Secession and EU Law

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Abstract

Secession is a live issue in today's Western Europe. In the last years, we have witnessed the failure of two pro-independence attempts in Scotland and Catalonia. In the near future, we might see their re-emergence, or the rise of other pro-secession movements in other European regions. The response of the EU institutions to secession within EU Member States may well be based mainly on political considerations. However, since the EU is a community of law based on the Rule of Law, it has also to justify its position with normative arguments of principle. This thesis aims to provide such normative support. The intention is to offer legal reflection that goes beyond a case-specific approach, which could be of relevance to any EU Member State.

The main research question of this thesis is the following: how should EU law respond to secessionist attempts within EU Member States? The central claim of the thesis, based on Article 4 (2) TEU, is that the EU duty to respect national identity and fundamental constitutional structures generates obligations in the context of secession to respect Member States constitutional orders, provided that the values enshrined in Article 2 TEU are not violated by the Member State affected. The thesis draws on a pluralist reading of the relation between EU law and national law, to support the conclusion that EU law should respect domestic constitutional orders, with the consequence that if domestic law considers that secession is unlawful (based on the legal criteria established by each EU Member State constitutional legal order), EU law should respect that position by not recognizing the statehood of the secessionist entity. If, on the contrary, the domestic legal order has authorized the secessionist attempt, EU law should respect that outcome by recognizing the new entity as a sovereign State and by entering negotiations in good faith. This means, in effect, that the features of the secession determine the different types of EU responses.

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Introduction

1. General topic and background: relationship between pro-secession movements in Europe and the EU

Secession is a live issue in today's Western Europe. Although secession in well-established democracies is something exceptional,[1] in the last years, we have witnessed the consolidation of pro-independence movements in Scotland and Catalonia. In the near future, we might see their re-emergence, or the rise of other pro-secession movements in other European regions. The response of the EU institutions to secession within EU Member States may well be based mainly on political considerations. However, since the EU is a community of law based on the Rule of Law, it has also to justify its position with normative arguments of principle. This thesis aims to provide such normative support. The intention is to offer legal reflection that goes beyond a case-specific approach, which could be relevant to any EU Member State. Secession within an EU Member State and the role of the EU is not only a hot topic that has been receiving the attention of the media in the last years, but it is also a fundamental EU law topic, since it leads to review and rethink of key features of the EU and the EU legal order. The fact that EU law says nothing about secession within Member States does not mean that EU lawyers can comfortably assume that secession is not really a matter of EU law. It is indeed, as will be shown.

The EU has played an important (although clearly unintended) role in these pro-independence trends, since it makes small statehood very appealing: 'it is easier for political groups to mobilise opinion in favour of independence in the European milieu.'[2]

[1] Stephane Dion, 'Why is secession difficult in well-established democracies? Lessons from Quebec' (1996) 26 (2) British Journal of Political Science 269, 269.
[2] Carlos Closa (ed), 'Troubled Membership: Dealing with secession from a member state and withdrawal from the EU' (2014) 91 EUI Working Papers 4

Despite some theoretical warnings about the death of the nation State, statehood is still important for pro-independence movements since it 'remains the sole means by which nationalists can be recognized as sovereign equals in the European political system.'[3] Regardless of the transformations of sovereignty, the State itself is still the primary means for some nationalists to achieve their goal: recognition as the legitimate authority over their respective territories. In effect, nationalist parties argue that EU integration has not erased the value of borders and has not undermined the meaning of statehood. On the contrary, statehood still matters, because States remain dominant actors in many policy functions.[4] What is particularly interesting is that without the perspective of the EU umbrella it is difficult to imagine some of these secessionist movements pushing so hard for independence. There has been a 'growing attraction of the concept of "independence in Europe"'.[5] But if in a globalized world, a country like Singapore can succeed[6] and being a member of the NATO guarantees your territorial integrity, why according to the

<http://cadmus.eui.eu/bitstream/handle/1814/32651/RSCAS_2014_91rev.pdf> accessed 11 November 2018.

[3] Janet Laible, *Separatism and Sovereignty in the New Europe* (Palgrave MacMillan 2008) 23.

[4] Besides, states are 'still recognized as the primary constitutive elements of legitimate political order in the EU and in the world system more generally.' ibid 205.

[5] Kathryn Crameri, 'Do Catalans have the right to decide? Secession, legitimacy and democracy in the twenty-first century Europe' [2015] Global Discourse: An Interdisciplinary Journal of Current Affairs and Applied Contemporary Thought 1, 3.

[6] As Alesina and Spolaore explain, the economically viable size of countries depends on the trade regime: '[w]hile small countries may not be viable in a world of trade barriers, they may be prosperous in a world of free trade and global markets.' Alberto Alesina and Enrico Spolaore, *The Size of Nations* (MIT Press 2003) 82. Donald Wittman shares this opinion about feasibility of small States in an open economy and considers that '[a]n international regime of free trade among nations allows for smaller scale political units because economic production is not limited by the demand and supply of domestic markets.' Donald Wittman, 'The wealth and size of nations' (2000) 44 (6) The Journal of Conflict Resolution 868, 870. In their concluding remarks Alesina and Spalaore go further and argue that thanks to free trade, 'Catalonia is a region that may not 'need' Spain if it were to become a member of the European Union. To put it differently, once a region is a member of a large common market, including even a common currency area, and can enjoy free trade, the incentives for the region to seek independence or autonomy increases. The national government is much less important for the economy of the region. […] the cost of being politically small is decreasing with economic integration. In Europe, we see that many regions can afford to be independent if they enjoy the benefits of the European common market.' Alesina and Spolaore (n 6) 213-214. Keating and Harvey share a similar opinion when they remind that '[t]he European Union, the European Economic Area and partnership agreements with non-EU States have secured large domestic markets and provided external economies of scale through cooperation.' Michael Keating and Malcolm Harvey, 'The Political Economy of Small European States: And Lessons for Scotland' (2014) 227 (1) National Institute Economic Review 54, 55.

polls is remaining within the EU so important for those supporting Catalan and Scottish independence?

One could argue that small States enjoy a relatively good status within the EU[7] and that the EU has not been able to build a sophisticated Europe of the regions.[8] In effect, small States in Europe have seen that their relative standing on the international scene has been strengthened as a result of EU membership and its amplifying effects for a member's voice. The strengthening of their voice is due also to 'the formal equality of small and big Member States, including the lack of a European equivalent to the UN Security Council', which ensures a unique voice opportunity for everyone in the decision-making process, particularly because in the EU most of the decisions are reached through consensus.[9] As for regions within the EU, and despite the initial optimism in the 1980s, Maastricht reforms, (the creation of the Committee of the Regions, the introduction of the principle of subsidiarity, and the legal possibility for regional ministers to join or lead national delegations at the Council of Ministers) gave only a limited recognition to regions.[10]

The EU, one could argue, bolsters the significance of statehood by limiting full participation in its institutions to Member States, and by doing that it has given supporters

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[7] Bearing in mind that no organization can turn upside down the world's power relations, small States understand that 'within the EU they can exert more influence and achieve more than they would outside it.' Esko Antola, 'The Future of Small States in the EU' in Mary Farrell and others (eds), *European Integration in the 21st century* (SAGE 2002) 74. According to Wivel, '[s]mall state influence is protected by formal EU institutions making traditional power capabilities less important and by codifying what is deemed acceptable behaviour within the EU'. Anders Wivel, 'From Small State to Smart State: Devising a Strategy for Influence in the European Union' in Robert Steinmetz and Anders Wivel (eds), *Small States in Europe* (Ashgate 2010) 23.

[8] In the 1980s, it became popular to envision a 'Europe of the regions'. Keating even thought that 'a role for regions within the EU might be a useful mechanism for accommodating nationalities', a way to counter-act pro-independence movements turning their demands into obsolete pretensions. Michael Keating, 'European integration and the nationalities question' (2004) 32 (3) Politics & Society 367, 375.

[9] Anders Wivel, 'The Security Challenge of Small EU Member States: Interests, Identity and the Development of the EU as a Security Actor' (2005) 43 (2) Journal of Common Market Studies 393, 399.

[10] Charlie Jeffery, 'Regions and the European Union: Letting them In, and Leaving them Alone' in Stephen Weatherill and Ulf Bernitz (eds), *The Role of Regions and Sub-national entities in Europe* (Hart 2005) 35. According to nationalist voices within European regions, the EU has made very limited steps to accommodate the participatory demands of certain sub national entities. 'European strategies tend to underestimate the importance of regional governments in delivering on key strategic goals.' Noreen Burrows, 'Scotland's European Strategy' in Roger Scully and Richard Wyn Jones (eds), *Europe, regions and regionalism* (Palgrave MacMillan 2010) 122.

of independence an additional reason (or excuse) to claim that only statehood guarantees full political participation in Europe.[11]

However, there might be a simpler argument beyond the privileged position of small States within the EU and the lack of attention towards regions at the EU decision-making level: pro-secession movements wish independence from their EU Member States, but their supporters do not know what it would be like outside the EU. If at least EU membership is assured, uncertainties are reduced. As said at the beginning of this introduction, the EU umbrella permits carrying out a risky and uncertain process like independence with a lifeboat (i.e. the EU). This is what Michael Keating seems to be highlighting when he argues that 'independence within Europe may represent an attenuated and less risky form of independence, since many of the externalities are catered for.'[12] Thus, Piris concludes, '[t]he EU is thus objectively one of the causes, albeit indirect and unintended, of the recent resurgence of separatist movements in some of its Member States.'[13] In this thesis, however, we will show that not any type of independence process can receive the supporting umbrella of the EU legal order.

The normative link between EU law and secession is an unexplored field. First, because economic and political science have until now dominated the field concerning secession and the European Union. And second, because lawyers have usually viewed secession only through the lens of constitutional and international law. The study of secession with an EU approach is, therefore, not a common angle. This is precisely the

[11] Christopher K. Connolly, 'Independence in Europe: Secession, Sovereignty and the European Union' (2013) 24 Duke Journal of Comparative & International Law 51, 54.
[12] Keating, 'European integration and the nationalities question' (n 8) 369. Piris shares this view: 'the EU is partly 'responsible' for this resurgence of separatist trends, because it is seen as able to carry out tasks which cannot be accomplished as well by small entities. These entities can envisage independence more securely, if they were certain of remaining under the protection of the EU umbrella.' Jean-Claude Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (I)' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 76.
[13] Piris (n 12) 77.

focus of this thesis: secession and EU law. It will not cover economic, political science or political philosophy dimensions. As stated above, the thesis has its origins in a political situation, the rise of pro-independence movements across Europe, but it aims to offer a legal analysis. Thus far, some authors have written about EU law and secession.[14] There are, however, only a few monographs on this topic.[15] This thesis aims to fill such a niche in EU legal scholarship. It should be noted that this work is not concerned with the moral legitimacy or the political convenience of pro-independence movements in well-functioning democracies. It is assumed as a fact that in some European regions there are strong pro-independence movements challenging the territorial *status quo*.[16]

[14] Among others, Carlos Closa, 'Secession from a Member State and EU Membership: the View from the Union' (2016) 12 (2) European Constitutional Law Review 240; Javier Tajadura, 'Los procesos secesionistas y el derecho europeo' (2016) 37 Teoría y Realidad Constitucional 347; Dimitry Kochenov and Martijn Van den Brink, 'Secessions from EU Member States: The Imperative of Union's Neutrality' University of Edinburgh School of Law Research Paper Series No 2016/06 1; Merijn Chamon and Guillaume Van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?' (2014) 20 (5) European Law Journal 613; Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Accession from Within? An Introduction' (2014) 33 (1) Yearbook of European Law 335; Daniel Kenealy and Stuart MacLennan, 'Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?' (2014) 20 (5) European Law Journal 591; Josu de Miguel, 'La cuestión de la secesión en la Unión Europea: una visión constitucional' (2014) 165 Revista de Estudios Políticos 211; Alan Boyle and James Crawford, *Annex A Opinion: Referendum on the Independence of Scotland - International Law Aspects* (UK Government 2013) <https://www-test.pure.ed.ac.uk/portal/files/14540285/Boyle_A_Annex_A_Opinion.pdf.> accessed 12 August 2018; David Edward, 'EU law and the separation of Member States' (2013) 36 (5) Fordham International Law Journal 1151; Araceli Mangas, 'La secesión de territorios en un Estado Miembro: efectos en el derecho de la Unión Europea' (2013) 25 Revista de Derecho de la Unión Europea 47.

