland's reform of its judicial system. Commission Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, Brussels, 20.12.2017 COM(2017) 835 final.

[44] According to TEU Article 2: "The Union is founded on the values of respect for . . . the rule of law . . . . These values are common to the Member States . . . ." TEU, *supra* note 43, Art. 2. *See also* Case 294/83, Parti écologiste "Les Verts" v. European Parliament, para. 23 (Eur. Ct. Justice Apr. 23, 1986) ("The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.").

[45] On the unconditional nature of EU law obligations, see Case C-265/95, Commission of the European Communities v. French Republic (Eur. Ct. Justice Dec. 9, 1997).

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required.[46] Mutual trust is totally dependent on respect for the rule of law by member states.[47] The Spanish Constitutional Court was right in pointing to these contradictions between the impugned Law and the values enshrined in TEU Article 2.[48] What it did not mention, however, is that federalism is also dependent on permanent negotiation and the search for common solutions. Unfortunately, it seems that the Court will have more opportunities in the future to recall these principles.

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International Tribunal for the Law of the Sea—maritime delimitation—tacit agreement and estoppel—delimitation method for seabed and water column—single maritime boundary—Article 83.3 obligation not to hamper the reaching of a final agreement

GHANA v. IVORY COAST. Case No. 23. *At* https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf.
Special Chamber of the International Tribunal for the Law of the Sea, September 23, 2017.

The charm of maritime delimitation and its enigmatic lessons hardly surprise us, yet the reasoning behind them sometimes seems seductively elusive. On September 23, 2017, a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) issued its decision in *Ghana v. Ivory Coast*.[1] The glamour of maritime delimitation is reason enough to note the judgment, but the case also addresses the equidistance principle for maritime delimitation, the standard for the acceptance of a tacit agreement, and international responsibility under Article 83 of the United Nations Convention on the Law of the Sea (UNCLOS).[2]

Ghana instituted an arbitral proceeding against Ivory Coast in 2014, pursuant to Annex VII of the UNCLOS. The proceeding arises out of a maritime boundary dispute. The parties agreed to submit the dispute to a special chamber constituted under Article 15(2) of Annex VI of the UNCLOS; Annex VI is called the Statute of the ITLOS. The ITLOS constituted a Special Chamber (Chamber) with the following five judges: Bouguetia (president), Wolfrum, Paik,

[46] TEU, *supra* note 43, Art. 4(3).

[47] Commission Reasoned Proposal, *supra* note 43, para. 2.

[48] A similar point has been made in a manifesto drafted by seven Spanish professors of public international law and signed by over four hundred international lawyers. *See* Statement on the Lack of Foundation on International Law of the Independence Referendum that Has Been Convened in Catalonia, Sept. 27, 2017, *available at* https://voicesfromspain.com/2017/09/27/statement-on-the-lack-of-foundation-on-international-law-of-the-independence-referendum-been-convened-in-catalonia.

* The opinions set out in this work are exclusively those of the author and do not engage the International Court of Justice.

[1] Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Case No. 23, Judgment of Sept. 23 2017.

[2] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 396 (*entered into force* Nov. 16, 1994) [hereinafter UNCLOS].