[15] Carlos Closa (ed) *Secession from a Member State and Withdrawal from the European Union* (Cambridge University Press 2017); Pau Bossacoma, *Secessió i integració a la Unió Europea. Catalunya nou Estat de la Unió?* (Institut d'Estudis de l'Autogovern 2016); Manuel Medina Ortega, *El Derecho de Secesión en la Unión Europea* (Marcial Pons 2014).

[16] Very often these movements are located in economically advanced regional groups. The classic work of Donald L. Horowitz about the logic of secessions gives a good explanation of the phenomenon. Horowitz observes that such advanced regional groups 'are likely to have a regional economic grievance. Advanced regions usually generate more income and contribute more revenue to the treasury of the undivided state than they receive. They believe that they are subsidizing poorer regions.' Donald L. Horowitz, *Ethnic Groups in Conflict* (2nd edn, University of California Press 2000) 249-50. In fact, an example Horowitz employs is Catalonia. It should not surprise us that one of the complaints of the Catalan pro-independence movement is the Catalan taxpayers 'unreasonable' (according to Catalan nationalists) contribution to the Spanish poorest regions. One of the battle cries of the Catalan nationalist movement is 'Madrid ens roba' (Madrid is robbing us). Germà Bel, *Anatomia d'un desengany* (Destino 2013) 165. This claim is not original from Catalans, though. The famous slogan 'Roma Ladrona' ('Rome the thief') was popularized in Italy in the 1990s by the *Lega Nord*. It conveyed the idea that the capital takes taxes from the hard-working Northern Italians and wastes it on the lazy South. The same rationale lies behind the 'Madrid ens roba' complaint.

2. Research questions and hypotheses

The main research question of this thesis is the following: how should EU law respond to secessionist attempts within EU Member States? The central claim of the thesis, based on Article 4 (2) TEU, is that the EU duty to respect national identity generates obligations in the context of secession to respect Member States constitutional orders, provided that the values enshrined in Article 2 TEU are not violated by the Member State affected. This thesis is therefore an inquiry as to how the EU should respond to any type of secessionist project. As it will be shown, the features of the secession determine the different possible types of EU responses: i.e. if domestic law considers that secession is unlawful (based on the legal criteria established by each EU Member State constitutional legal order), EU law should respect that position by not recognizing the statehood of the secessionist entity. If, on the contrary, the domestic legal order has authorized the secessionist attempt, EU law should respect that outcome by recognizing the new entity as a sovereign State and by entering negotiations in good faith.

3. Overview and chapters summary

Chapter 1: Main legal terms

The aim of chapter 1 is to establish the necessary legal frame of the thesis by clarifying and exploring some of the concepts and legal relations that permeate and sustain the thesis. Secession within an EU Member State is an issue that touches upon three different legal orders that interact in a certain territory, namely the EU's territory: international law, national constitutional orders and EU law. First, the chapter explains to what extent EU law is compelled by international law. A legal discussion as to how EU law accommodates international law is central to this thesis, since chapter 2 explores the EU

legal obligations that derive from international law when it comes to self-determination, a concept closely linked to secession, as will be explained in chapter 2; and chapter 5 will analyse the international legal framework of succession of States in case of secession and the restrictions on citizenship law derived from international law. In this sense, it is particularly relevant to establish the binding character of international norms vis a vis EU law. Second, the chapter addresses the question of how should EU law relate to national constitutional provisions. The central claim of the thesis is that the EU duty to respect national identity generates obligations in the context of secession to respect Member States constitutional orders. Thus, it is necessary to explain why EU law should show certain deference to national legal orders. It is particularly relevant to reflect on the relationship between EU law and national constitutional provisions. Third, this chapter explores the legal concept of secession, both from an international and constitutional law perspective, and the different types of secession, consensual vs non-consensual, and lawful vs unlawful. A clear distinction of these types will be required later in the thesis, since it will be argued that the EU response will depend on the concrete circumstances of secession and the lawfulness criteria used by each constitutional legal order.

Chapter 2: International Law and secession

This chapter explores the regulation of secession by international law. Is it prohibited? Should, then, EU law oppose any type of secession? Or is there a right to secede under international law? Under what circumstances? As explained in chapter 1, EU law is constrained by international law and will have to take into account its approach when drafting its legal response to secessions. As for the prohibition of secession, the International Court of Justice ('ICJ') stated in 2010 that there is no general prohibition

against unilateral declarations of independence, even if they occurred against the will of the parent State.[17]

As for the right to secede under international law, apart from the right to self-determination of colonies or territories subject to alien domination and exploitation, there is no positive entitlement to secession. Scholars discuss if under extreme circumstances a region can be entitled to a similar right, the so called 'remedial secession'. Some international courts have admitted the existence of such a right if gross violations of human rights take place.[18] However, the ICJ stated that there is not enough consensus around this topic.[19] In any case, sub-national entities within Member States (well-functioning democracies) per definition cannot qualify for a right to secede under international law, since European regions cannot be regarded as colonial or occupied territories. If there was ever a situation of systematic and gross human rights violations in a certain EU region, we would need to revert to Article 7 TEU, a mechanism to guarantee the protection of EU core values, with an early warning system in case of a risk of breaches, and a sanctions mechanism in the event of a serious and persistent breach by a Member State. Save for this far-fetched situation, there is under international law no right to secede for EU regions.

Chapter 3: Constitutional Law and secession

If international law does not play a prominent role when assessing secession within constitutional democracies (where, by definition, there is no remedial situation), the way

[17] *Accordance* with *International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 403, para 81.
[18] See Katangese *Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights, Comm. No. 75/92* (1995) para. 6 and *Kevin Mgwanga Gunme et al / Cameroon, African Commission on Human and* Peoples' Rights, Comm. No. 266/03 (2009) para. 194.
[19] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 17) para 82.

forward in the legal analysis is constitutional law.[20] This is the aim of chapter 3. We will examine the different responses offered by constitutional democracies that have faced secessionist challenges, and the organization of referendums on independence, or at least the attempt to organize such plebiscites (referendums as one tool of carrying out an independence process): mainly the US (as the classic paradigm), Canada (the new paradigm), UK and Spain. It will be seen that there are some common trends. Such trends enable us to talk about lawful and unlawful secessions according to constitutional legal precepts. These criteria will become key when assessing the EU response to secession (chapter 4). For instance, none of them recognizes a unilateral right, or a procedure, to secede. Thus, if secession is carried out unilaterally it is considered unlawful by most constitutional legal orders, since it denies the fundamental basis of a constitutional pact.[21] At maximum, we find acceptance of consensual secession, as in the cases of Canada and the UK. This acceptance might appear due to a judicial process, like in the case of Canada, or as the result of political negotiation, as in the UK. In both cases the prominent position of central or national authorities is uncontested. At the same time, it will be shown that the strict Spanish response, which does not allow for a referendum on secession, is not unique. Although the circumstances vary, since none of them faces the same type of secessionist challenge, the US, Italian and German constitutional legal orders have similar strict responses to secession.

[20] Jure Vidmar, 'Catalonia: The Way Forward is Comparative Constitutional Rather than International Legal Argument' (*Blog of the European Journal of International Law,* 24 October 2017) <https://www.ejiltalk.org/catalonia-the-way-forward-is-comparative-constitutional-rather-than-international-legal-argument/> accessed 5 November 2018.
[21] David Haljan, *Constitutionalizing Secession* (Hart 2014) 345.

Chapter 4: European Union Law towards a secessionist challenge

There is no clear and explicit EU law provision regarding secession within EU Member States. Nor is there precedent of successful secession, or case law. However, given current political events in certain Member States, EU institutions have been forced to make statements dealing with such a scenario. Those statements do not, however, constitute a fully articulated policy. This chapter reviews the scholarly debate in the field, from those who consider that any secessionist movement is against the ethos of the European integration, to those who believe that welcoming new States emerging out of democratic secessionist processes is the duty of the EU institutions. The argument advanced in this thesis is in alignment with those authors who make a distinction between lawful and unlawful secessions. Lawfulness and unlawfulness will be based on the legal criteria established by each EU Member State constitutional legal order, as explained in the previous chapter. The key provision to justify and base this EU law response to secession is to be found in the principle of respect for fundamental constitutional structures (Article 4(2) TEU). Drawing on such provision, which is an example of constitutional tolerance to be found within the EU, as established in chapter 1, it will be explained that EU law should respect domestic constitutional orders, with the consequence that if domestic law considers that secession is unlawful, EU law should respect that position by not recognizing the statehood of the secessionist entity. If, to the contrary, the domestic legal order has accepted the secessionist attempt, EU law should respect that outcome by recognizing the new entity as a sovereign State and enter into good faith negotiations. The limits of this EU deferential attitude are to be found within the very same EU legal order. In this regard, Article 2 TEU points to those limits: Member States affected will enjoy the benefits of constitutional tolerance as long as they do not violate the values enshrined in the referred Article 2 TEU.

Chapter 5: European Union Law in relation to new States emerging by way of secession

This chapter will explore the legal situation that arises when a new State has emerged and has been recognized by the EU and EU Member States following the recognition policy explained in previous chapters (i.e. lawful and consensual secession). The chapter will first address the debate about State continuity and succession: will the rump Member State be the continuing State and, therefore, retaining its EU membership, while the seceding territory would become a new, successor State that would have to ask for membership? Or, following internal enlargement theory, will both States maintain EU membership? As will be shown, in the event that the new State is interested in EU accession, it will be argued that the rump State will continue with its EU membership, while the seceded new State will have to ask for EU membership. A further important issue concerns the route towards EU membership, thereby requiring discussion of Article 49 TEU and Article 48 TEU. Thus, should the new independent State follow the ordinary path of Article 49 TEU or is there any possibility to treat this accession as an amendment to the treaties and, therefore, invoke Article 48 TEU? I will argue that discussion about accession routes is relevant only to a limited extent, since regardless of the chosen legal route, both require a high degree of political consensus, this being unanimity and ratification process by all EU Member States. In any event, it will be argued that from a legal point the most suitable approach is recourse to Article 49 TEU. Finally, the chapter will also take into consideration the debate about EU citizenship, nationality and secession. It will be considered how far nationality law, which is in principle mainly governed by internal law, is constrained by international and, above all, EU law. In other words, would the withdrawal of national citizenship rights and consequently EU citizenship rights, as a possible result of secession negotiations, violate EU law? Could

EU citizenship have any effect at all in the EU approach towards secessionism? It will be argued that EU Member States still hold an important degree of autonomy when it comes to defining nationality and, therefore, the impact of EU citizenship can only be limited.

Chapter 6: European Union policy regarding territorial changes within the EU and secession in neighbouring countries. The practical argument

The aim of this chapter is to contribute to the research question as to how EU law should respond to secessionist attempts within EU Member States, with empirical data, namely to identify the policies of the EU and EU Member States towards secession. While the preceding chapters are mainly theoretical, this last chapter is empirical, and considers how the EU reacted to secession. Since there has been no proper secession within a Member State, the focus will be on the EU approach to territorial changes within EU Member States and secession in neighbouring countries. The initial focus will be on those situations concerning territorial changes that occurred within EU Member States: the independence of Algeria (within the decolonization paradigm, not properly a case of secession), the withdrawal of Greenland and the reunification of Germany. Second, the case of the Turkish Republic of Northern Cyprus and the EU attitude towards it since its declaration of independence will be considered. This is an extraordinary example of how pivotal a role a Member State can play in EC policy formation if its national interest is at stake. Next, the chapter examines the experiences of the countries borne right after, or immediately before, the crumbling of the Soviet Union. These are all examples of national fragmentation in the post-communist world and cannot be considered genuine secessionist challenges comparable to the ones posed in constitutional and liberal democracies. However, some lessons drawn from these experiences might tell us something relevant about EU and secession. This will be followed by an analysis of EU

policies towards more recent secessionist attempts in neighbouring countries such as Serbia with the two key cases of Montenegro and Kosovo. Finally, the cases of Transnitria (Moldova), South Ossetia and Abkhazia (Georgia), Nagorno-Karabaj (Azerbaijan) and Crimea (Ukraine) will be analyzed. This chapter will tell us that the EU already has a distinctive approach towards secessionism in its external policy.

This thesis explores the normative link between EU law and secession. The focus is primarily legal, since this work aims at filling a niche in EU legal scholarship. However, no legal analysis can be understood in abstract, ahistorical terms. That is why, in the last chapter, this thesis will be concerned with testing the political viability of the normative proposition developed throughout the thesis.

Chapter 1: Main terms and legal framework of the thesis

Introduction

The main research question of this thesis is the following: how should EU law respond to secessionist attempts within EU Member States? The central claim of the thesis, based on Article 4 (2) TEU, is that the EU duty to respect national identity generates obligations in the context of secession to respect Member States' constitutional orders, provided that the values enshrined in Article 2 TEU are not violated by the Member State affected. This thesis is therefore an inquiry as to how the EU should respond to any type of secessionist project. The aim of this chapter is to establish the necessary legal frame of the thesis by clarifying and exploring some of the concepts and legal relations that permeate and sustain the thesis.

First, this chapter will deal with the EU law interaction with public international law and national constitutional order having very much in mind the question at hand, i.e. secession. In particular, the first section of this first part will address the following questions: to what extent is EU law compelled by international law? A legal discussion as to how the EU accommodates international law is central to this thesis, since chapter 2 explores the EU legal obligations that derive from international law when it comes to self-determination,[1] a concept closely linked to secession (as it will be explained in

[1] For instance, as an example of the relevance of these obligations, note the recent decision of the Court of Justice of the EU on the validity of the EU-Morocco Fisheries Partnership Agreement and its application to the territory of Western Sahara, a non-self-governing territory to be decolonised in accordance with the international legal principle of self-determination. The Court's exclusion of Western Sahara ensures the compatibility of the Agreement with international law. Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI 118, paras 63-64: '[i]f the territory of Western Sahara were to be included within the scope of the Association Agreement, that would be contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, stated in Article 1 of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression […].That being the case, the territory of Western Sahara is not covered by the concept of 'territory of Morocco' within the meaning of Article 11 of the Fisheries Partnership Agreement.'

chapter 2); and chapter 5 will analyse the international legal framework of succession of states in case of secession and the restrictions on citizenship law derived from international law. In this sense, it is particularly relevant to establish beforehand the binding character of international norms vis a vis EU law. The second section of this first part of the chapter will address the question of how should EU law relate to national constitutional provisions. Bear in mind that the central claim of the thesis is that the EU duty to respect national identity generates obligations in the context of secession to respect Member States constitutional orders. To what extent is the classic notion of 'primacy' of EU law undermined by this assumption? Why should EU law show deference to national legal orders? In this sense, it is particularly relevant to reflect on the relationship between EU law and national constitutional provisions.

Second, we will explore the concept of secession. How is secession understood from a legal point of view? Leaving aside legitimacy considerations, we will focus on the legal debate around secession, both from international and constitutional law points of view. In addition, we will also explore different types of secession. In this sense, how can consensual or non-consensual secession be defined? And how can lawful or unlawful secession be described? A clear distinction between these concepts will be necessary in the further development of the thesis. To what extent should EU law take into account the different types of secession? We will also address the relationship between self-government and secession, since the EU is obliged to respect regional and local self-government within EU Member States. Is there any possibility to justify secession based on regional self-government?

1. Interaction between EU law, Public International Law and National Constitutional Orders

This thesis, when dealing with secession within an EU Member State, is at the same time touching upon three different legal orders that interact in a certain territory, namely the EU's territory: international law, national constitutional orders and EU law. How do they relate with each other? This is the question that we will address in this first part of the chapter, including one section devoted to international law and another one focused mainly on national constitutional legal orders.

1.1 EU Law and International Law

Although the EU is, in many ways, a creature of public international law (in the sense that the Community legal order is created by an instrument of international law, i.e. international treaties, which are governed by international law), from the very beginning the Court of Justice of the EU ('ECJ') famously stated the autonomy of the EU legal order in the *Van Gend & Loos* decision.[2] Thus, although the European treaties are subject to the fundamental rules of the law of the treaties, '[t]hat does not mean that the European legal order as a whole is subject to the basic principles and mechanisms of international law.'[3] Then, how does the EU relate with international law? EU treaties remain virtually silent on the role, impact and effect of international law on EU law. But the ECJ, in its extensive case law, has offered some guidance. Advocate General Poiares Maduro recalled the basic foundations, noting that the EU has traditionally played an important role as an active and constructive member of the international community when it comes to the development

[2] '[T]he Community's "operating system" is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles,' Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2407.

[3] Jean d'Aspremont and Frédéric Dopagne, 'Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders' (2008) 5 International Organizations Law Review 371, 374.

and consolidation of international law. Therefore, '[t]he application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments.'[4] This is in fact the essence of the current Article 347 Treaty on the Functioning of the European Union ('TFEU'):

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.[5]

But the ECJ has also stated that the EU, when determining the effect of international obligations within its own legal order, should also take into account the conditions set by EU law itself. Thus, even when the EU is obliged by international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaties:

> Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[6]

Note that the reference explicitly says 'once the Community is bound by a rule of international law', which means that not any rule of international law is binding or compulsory. Thus, the question remains: when is international law compelling? When is EU law subject to international law? How can we be sure that EU law is bound by the right to self-determination (that might lead to secession), assumed by international courts

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[4] Opinion of the Advocate General Poiares Maduro, 16 January 2008, Case C-402/05 P, *Yassin Abdullah Kadi v. Council and Commission* [2008] ECR I-06351, para 22.

[5] De Burca refers to the 'traditional self-presentation of the EU as a virtuous international actor in contradiction to the exceptionalism of the United States' and 'Europe's distinctive fidelity to international law'. Grainne de Burca, 'The EU, the European Court of Justice and the international legal order after Kadi' (2009) 1 (51) Harvard International Law Journal 1, 3, 6.

[6] Opinion of the Advocate General Poiares Maduro (n 4) para 24. This line of reasoning was later accepted by the ECJ.

as a customary norm of international law? First, we have to distinguish between international agreements and customary international law. And among international agreements, we will have to distinguish between treaties signed by the EU and treaties signed solely by EU Member States.

As for international treaties signed by the EU, in general, it should be noted that, while the EU has accepted the primacy of international treaties over secondary EU legislation, it continues to place international treaty norms below EU primary law, i.e. the EU constitutional framework. Consider Article 218 (11) TFEU that sets forth the following:

> A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

In short, this Article foresees that international treaties will have to comply with EU treaties. If they do not, they will have to be amended. Otherwise, primary law will have to be revised. In the event of conflict, EU treaties prevail. According to the ECJ, international treaties signed by the EU (and compatible with the EU legal order) form an integral part of the EU legal system and are, therefore, directly applicable in the EU legal order.[7] And even when lacking direct effect, EU secondary legislation must, so far as possible, be interpreted in a manner that is consistent with the agreement.[8] In sum, international treaties signed by the EU prevail over secondary legislation, but will have to comply with EU primary law.

[7] Case C-181/73 *R. & V. Haegemann v Belgium* [1974] ECR 449, para 5: 'The provisions of the Agreement, from the coming into force thereof, form an integral part of Community law.'

[8] Case C-61/94 *Commission v Germany* [1996] ECR 3989, para 52: 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as it is possible, be interpreted in a manner that is consistent with those agreements.'

As for the international treaties to which the EU is not a party, the question about the relationship with the EU legal order will only arise when all the EU Member States are parties. If this is the case, the ECJ assumed in the famous *International Fruit Company* decision the so called 'succession doctrine': if the EU has assumed certain policies (in this particular case, tariff and trade policy) formerly implemented by EU Member States through international treaties, Member States are showing their wish to bind the EU by the obligations entered into under the international agreements.[9] Therefore, says the ECJ, the EU is equally bound by the treaties that are signed and ratified by all Member States.

Finally, as for customary international law, the ECJ has also made clear that it 'must respect international law in the exercise of its powers' including customary international law.[10] In effect, the ECJ has confirmed that since the EU must respect international law in the exercise of its powers, '[i]t is therefore required to comply with the rules of customary international law when adopting a regulation […] It follows that the rules of customary international law […] are binding upon the Community institutions and form part of the Community legal order'.[11] There are, however, some doubts as to the question of direct effect and hierarchical rank that customary international law enjoys

[9] Joined Cases 21 to 24/74 *International Fruit Company and others NV v Produktschap voor Groenten en Fruit* [1974] ECR 1219, paras 14-15.

[10] Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6048, paras 9-10: 'As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea. […] In this connexion, account must be taken of […], in so far as they codify general rules recognized by international custom […] It has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law.' Bear in mind also the reference to customary international law made at *Van Duyn*: 'it is a principle of [customary] international law, which the Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.' Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337, para 22. Anne Peters also considers that there exists an unwritten norm that foresees the incorporation of customary international law into the EU legal order. Anne Peters, 'The Position of International Law within the European Legal Order' (1997) 40 German Yearbook of International Law 9, 21.

[11] Case C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655, para 46.

within the EU legal order.[12] It seems clear that customary international law should prevail over secondary legislation, but it is less clear whether it should prevail over the primary treaties. This is still a controversial question.

In short, as has been explained, international treaties signed by the EU, those ratified by all Member States and customary international law are binding upon the EU, without the need of any formal act of incorporation[13] and (at least) as long as they do not conflict with the constitutional framework of the EU. This final condition, underlined in the abovementioned quotation of Advocate General Maduro, is particularly relevant for this thesis, because it underlines one of the key aspects of the relationship between the three legal orders in the European milieu: the need of accommodation. This issue warrants further analysis. This condition of subordination to the main constitutional principles of the EU became particularly noteworthy after *Kadi*, although the Court's reasoning was consistent with its previous case-law, though it meant a departure from the General Court decision.[14]

Yassin Abdullah Kadi was a Saudi Arabian national who was listed in the annex of an EU (then EC) Regulation as a person suspected of supporting terrorism. The EU Regulation was adopted to implement Security Council Resolutions approved under Chapter VII of the UN Charter. The effect of the EU Regulation was that all his funds and financial assets in the EU would be frozen. As a result, he brought an action for annulment before the then Court of First Instance insofar as the EU Regulation affected

[12] Robert Schütze, 'On "Middle Ground". The European Community and Public International Law' (2007) 13 EUI Law Working Papers 12 <http://cadmus.eui.eu/bitstream/handle/1814/6817/LAW-2007-13.pdf?sequence=3&isAllowed=y> accessed 19 August 2018.

[13] The EU legal order has traditionally proven very monist in that it has not subjected the introduction of treaty law and customary international law to any formal requirement. D'Aspremont and Dopagne (n 3) 377.

[14] Santos Vara has indicated that the line of reasoning followed by the ECJ in *Kadi* 'is more consistent with the previous case-law on the relationship between European and international [law] and on the protection of fundamental rights than the General Courts rulings.' Juan Santos Vara, 'The Consequences of *Kadi*: Where the Divergence of Opinion between EU and International Lawyers Lies?' (2011) 17 (2) European Law Journal 252, 256.

him. The General Court (at that moment the Court of First Instance) reached the conclusion that it had no jurisdiction to review the legality of the contested regulations regarding fundamental rights protected by EU law, following an examination of the relationship between the UN Charter obligations and the EU treaties obligations upon Member States:

> From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for instance, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty. […] It also follows from the foregoing that, pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations. […] Following that reasoning, it must be held, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.[15]

This ruling of the then Court of First Instance was widely criticised.[16] Eeckhout, for instance, argues that the individual is increasingly a subject of international law, and must thus be guaranteed effective judicial protection. If international law is not able to offer it, municipal courts have to step into the breach by applying domestic constitutional standards of protection of fundamental rights. He understands that this approach is not ideal, 'but it would be consistent with the now firmly established European Solange tradition. As long as the international legal order does not provide the individual listed in a UN Security Council Resolution with an effective remedy, Community law, as a kind

[15] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, paras 181, 190, 204.
[16] See, among others, Christine Eckes, 'Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance' (2008) 14 European Law Journal 74. She refers to 'radical legal constructs' and 'various errors of law'. ibid 91-92.

of municipal legal system, cannot dispense with review on the basis of its own constitutional standards.'[17]

This is, precisely, what the General Court failed to do, but what the ECJ did in the appeal. In effect, when the ruling was appealed, the ECJ adopted a 'robustly pluralist approach to international law and governance, emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law.'[18] The ECJ affirmed firstly that the EU is based on the Rule of Law and cannot avoid reviewing the legality of acts of the EU institutions. That is why the ECJ was obliged to control the legality of the EU Regulation invoked. Secondly, according to settled case-law, fundamental rights form an integral part of the EU general principles of law. The ECJ recalled here the importance of the constitutional traditions common to the Member States and also the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. Moreover, according to settled case-law, respect for human rights is a condition of the lawfulness of EU acts:

> It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. In this regard, it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.[19]

In short, the ECJ held that the EU is subject to the Rule of Law and that respect for fundamental rights is part of its constitutional legal framework and, therefore, it cannot

[17] Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit' (2007) 3 European Constitutional Law Review 183, 205.
[18] De Burca (n 5) 7.
[19] Case C-402/05 P, *Yassin Abdullah Kadi v. Council and Commission* [2008] ECR I-06351, paras 285-286.

accept the lawfulness of an EU act that violates the referred rights, even if such act has been passed in compliance with the UN Security Council Resolutions. This means that EU law, as an autonomous legal order, decides for itself, like any other municipal legal order, whether or not to incorporate rules laid down in another legal order, i.e. international law. For de Burca, this strongly pluralist decision has meant a departure from the classical approach of the ECJ,[20] while for Klabbers it has fenced off EU law against intrusion by international law[21]. Hinojosa criticised the ECJ for calling in question the hierarchy of norms in the international legal order by applying the European standards of protecting fundamental rights and, therefore, annulling the Council Regulation derived from Security Council Resolutions:[22]

> Paragraph 282 of the Kadi judgment places the EC Treaty above the UN Charter as the source of validity in European law. By doing so, it goes well beyond the traditional reference to the 'constitutional' character of the constituent Treaties, meaning that they contain a complex political structure and a system for the protection of fundamental rights, and it places these Treaties at the level of the *Grundnorm* of a Sovereign, the Constitution of a State.[23]

In any event, the message of the ECJ seems clear: where the Member States use EU legislation to fulfil their obligations arising under the United Nations, they have to comply with the constitutional principles of the EU legal order.[24] This position is very similar to the one conducted by the national constitutional Courts when applying the Solange doctrine.[25] As Santos Vara states,

> The constitutional courts of the Member States have expressed their willingness not to review Community acts on the basis of domestic constitutional law as long as an adequate level of protection is guaranteed at EC level (Solange). If the ECJ have decided not to review the contested regulations in the light of the fundamental rights protected by the EC law, some constitutional courts may try

[20] De Burca (n 5) 49.
[21] Jan Klabbers, 'Straddling the fence: the EU and international law' in Anthony Arnull and Damian Chalmers (ed), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 68.
[22] Luis M. Hinojosa Martínez, 'Bad law for good reasons: the contradictions of the Kadi judgment' (2008) 5 International Organizations Law Review 339, 346.
[23] Hinojosa (n 22) 343.
[24] Schütze (n 12) 17.
[25] See as well, d'Aspremont and Dopagne (n 3) 378.

> to ensure the protection of human rights, and such a judicial intervention will negatively affect the primacy of Community law over internal law.[26]

The issue remains however controversial, since some scholars have also criticised the ECJ's decision and prefer the General Court approach.[27] The General Court, as has been mentioned before, took a different path when confronted with the same question in the *Yusuf* case and decided that the EU 'may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance'[28], even if that meant leaving aside the standard of human rights protection required by the EU. While the General Court showed the greatest respect for international law, the ECJ's position rests essentially on EU-based arguments.[29]

Doubts concerning the hierarchical position of international law within the EU legal order are particularly relevant if and when there is a conflict between the two normative orders. As we will see throughout the thesis, in the case at hand, (secession within an EU Member State), there is no such conflict. First, chapter 2 will show that the right to self-determination (that might lead eventually to secession) cannot be applied to regions within EU Member States. Second, international law will be incorporated to when there is an EU vacuum or lack of regulation, as in the case of succession of States (chapter 5); by definition, if there is no EU law, there cannot be a conflict between laws. It is for that reason that there is no need to define further the relationship between the EU and international legal orders.

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[26] Santos Vara (n 14) 274.

[27] De Burca, for instance, argues that 'instead of adopting a strongly pluralist approach to international law, the ECJ could and should have followed the soft-constitutionalist approach which it and other European courts have used on different occasions to mediate the relationship between the norms of the different legal orders.' De Burca (n 5) 4. She also regrets the potential implications of *Kadi* 'for the image the EU has long cultivated of itself as an actor which is committed to "effective multilateralism", professing a distinctive allegiance to international law and institutions'. De Burca (n 5) 49. Hinojosa refers to 'extreme assertion of autonomy' that is 'not sound law' and appears as 'legal contradictions'. Hinojosa (n 22) 343, 356.

[28] Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533, para 254.

[29] Santos Vara (n 14) 263.

1.2 EU Law and National Constitutional Orders

As for the relationship between EU law and national legal orders,[30] 'one of the more remarkable features of EU law and its relations with Member States' law is the near universal agreement among EU and Member State institutions that EU law has priority over Member States' law.'[31] Labelled by Kumm as 'European monism', this embodies the proposition that European law is supreme and that the ECJ alone has the power to review and annul Community measures on any grounds and the Member States may not invoke their Constitutions to justify not applying EU law in their territory.[32] As explained by the ECJ in its seminal decisions, supremacy of EU law is required in order to ensure the uniform application of the Community's law, necessary to establish a coherent legal order.[33] However, this claim must be examined more closely. National Constitutional Courts (mainly the German one) have contended that they have the final say in determining whether EU law violates basic rights. While this review will be undertaken in cooperation with the ECJ, if the latter performs its tasks unsatisfactorily, national courts will resume their role.[34] Thus, practice shows that the acceptance by Member States of EU law primacy is based on the national courts' own constitutional terms, not by virtue

[30] In *Internationale Handelsgesellschaft* the ECJ rejected, based on EU law autonomy, the referral to national rules in order to assess the validity of norms adopted by the EU institutions. Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3.

[31] Keith Culver and Michael Giudice, 'Not a system but an Order' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundation of European Union Law* (Oxford University Press 2012) 55.

[32] Mattias Kumm, 'Who is the final arbiter of constitutionality in Europe?: three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351, 354.

[33] Case C-26/62 *Van Gend en Loos v. Netherlands* [1963] ECR 1; Case C-6/64 *Costa v. Enel* [1964] ECR 585; Case C-11/70 [1970] *Internationale Handelsgesellschaft* ECR 1125.

[34] The famous Maastricht Judgment of the German Constitutional Court brought to the fore the risks of conflicts between EU law and national constitutional legal orders. The decision had been preceded by the well-known Solange cases of 1974 and 1986. Other Constitutional Courts across Europe had been contributing to the same debate and were reinforced by the decision of the German Court. As Baquero Cruz explains, '[t]he German Court ha[d] acted as a sort of Pied Piper of Hamlin, attracting some national courts with the charming song of the defence of State-based constitutional democracy, leading them out of the walls of the European city, into the river of national constitutional dogmatics.' Julio Baquero Cruz, 'The Legacy of the Maastricht –Urteil and the Pluralist Movement' (2007) 13 EUI Working Paper <http://cadmus.eui.eu/bitstream/handle/1814/6760/RSCAS_2007_13.pdf?sequence=1&isAllowed=y> accessed 24 October 2018.

of the inherent nature of EU law, as the ECJ argues.[35] In other words, Constitutional Courts have tried to prevent unwarranted intrusion by EU law in defence of basic rights and democratic self-government invoking a traditional conception of the sovereign nation State.[36] At the same time, Constitutional Courts also find themselves in the sometimes conflictual position of being enforcers of EU law and guardians of national constitutions.[37]

When examining EU law and national law (particularly constitutional national law), we must accept that we are faced with competing legal orders with potential normative conflicts, which can only be resolved through cooperation and respect. This is the rationale for the development in the legal literature of a pluralist reading of the relation between EU law and national law.[38] As MacCormick advised, we should not be wedded to notions like hierarchy in thinking about the relations between EU law and national legal systems.[39] In effect, the relationship between EU law and national legal orders seems to have created a pluralistic legal system or a multilevel constitutional system where hierarchical relationships of validity do not accord properly to the current legal reality. In 1995 MacCormick became the first one to introduce the concept of 'constitutional pluralism' affirming that

> [T]he most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal system of Member States and their common legal system of EC law are distinct but interacting systems of law and hierarchical relationships of validity within criteria

[35] Bruno de Witte, 'The Nature of the Legal Order' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 352.
[36] Kumm (n 32) 374.
[37] Marta Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' (1990) 12 (1) Michigan Journal of International Law 173, 175.
[38] Among the leading contributions: Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 3; Miguel Maduro Poiares, 'Contrapunctual law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 501; Mathias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 European Law Journal 262.
[39] Neil MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) 117-118.

> of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.[40]

That is why Kumm considers that 'within a pluralist framework, it does not make sense to speak of a final arbiter of constitutionality in Europe.'[41] No one should pretend to be able to give the definitive or final word on legal sovereignty. Basically, the emerging idea of hierarchy between national constitutional law and EU law appeared 'inherently unstable, or unresolved, and destined to remain so. The idea of a potential stability in instability was conceived.'[42] In the same vein, Von Bogdandy argues that 'European legal unity is not to be perceived as unitary and hierarchical, but as pluralistic and dialogical.'[43] In fact, he argues that there is a mutual dependence that leads to a concept of 'complementary constitutions.'[44] He explains his position:

> The concept of legal pluralism does not imply a strict separation between legal regimes. Rather, it promotes the insight that there is an interaction among the different legal orders. This concept has far-reaching consequences for the understanding of constitutional law: any given constitution does not set up normative *universum* anymore but is, rather, an element in a normative *pluriversum*.[45]

The emergence of the ideas of legal pluralism to explain the relationship between EU law and national law has nuanced the original notion of primacy. As Maduro explains, constitutional pluralism propagated the idea that both the EU and national legal orders could coexist and could be conceived of as constitutional systems, even if it was

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[40] Neil MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 European Law Journal 259, 265.
[41] Kumm (n 32) 384. In fact, it has been stated that the theory of constitutional pluralism emerges as a response to the decisions of national constitutional courts. Baquero Cruz (n 34).
[42] Leonardo Pierdominici, 'The Theory of EU Constitutionalism Pluralism: A Crisis in a Crisis?' (2017) 9 (2) Perspectives on Federalism <http://www.on-federalism.eu/attachments/262_download.pdf> accessed 24 October 2018.
[43] Armin von Bogdandy, 'Neither an international organization nor a nation State: the EU as a supranational federation' in Erik Jones, Anand Menon and Stephen Weatherhill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 765.
[44] ibid 769.
[45] Armin von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 International Journal of Constitutional Law 397, 401.

impossible to reconcile competing claims of authority.[46] In fact, he argues, not only the final authority question remains open, it should remain so.[47] Or as MacCormick contends, within a constitutionally plural territory, like the EU, it is possible that each constitutional legal order acknowledges 'the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another.'[48] In essence, constitutional pluralism has emerged as a theory to better understand the nature of a complex polity like the EU. In fact, as Kennedy admits, 'legal pluralism is not a fact about the world. It is a professional experience: the experience that things don't add up, that coherence fails, that incommensurability must be acknowledged.'[49] In effect, as Walker admits, 'the advent of multilevel constitutionalism is a product first and foremost of objective changes in the socio-political world rather than of innovation in the world of ideas.'[50] However, this does not deprive these concepts of their relevance and influence. Indeed, 'multilevel constitutionalism', a concept coined by Pernice, has contributed to the understanding of the constitutional structure of the European juridical space as a complex and inclusive unity.[51] EU law and domestic legal orders have been defined 'as two interdependent, interwoven and reciprocally influential parts of one unit.'[52] Maduro has argued that one aim of Europe's constitutional pluralism is to prevent constitutional conflicts: to adjust to each other.[53] Thus, Member States and EU both claim sovereignty, but try to avoid direct conflicts through making concessions to each other. In a related

[46] Miguel Poiares Maduro, 'The Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 67-68.
[47] ibid 75.
[48] MacCormick, *Questioning Sovereignty* (n 39) 102.
[49] David Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan View' (2007) 31 New York University Review of Law and Social Change 641, 641.
[50] Neil Walker, 'Multi-level constitutionalism: looking beyond the German debate' (2009) 8 LEQS Paper <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper8Walker.pdf> accessed 1 September 2018.
[51] ibid.
[52] Ingolf Pernice, 'The Treaty of Lisbon: Multi-level constitutionalism in Action' (2009) 2 WHI 26.
[53] Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed) *Sovereignty in transition* (Hart 2003) 531.

vein of argument, Barber has pointed out that European pluralist legal system arms national and EU law with weapons that may help ensure mutual respect and restraint.[54] As Craig points out, at present the resolution of the possible clashes between the norms is done through the ECJ's jurisprudence, in constant and tolerant dialogue with national courts, 'an intricate process':

> It entails a complex discourse in which the national courts have been able to structure their reaction to the European Court of Justice's jurisprudence in a way that is acceptable to them. It allows for points of difference to exist. It enables national courts, if they so wish, to qualify acceptance of Community law supremacy in certain respects by hypothesising situations in which they would not give unequivocal support to Community law supremacy.[55]

Weiler explains very nicely the ultimate reasons behind this choice in favour of constitutional tolerance, which he regards as one of Europe's most important constitutional innovations: the attachment of Europeans to their own national constitutional orders:

> Our national constitutions are perceived by us as doing more than simply structuring the respective powers of government and the relationships between public authority and individuals or between the state and other agents. Our constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a community or as a union.[56]

According to Weiler, this is why national courts have become even aggressive in their own constitutional orders defence. If it wants to last, the EU legal order cannot become a threat to national constitutions. As will be argued in chapter 4, Article 4(2) TEU and the way the ECJ is approaching the concept of national identity are an expression of this

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[54] Nick Barber, *The Constitutional State* (Oxford University Press 2010) 171.

[55] Paul Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7 (2) European Law Journal 125, 144.

[56] Joseph H. H. Weiler, 'On the power of the Word: Europe's constitutional iconography' (2005) 3 (2-3) International Journal of Constitutional Law 173, 184. Weiler argues further that this option in favour of constitutional tolerance embraces a civilizing strategy of dealing with the other: 'We acknowledge and respect difference and what is special and unique about us all as individuals and groups and also bridge differences in recognition of our essential humanity. The significant elements in this strategy are the maintenance, on the one hand, of the identity of the alien, who is not invited to be saved by becoming one of us, and the acceptance of the alien in his alienship, according him human dignity while preserving the boundaries between "I" and "the alien"'. ibid 187.

pluralistic and tolerant standpoint.[57] Legal pluralism, as opposed to the constitutionalist approach which assumes a single integrated legal system, emphasizes the separateness and distinctiveness of legal orders. It values the diversity and difference among different (international and national) normative systems and underlines the undesirability and implausibility of constitutional approaches which seek hierarchy between these systems.[58] And it encourages tolerance and mutual accommodation. In sum, it promotes a deferential attitude. This is the approach that probably defines at its best the current competing claims and judicial dialogue between the highest Courts of the different legal orders within the EU territory. This is also one the main hypothesis underlying this thesis: deference should be the guiding principle when approaching EU response to secessionism within EU Member States.

Needless to say, constitutional pluralism has also been put into question. Although it became an orthodox paradigm in the study of EU law, some have not accepted the constitutional narrative of the EU, which is the basis of EU constitutionalism.[59] Criticism

[57] Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1452.
[58] De Burca (n 5) 32.
[59] The ideas of constitutionalism beyond the state or multi-level constitutionalism have received some criticism by those who hold an essentialist conception of constitutionalism. Thus, there are authors who contest that the category of constitution is necessarily restricted to and deeply embedded in the nation-State concept. For instance, Dieter Grimm argues that constitutionalism is bound to the state in the sense that its comprehensively validity claim was territorially limited from the beginning: 'Although the idea of constitutionalism claimed universal validity, it was realized in the particular, in different states, from the start.' Therefore, '[t]he decline of statehood places not individual constitutions but constitutionalism as such in question.' For him, however, the more important question is whether constitutionalism can be transferred to the international level: 'the question is whether the constitution, as a form of the juridification that originally referred to the state, can be detached from it and transferred to non-state political entities that exercise public power.' According to Grimm, the European Union experience lacks one essential element that prevents constitutionalism within the EU: its democratic origin, since the public power the EU exercises emanates not from the people, but from the Member States. Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 Constellations 447, 453-459. Loughlin, for example, underlines the alleged legal inconsistencies of constitutional pluralism: 'Constitutional pluralism fails both to provide evidence for its claims about the nature of existing relations between member states and the EU and to offer a coherent account of a sustainable future state. Its so-called empirical claims amount to a catalogue of unsubstantiated assertions about the 'autonomous' nature of EU institutional arrangements and a conflation of the concepts of legal with constitutional ordering. Its normative claims lead either to a radical claim of openness that undermines the basis of its own authority or to a modified 'pluralism under international law' that turns out to be monist rather than pluralist in nature.' Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 (1) Global Constitutionalism 9, 29.

has become particularly acute after the Euro-crisis and the austerity measure triggered by EU institutions and the emergence of legal and political conflicts with Central and Eastern European Member States, where some EU law provisions are finding it hard to be implemented. However, all in all, and despite the flaws and the controversies, it is difficult to deny that constitutional pluralism is the theory that is best able to describe the current state of affairs of EU constitutionalism. It retains, therefore, its strong empirical claim. It depicts the European phenomenon of a plurality of constitutional sources and claims of ultimate authority, and the inherent potential constitutional conflicts that are not hierarchically regulated.[60]

When referring to European constitutionalism we are implicitly admitting that it is the society, not the state, whose order is secured by a constitution. In this sense, constitutionalism is not only about an original constituent power of a people, something that is needless to say missing at the EU level, but about limiting the power and securing rights of peoples within different political authorities. The very existence of the EU (and also other elements of the current 'postnational constellation'[61]) puts into question the Westphalian model of constitutional statehood and requires a notion of constitutionalism beyond the State or multilevel constitutionalism. Again, constitutional pluralism is not so much about what it should be, but about describing and reflecting accurately the problems of authority and community within the EU territory.

2. Definition of Secession

In this second part of the chapter, the notion of secession will be considered. How can it be legally understood? What are the different types of secession? A clear understanding of these notions will clarify the further discussion throughout the thesis.

[60] Pierdominici (n 42).
[61] Jürgen Habermas, *The Postnational Constellation* (MIT Press 2001).

2.1 Secession in International Law

There is no officially recognized definition of secession, but there is an extensive scholarly debate. One conclusion of such debate is that there is little consensus among scholars on a precise definition.[62] What is clear, though, also from its Latin linguistic roots, is that secession is associated with leaving or withdrawing from a place.[63] From an international law approach, secession is the ultimate challenge to state sovereignty, since it involves the creation of a State by the dismemberment in whole or in part of an existing state. This explains the limited scope of the right to self-determination under international law, as we will see in chapter 2. Secession is a process, it 'is not an instant fact. It always implies a complex series of claims and decisions, negotiations and/or struggle, which may -or may not- lead to the creation of a new State.'[64]

Some scholars consider that secession requires the use or threat of force and the lack of consent of the former sovereign.[65] In this regard, Crawford offered a definition that has become classic and reads as follows: secession is 'the creation of a State by the use or threat of force without the consent of the former sovereign.'[66] In fact, this has been usually the case in history: secession has occurred against the will of the parent State and very often through violent means. Others prefer to omit the references to the use of force and define secession as 'the unilateral attempt of one section of the polity to dissociate itself from the rest.'[67] In both cases, however, 'unilaterality' is a key characteristic. Other

[62] Peter Radan, 'Secession: A Word in Search of a Meaning' in Aleksandar Pavkovic and Peter Radan (eds), *On the way to Statehood, Secession and Globalization* (Ashgate 2008) 17.
[63] ibid 18.
[64] Marcelo G. Kohen, 'Introduction' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2012) 19.
[65] James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 375.
[66] ibid 375.
[67] David Haljan, *Constitutionalising Secession* (Hart 2014) 14. Also, John Dugard, 'A legal basis for secession – relevant principles and rules' in Julie Dahlitz (ed), *Secession and International Law* (T.M.C. Asser Press 2003) 89.

authors, on the other hand, believe that secession can encompass also those processes whereby consent of the former parent State is granted, the so called 'consensual secession' or consensual dissolution of the polity.[68] Thus, Radan prefers a 'definition of secession [that] extends secession beyond unilateral secession. It includes the creation of new states out of existing states by consent of the existing states.'[69] Finally, some authors believe that decolonisation cases fall within the definition of secession, while others exclude all such cases of state creation from their definitions of secession.[70]

In order to encompass a broad range of scenarios, but accepting the most common and broad meaning, let us assume for now that secession involves the creation of a State by the dismemberment in whole or in part of an existing state. Although we will explore the international legal debate around secession in depth in the next chapter, including the relationship between the right to self-determination and secession, we should already make clear that secession is not prohibited or promoted by international law, except for very particular cases, where i) independence has been gained through the violation of basic principles of international law or ii) secession is a right entitled to concrete political communities. Beyond these concrete cases, the main legal discussion around secession is to be found in constitutional law.

2.2 Secession in Constitutional Law

From a constitutional law standpoint, secession implies much more. From the nation-State perspective, 'a secession crisis is quintessentially a situation of constitutional disorder'[71]. Disorder is constitutionally an appropriate word to define secession for the

[68] Peter Radan, 'Secessionist Referenda in International and Domestic Law' in Matt Qvortrup (ed), *Nationalism, Referendums and Democracy. Voting on Ethic Issues and Independence* (Routledge 2014) 10.
[69] ibid.
[70] For instance, Radan accepts decolonisation cases as secession cases. Radan, 'Secession: A Word in Search of a Meaning' (n 62) 23.
[71] Haljan (n 67) 9.

following reasons. Many countries, some of them well-functioning democracies, declare in their written Constitutions the indivisibility of the country. This is so in for example the USA, France, Italy, Australia or Spain. The ultimate reason on which such indivisibility is based is the bond that unites the citizens and regions within a country, namely solidarity within a secular political community.[72] All citizens owe to each other a certain amount of solidarity (mutual help, assistance) to their fellow countrymen. The basis of modern communities, their essential nature as polity, is precisely the co-operative effort of intertwining of commitments, benefits and burdens. Or as Haljan puts it, what binds us to the state is the fairness principle:

> Insofar as an individual enjoys benefits arising out of a political association [e.g. physical protection and minimal care], that individual is also morally bound to assume the burdens consequent upon such an association, the chief of which is to obey the laws of the association [e.g. redistribution of wealth].[73]

But what if a group of citizens reject unilaterally, for whatever reasons[74], such bonds?

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[72] Stephane Dion justifies his opposition to secession within a well-functioning democracy invoking a similar idea: 'The democratic ideal encourages all the citizens of a country to be loyal to each other, regardless of language, race, religion or regional considerations. Secession asks the opposite of citizens, asking them to break the solidarity that unites them, and to do so, almost always, based on considerations related to specific affiliations, such as language or ethnic origin. Secession is that rare and unusual exercise, in a democracy, whereby a choice is made as to which ones of our fellow citizens we want to keep and which ones we wish to transform into foreigners.' Stephane Dion, 'Secession and Democracy: A Canadian perspective' (*Real Instituto Elcano*, 9 April 2013) <http://www.realinstitutoelcano.org/wps/wcm/connect/fdf4b5804f3b281e9521df09dfd350c4/Stephane-Dion-secession-democracy-Canada.pdf?MOD=AJPERES&CACHEID=fdf4b5804f3b281e9521df09dfd350c4> accessed 19 August 2018.

[73] Haljan (n 67) 95.

[74] There are different reasons given by the various pro-independence movements across EU Member States to justify their secessionist aspirations. Very often economic reasons or the rejection of solidarity bonds are the basis of the movements (that is why the majority of strong pro-independence movement are to be found within advanced regions). However, economic reasons tend not to be enough to mobilize a political community against a well-functioning democracy. There are usually other reasons linked to self-recognition and national identity of minorities. In a State with a significant minority, such minority might ask itself if it is seriously taken into account by the majority, if the majority cares about them. Is the majority able to recognize legally and symbolically certain characteristics of the minority that make it different from the rest? If such recognition is not perceived by the minority, it feels marginalized and ignored. See Charles Taylor, *Acercar las soledades* (Tercera Prensa-Hirugarren Prentsa 1999) 301. Taylor also explains why such recognition is so important for minorities. According to the communitarian philosophy, man is not an isolated atom in society, but a 'self' inserted into the community. Personality is being made through permanent dialogue with the others. In Taylor's point of view, human identity is forged by the interactions with the others, the 'significant others'. Charles Taylor, *La ética de la autenticidad* (Paidós 1994) 68. A healthy identity requires the recognition on the significant other's part. Thus, the social and political community plays a constitutive role in defining human's identity. The recognition or the lack of it will

> A secession crisis arises when a section of the polity purports to reject the established constitutional order and to substitute itself as sole political and legal authority over a defined territory.[75]

Secession challenges some of the most basic values and assumptions of liberal theory related to autonomy, consent and democracy.[76] As Buchanan argues, '[i]f democracy is popular sovereignty, government by the people, then secession might be seen simply as the effort of various peoples to govern themselves, to be politically self-determining in the most literal sense, by forming their own states.'[77] There is an extensive philosophical debate on the morality of secession, but leaving aside legitimacy and justice considerations that go beyond the limits of this thesis, from a legal standpoint what seems clear is that it constitutes a constitutional crisis, a moment of constitutional disorder. This is something that we will have to bear constantly in mind when exploring and finally justifying the EU deferential approach to national constitutional legal orders facing pro-secession attempts.

The connection between the American Civil War and secession resulted in a political demonization of secession, and its configuration as being incompatible with constitutionalism.[78] In the last decades, however, the emergence of peaceful pro-secession movements within well-functioning democracies and the 1998 Supreme Court Canadian opinion, which will be explained in more detail in chapter 3, resulted in a change of constitutional paradigm[79], by admitting the possibility of constitutionalising

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determine if such identity can be lived naturally or in a conflictive way. Taylor argues that the lack of recognition may distort or oppress, which can ultimately promote the emergence of pro-secession movements. ibid 84.

[75] ibid.

[76] Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 34.

[77] Allen Buchanan, 'Democracy and Secession' in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 15.

[78] Susanna Mancini, 'Secession and self-determination' in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 494.

[79] Alberto López Basaguren, 'Estado democrático y secesión de territorios. Un análisis comparado sobre el tratamiento democrático de las reclamaciones secesionistas' in Joseba Arregi Aranburu (ed), *La Secesión de España* (Tecnos 2014) 51.

secession.[80] Other European Constitutional Courts, in turn, still hold valid the classic US paradigm, as we will see. In any event, as Haljan explains, constitutionalizing secession is not so much about establishing a unilateral procedure or a right that offers a route for secession to a particular group[81], but about opening a national debate, a process of deliberation and negotiation that at the end might imply rejection, modification or acceptance of secessionist claims.[82] In sum, each national legal order will decide by itself the lawfulness of secession (chapter 3).

2.2.1 Relationship between secession and self-government

After this literature review concerning the definition of secession, the focus shifts to whether there is any relationship between self-government and secession. This is relevant because although EU law does not refer to secession, it does establish the EU obligation to respect the regional and local self-government structures of Member States (Article 4 (2) TEU). The concept of regional and local self-government within EU Member States is different in constitutional terms from secession, since self-government refers to different tiers of government, central, regional and local, over a defined territory,[83] while secession, on the contrary, as it has been explained, is aimed at the sole sovereign power in a given territory and polity.

First, one should recall, as the Committee of the Regions has stated, that 'the EU Member States are under no obligation to choose a particular model for their institutional structure or for the devolution, transfer or sharing of powers between the different models of governance, but points out at the same time that the EU also respects regional and/or

[80] *Reference re Secession of Quebec* [1998] 2 SCC 217, para 88.
[81] This thesis of including a right to secede in national Constitutions has been advocated by some legal scholars, as will be explained in chapter 3.
[82] Haljan (n 67) 249.
[83] This distinction is related to the federal principle, described classically as 'the method of dividing powers so that the general and regional governments are each within a sphere co-ordinate and independent.' Kenneth C. Wheare, *Federal Government* (4th edn, Oxford University Press 1963) 11.

local self-government, as highlighted, in particular, in Article 4(2) TEU.'[84] Therefore, the unitary, regional or federal character of the Member State is a decision to be taken by the Member State concerned, without the EU promoting any particular trend.

Second, if regional self-government is recognized by a Member State, what are the limits of such self-government? Is secession permitted? Should, therefore, the EU promote it or at least protect it? In this regard, it is noteworthy to invoke the 2001 Opinion of the Committee of the Regions concerning a European Charter of Regional Self-Government, where it is established that '[t]he definition of regional self-government recognises the existence of an intermediate tier between central government and local authorities. The task of determining the division of decision-making powers between national, regional and local authorities is a matter for national authorities.'[85] Therefore, one could argue that national legal orders establish the limits of regional self-government, whose scope and characteristics are constrained by the law and, particularly, by the Constitution. As will be explained in depth in chapter 3, with the partial exception of Northern Ireland, there is no EU Member State constitutional legal order entitling regional entities to unilaterally secede. Thus, there is no EU obligation to protect a provision, a hypothetical secession clause, which has not been included by EU Member States.

2.2.2 Consensus (and lack of) and lawfulness (and lack of) related to secession

As has been already stated, the main claim of the thesis developed in chapter 4 is that EU law, based on Article 4 (2) TEU, should defer to national constitutional law, as long as the national legal order complies with the values enshrined in Article 2 TEU. It will be

[84] Committee of the Regions, 'Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery' 2013/C 139/08.
[85] Committee of the Regions, 'Recommendation of the Congress of Local and Regional Authorities of Europe on a European Charter of Regional Self-Government' 2001/C 144/02.

argued that if domestic law considers that secession is unlawful and non-consensual, EU law should respect that position by not recognizing the statehood of the secessionist entity. As will be explained in chapter 4, this is exactly what occurred in October 2017 when the regional Catalan government declared unilaterally its independence. Our argument is that the EU response was in accordance with EU law. If, on the contrary, the domestic legal order has authorised the secessionist attempt (consensual and lawful secession), EU law should respect that outcome by recognizing the new entity as a sovereign State and by entering into good faith negotiations. In order to facilitate the discussion, it is necessary to address some basic legal precepts such as consensual and non-consensual secession, and lawful and unlawful secession. Note also that this thesis is solely focused on the response to secession within the EU. Therefore, we will be approaching secession assuming that it occurs within an EU Member State, a well-functioning democratic State. If the EU Member State does not behave like a well-functioning democracy, namely, it violates values enshrined in Article 2 TEU, we would be facing a different scenario, where the Article 7 TEU mechanism should be triggered.

The key here is, firstly, to distinguish between the concepts of consensus and lawfulness. They both refer to two different levels of analysis. Constitutional consensus touches upon the values and goods reified through deliberative process into institutions and legal concepts included in the constitutional order.[86] Consensus is related to the formation of the democratic will, the commitment and pact of a plural polity.[87] Except in the United Kingdom, in constitutional liberal democracies this pact tends to crystallize in a written Constitution, interpreted by a Constitutional or a Supreme Court. In modern constitutional terms, consensus tends to equate with the principle of democracy. Yet, the democratic will, the principle of democracy, as the Canadian Supreme Court stated in

[86] Haljan (n 67) 46.
[87] Miguel Herrero de Miñón, 'La Constitución como pacto' (1998) 44 Revista de Derecho Político 17, 19.

1998 'cannot exist without the rule of law,'[88] which means that consensus requires lawfulness. The will has to be subject to the legal procedure: '[i]t is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented' held the Canadian Court.[89] 'Democratic institutions must rest, ultimately, on a legal foundation.'[90] In constitutional democracies, the democratic will, the agreement, the consensus will not be legitimate outside the law, but equally, 'a system of government cannot survive through adherence to the law alone. […] The system must be capable of reflecting the aspirations of the people. […] A functioning democracy requires a continuous process of discussion',[91] in order to achieve a conciliatory interaction between the democratic consensual will and the law. Lawfulness, or to be more precise, lawfulness in a democratic State also requires consensus. In sum, in a well-functioning democracy, consensus and lawfulness should go hand by hand.

As for secession, a) a consensual secession can be defined as a secession agreed upon between the parent State and the regional seceding government. The agreement can be reached during the process or afterwards (for instance, in the case of supervening political recognition); b) non-consensual secession refers to the lack of agreement between the parent State and the regional seceding government; c) lawful secession refers to the scenario where secession is conducted following a certain legal procedure. Subject to limited exceptions (explored in chapter 3), national legal orders do not foresee any procedure or right for secession. However, several Supreme and Constitutional Courts have argued that in the event of a political agreement to accept secession, there is a need to amend the constitution in order to include a formal procedure and subject the secessionist bid to the law. In EU Member States, where the reform of the Constitution

[88] *Reference re Secession of Quebec* (n 80) para 67.
[89] ibid.
[90] ibid.
[91] ibid.

tends to require wide consensus[92] (with the exception of the UK), lawful secession will imply consensual secession; d) unlawful secession is one conducted against the national legal order, and probably also against the will of the parent State, of the national legal order, i.e. revolutionary or unilateral secession. Usually, unlawful secession implies non-consensual secession. As seen, when referring to lawfulness, we are adopting the constitutional law point of view, since international law barely refers to secession beyond the extraordinary scenarios that will be explained in chapter 2.

In practice, consensual secession tends to be lawful and non-consensual secession tends to be unlawful. The Catalan secessionist movement (see chapter 3) is an example of non-consensual and unlawful secession (prohibited by Spanish legal order), like the Crimean case, outlawed by the Ukrainian legal order (see chapter 6). Montenegro (see chapter 6) was an example of consensual and lawful secession (permitted by the State Union of Serbia and Montenegro legal order), as the European Council expressly admitted. Scotland (see chapter 3) would have been an example of consensual and lawful secession (permitted by the British legal order). However, it is necessary to explore the possibility of other scenarios to facilitate the discussion in chapter 4, where the principal claim of the thesis is tested. The present chapter is not the appropriate place to discuss the EU response to the different scenarios, which will be further explored in chapter 4, but to clearly elaborate different hypotheses, even if they might look like far-fetched scenarios. Thus, here we will then refer only to the contours of the scenarios.

[92] As the Venice Commission stated '[i]t is a fundamental feature of all written constitutions (unlike ordinary statutes) that they contain provisions for amending themselves. In almost all constitutions such change is more difficult than with ordinary legislation, and typically requires either a qualified parliamentary majority, multiple decisions, special time delays or a combination of such factors. Sometimes ratification by popular referendum is required, and in federal systems sometimes ratification by the entities.' Venice Commission, 'Report on Constitutional Amendment', CDL-AD (2010) 001, para. 6.

Consensual but unlawful secession

A consensual but unlawful secession connotes the idea that the legal framework requires a certain procedure or plainly outlaws secession, but the central government nonetheless reaches a political deal with the secessionist entity. This could generate a constitutional crisis in that Member State,[93] since, by definition, the constitutional identity of the country is in the making, and there is a profound mismatch between the legal order and the political legitimacy that has to back it: a transitional constitutional moment. The fact that constitutional change, or mutation, can occur outside the formal amendment process is not an alien idea for constitutional scholars, nor for EU lawyers.[94] Based on his theory of dualist democracy, Ackerman famously argued that major constitutional shifts can occur outside the amendment process, 'when political movements generated mobilized popular consent to new constitutional solutions.'[95] The Venice Commission also points out that '[f]ormal amendement is not the only form of constitutional change, and in some systems not even the most important. Leaving aside revolutionary or unlawful acts, the two most important alternative ways of legitimate constitutional change are through judicial interpretation and through the evolvement of unwritten political conventions supplementing or contradicting the written text.'[96] In this scenario of constitutional transformation, there are basically two options: i) either no one challenges the situation

[93] Although this is, in principle, a difficult scenario to imagine, in fact it resembles to what occurred with the dissolution of Czechoslovakia, as explained in chapter 6. In this hypothetical scenario, the constitutional legal order of the country concerned has failed to fulfil its function of comprehensively juridifying public power, since the Constitution has lost acceptance. Grimm (n 59) 453.

[94] Agustín José Menéndez, for instance, reminded that '[t]he ongoing European constitutional transformation is the cumulative result of decisions, which have not been adopted through 'standard' supranational Treaty amendment processes or national constitutional reform processes, but taken off the beaten constitutional track through ordinary law-making procedures, through peculiar intergovernmental negotiations and last but not least, through the toleration of new institutional practices.' He insisted that '[i]t could well be argued that unconventional constitutional reform is as European as stopping the clock in the meetings of the Council of Ministers or European Councils ending in the small hours.' Agustín José Menéndez, 'Editorial: A European Union in Constitutional Mutation?' (2014) 20 (2) European Law Journal 127, 127.

[95] Bruce Ackerman, *We the People. Foundations* (Harvard University Press 1991) 31.

[96] See Venice Commission, 'Report on constitutional amendment' (n 92).

and there is no High/Supreme/Constitutional Court denouncing, for the time being, the unlawful situation, or ii) the deal and/or its consequences are challenged before a Court.

In the first scenario, we are faced with evolution of the constitutional order. The constitutional order cannot be explained solely by the letter of the Constitution or the case law of the Highest Courts, but also by the laws and regulations that apply and interpret it. And, mainly, by the political consensus upon which the constitutional order is built. As the Canadian Supreme Court recently stated:

> The Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture, that modify the meaning of the constitutional text.[97]

Once the deal is consolidated (either ultimately through a formal amendment or without it), the constitutional identity of the country has changed, has evolved.

In the second scenario, if the Court confirms the unlawfulness of the deal, the political players will be forced to undertake the constitutional foreseen amendment procedures. The Court has also another option. Under the common-law doctrine of 'effectiveness' a Court can exercise a supra-constitutional jurisdiction in determining whether a revolutionary act (secession against the law might be considered a revolution) ought to be given legal recognition. In this regard, it would be important to explore the question of popular support to the new constitutional framework and whether a majority of the people are behaving, by and large, in conformity with the new reality.[98] In both cases there is constitutional identity in transition.

[97] *Reference re Senate Reform* [2014] 32 SCC 704, 706.
[98] George Williams, 'The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji' [2001] Oxford University Commonwealth Law Journal 73, 85-86.

Non-consensual but lawful secession

A non-consensual but lawful secession is an even more difficult scenario to imagine, since within the EU there is only one country, namely the United Kingdom, where there is a partial recognition of a right to secede, e.g. a route to secession legally foreseen. As will be further explained in chapter 3, we are referring to the legal obligation contained in Article 1 of the British-Irish Agreement ('BIA') of 10 April 1998 as for the right to self-determination in Northern Ireland. If the conditions established in the Agreement reached in the Multi-Party Talks (a political agreement annexed to the BIA and, therefore, part of the text of the BIA) are met (those conditions will be explained in chapter 3), but the British government refuses to authorize the organization of the referendum, we might end up facing a situation where the British constitutional legal order is entitling a collective right whose fulfilment is denied by the central government due to a lack of political will or consensus. In such scenario, there would be a violation of the constitutional order by the Member State concerned. In this regard, the EU will have to distinguish the type and extent of the unlawfulness and act accordingly.

Non-consensual, unlawful secession but widely supported secession move

A non-consensual, unlawful secession, but one which is widely supported, is another hypothesis that should be tested. What kind of situation are we referring to? We have in mind a situation where a large part of a national polity, usually concentrated in a region, rejects by some significant margin[99] the current constitutional legal order and advocates secession. In other words, a situation where over time there is a repeated and sustained support for independence in regional elections, where pro-independence parties obtain at least more than fifty percent of popular support, but the constitution rejects independence

[99] Following the Canadian clarity doctrine, explained in chapter 3, this will imply more than just fifty percent of the population concerned.

and the central government refuses to negotiate any accommodation formula.[100] In Europe, this is an unknown scenario. In Catalonia, for instance, as will be explained in chapter 3, pro-independence parties have never obtained more than fifty per cent of popular support. However, we should not dismiss this scenario in the future.

Conclusion

This chapter has established the necessary legal frame by clarifying some of the concepts that underpin the thesis. Throughout this thesis, we will be invoking international law provisions that might affect EU institutions and Member States behaviour. We will also be referring constantly to internal legal orders. It was therefore necessary to explore the relationship between these orders and also the different types of secession.

[100] Josep Maria Castellà, 'Sobre el encaje constitucional del pretendido referéndum de secesión en Cataluña' in Eva Sáenz and Carlos Garrido (eds), *La Funcionalidad del Referéndum en la Democracia Representativa* (Tirant Lo Blanch 2017) 152.

Chapter 2: International law regarding secession

Introduction

The aim of this chapter is to contribute to the research question with analysis of international law in relation to secession. It will be shown that the classic position of international law concerning secession was that of neutrality. However, this changed since the second half of the 20th century with the emergence of the right to self-determination that included a right to independence under certain circumstances (which can be viewed as an 'improper'[1] right to secession). In particular, this right refers to non-self-governing units in the context of decolonization, alien subjugation and presumably apartheid. Today there is a considerable scholarly debate surrounding the evolution of this right and whether and to what extent it has evolved enough and now includes other types of sub-national units beyond the colonial paradigm. In effect, the revival of secessionist movements in many parts of the world raises the question of whether there exists a right to secede under international law.[2] As we will see, no international treaty recognizes such a right, there is not enough practice and there is no consensus among States. Therefore, it cannot be said that international law has extended a right to secession beyond the abovementioned scenarios. This chapter explicates the existing legal framework of secession in a discipline closely connected to EU law before analysing the position of EU law *vis a vis* secession. It does not try to present a comprehensive theory

[1] 'Improper' in the sense that usually colonial movements are excluded from the term 'secession': 'Decolonisation, the most important means of creation of new States during the second half of the twentieth century, was not viewed by the international legal order as a case of secession.' Marcelo G. Kohen, 'Introduction' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2012) 1. However, some authors believe that a broad definition of secession can also encompass colonial movements, as we have explained in chapter 1. For instance, Peter Radan, 'Secession: A Word in Search of a Meaning' in Aleksandar Pavkovic and Peter Radan (eds), *On the way to Statehood, Secession and Globalization* (Ashgate 2008) 23.

[2] Photini Pazartzis, 'Secession and international law: the European dimension' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2012) 355.

on secession, but rather to explore to what extent EU law is subject to international legal obligations for the treatment of secession within the EU. Is EU law constrained by international law in its approach to secession?

1. International law and secession

As explained in the previous chapter, Crawford offered a classic definition of secession in international law by virtue of which secession could be considered as 'the creation of a State by the use or threat of force without the consent of the former sovereign.'[3] However, other scholars prefer to omit the references to the use of force[4] and some even argue that secession can encompass also those processes whereby consent of the former parent State is granted, the so called 'consensual secession' or consensual dissolution of the polity.[5] In order to encompass a broad range of scenarios, we will assume, as noted in chapter 1, that secession involves the creation of a State by the dismemberment in whole or in part of an existing state, with or without the consent of the parent State.

1.1 Secession as a legally neutral act in Public International Law

The orthodox and classic position is that secession, broadly considered, is a matter of fact where international law should remain neutral. Lauterpacht says that '[i]nternational law does not condemn rebellion or secession aiming at the acquisition of independence.'[6] According to Crawford '[t]he position is that secession is neither legal nor illegal in

[3] James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 375.
[4] David Haljan, *Constitutionalising Secession* (Hart 2014) 14. The same here: 'I prefer to see secession as the unilateral withdrawal of part of an existing State from that State without the consent of the government of that State. Secession by agreement is better described as dissolution of a State.' John Dugard, 'A legal basis for secession – relevant principles and rules' in Julie Dahlitz (ed), *Secession and International Law* (T.M.C. Asser Press 2003) 89.
[5] Peter Radan, 'Secessionist Referenda in International and Domestic Law' in Matt Qvortrup (ed), *Nationalism, Referendums and Democracy. Voting on Ethic Issues and Independence* (Routledge 2014) 10.
[6] Hersch Lauterpacht, *Recognition in international law* (Cambridge University Press 1947) 8.

international law, but a legally neutral act the consequences of which are regulated internationally.'[7] Cassese agrees and argues that

> international law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach the legal consequences depending on the circumstances of the case.[8]

The League of Nations clearly stated the position of international law in the 1920s: international law has nothing to say when it comes to separation claims:

> Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is exclusively an attribute of the sovereignty of every State which is definitely constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of [the] sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term 'State', but would also endanger the interests of the international community.[9]

Musgrave summarizes this traditional position as follows:

> Secession is a domestic matter, and therefore a legally neutral act in international law. […] Although secession produces consequences in international law when a new state is formed, the act of secession itself is essentially political rather than legal in nature. As a political act, secession cannot be characterized by legal formulations.[10]

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[7] Crawford (n 3) 390. Crawford explains that in effect classic international law followed a non-legal approach, but an efficacy principle: 'nineteenth-century practice […] established that a seceding territory could properly be recognized as a State if it governed its territory effectively and with sufficient stability, such that there was no real likelihood of the previous sovereign […] reasserting its position.' ibid 382.

[8] Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge University Press 1995) 340.

[9] 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question', (1920) Official Journal of the League of Nations (3) 5. Cassese explains why the Aaland Islands dispute did fall within the jurisdiction of the League of Nations: 'This was not because of any alleged 'right' to self-determination which outweighed issues of State sovereignty but because Finland, only recently liberated from Russian control, in the International Committee of Jurists' Opinion, 'had not yet acquired the character of a definitively constituted State' and was not an independent member of the international community.' Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 29.

[10] Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford University Press 1997) 210.

Some would allege that international law is predicated upon the idea of the nation State[11] and that the principle of territorial integrity is one of the most fundamental and well-established principles of international law. In this sense, 'secession is the antithesis of territorial integrity',[12] which includes an implicit prohibition of secession. Therefore, international law should not remain neutral, but prohibit secession. This was the argument advanced by Russia and Serbia before the ICJ when the ICJ was deciding upon the 2010 Kosovo Advisory Opinion. However, the ICJ responded that such principle is only opposable to third States, not to political units within the State, following the thesis submitted by the US, among others. In effect, the Court established that the principle of territorial integrity does not apply to groups within a state: 'the scope of the principle of territorial integrity is confined to the sphere of relations between States.'[13] Thus, it could be understood that 'international law does not protect states from disaggregation from within. Action which would be prohibited if committed by other states is left unregulated by international law when committed by non-state actors.'[14] Interestingly, the ICJ reformulated the question asked by the General Assembly: from 'is the Declaration of independence in accordance with international law?' to 'does the Declaration violate international law?'[15] As the Court noted,

> The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away

[11] Rosalyin Higgins, 'Self-determination and secession' in Julie Dahlitz (ed), *Secession and International Law* (T.M.C. Asser Press 2003) 23.
[12] Musgrave (n 10) 181. In fact, it is by reason of territorial integrity that the international community does not recognize a general right of secession. Antonio Cassese, *International Law* (Oxford University Press 2003) 113.
[13] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010* 403, para 80. Before this 2010 Opinion, scholars used to discuss the internal application of the principle. Marc Weller, 'The international response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 (3) The American Journal of International Law 569, 572.
[14] Christian Walter, 'The Kosovo Advisory Opinion. What It Says and What It Does Not Say' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 22.
[15] ibid 24.

> from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.[16]

The formula chosen by the General Assembly ('in accordance with') seemed to presuppose that the issue is regulated by law: it must be either allowed or prohibited. The ICJ's formula ('not in violation of') does not presuppose such regulation. The reformulation merely reflects the approach taken by the Court: since the international legal principle of territorial integrity is not applicable to non-state actors, and since no other international legal norms are applicable to the case, international law is silent. A positive ruling holding the declaration in question to be 'in conformity with' international law is therefore excluded.[17] That is why some authors have considered that the ICJ Advisory Opinion was read to mean that the judgment of whether a political entity is a sovereign state was not a genuinely normative judgment.[18] In effect, if one takes a look at the following paragraph, it seems that the success of a declaration of independence had little to do with the normative support behind it:

> During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. State practice during this period [eighteenth, nineteenth and early twentieth centuries] points clearly to the conclusion that international law contained no prohibition of declarations of independence.[19]

[16] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 13) para 56.
[17] Walter (n 14) 25.
[18] Stefan Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession' in in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 49
[19] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 13) para 79.

It is true, however, that in some cases (e.g., Katanga, Southern Rhodesia, the Turkish Republic of Northern Cyprus) the UN Security Council has characterized secession as illegal[20]. However,

> [i]n all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact they were, or would have been connected with the unlawful use of force or other egregious violations of norms of general international law.[21]

In conclusion, since the 2010 release of the ICJ Advisory Opinion on Kosovo there is a wide consensus among international lawyers that secession, even without the consent of the parent State, is not prohibited by general international law. However, is there any right to secession under international law? Is there any legal obligation that the EU should be aware of?

1.2 Right to secede recognized in certain circumstances

It has been shown until now that international law used to remain neutral when it comes to secession. This was in effect the classic orthodox position. But this is not the case anymore. Under certain circumstances, international law abandons its neutrality and recognizes a right to become a sovereign, independent State. This became evident since the end of the WWII with the appearance of the right to self-determination that created a

[20] In effect, UN Security Council referred to secessions of Katanga and Southern Rhodesia as illegal. For instance: UN Security Council Resolution 169 (1961), of 21 February, '[s]trongly deprecates the secessionist activities illegally carried out by the provincial administration of Katanga, with the aid of external resources…'; UN Security Council Resolution 216 (1965), of 12 November, '[d]ecides to condemn the unilateral declaration of independence made by a racist minority in Southern Rodhesia; 2. Decides to call upon all States not to recognize this illegal racist minority regime in Southern Rodhesia and to refrain from rendering any assistance to this illegal regime.'

[21] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 13) para 81. Crawford had already explained that after reviewing the debates of the cited resolutions, 'there is little or no reliance on legal rules prohibiting secession; rather, reference is made to the internal law of the metropolitan State. Any international concerns associated with secession movements relates to the existence of foreign intervention (as in Katanga) or the existence of a threat to international peace and security (as in Rhodesia).' Crawford (n 3) 390. See also UN Security Council Resolution 541 (1983), of 18 November, concerning northern-Cyprus and UN Security Council Resolution 787 (1992), of 16 November, concerning the Republika Srpska.

limited right to independence. In effect, as will be shown, the right to self-determination enables non-self-governing entities subject to colonial rule or alien subjugation to become independent from the metropolitan State. This right to independence has often been seen as a right to secede.

1.2.1 From the principle to the right to self-determination

This right emerged after WWII, but appeared in the international arena much earlier as a political principle. In fact, the philosophical principles behind the concept of self-determination can be traced back to the combined emergence of liberalism in the eighteenth century and of nationalism in the nineteenth century.[22] The principle of self-determination itself appeared on the international scene with the advent of the WWI and the Bolshevik Revolution. For US President Woodrow Wilson it was a key principle to build a lasting peace in Europe.[23] 'It was recognized that lasting, peaceful arrangements could be achieved only by clearing the way for the establishment of comprehensive national states and by recognizing the rights of occasional minorities within such States.'[24] Although the meaning remained vague and imprecise, it was understood as the proposition that every people should freely determine its own political status and its economic, social and cultural development.[25] The principle began to emerge in the wake

[22] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 11; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights* (revisited edn, University of Pennsylvania Press 1996) 27; Simone F. van Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* (Intersentia 2013) 35.

[23] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 13. Not everyone in the US government was satisfied with the appearance of the concept. Robert Lansing, the US Secretary of State who negotiated the 1919 Paris Peace Agreement, explained in his memoirs the reluctance he always had towards the expression: 'The more I think about the President's declaration as to the right of self-determination, the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and create trouble in many lands… The phrase is simply loaded with dynamite. It will raise hopes that can never be realised. It will, I fear, cost thousands of lives.' Robert Lansing, *The Peace Negotiations. A personal narrative* (Constable and Company Ltd 1921) 87.

[24] Markku Suksi, *Bringing in the people: a comparison of constitutional forms and practices of the referendum* (Martinus Nijhoff 1993) 241.

[25] John P. Humphrey, 'Political and Related Rights' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (1st vol, Oxford University Press 1984) 193. Still today, self-determination

of the plebiscites held in Europe after IWW.[26] However, it was applied inconsistently. 'Self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers.'[27] In fact, a great number of areas affected by the WWI were subject to change of sovereignty without carrying out any consultations with the people concerned.[28] Although the principle was well known in those years, it was not included in the Versailles Treaty. Self-determination as political principle only entered the realm of international law in 1945[29], when it was proclaimed in Articles 1(2) and 55 of the UN Charter. But even then, no clear legal obligation was imposed on States.[30] In effect, even after WWII 'self-determination evolved from a mere political principle into a legal entitlement. But the precise status remained ambiguous.'[31]

UN General Assembly Resolutions 1514 (1960), 1541 (1960) and 2625 (1970), adopted unanimously, defined the scope and meaning of the right. The right to self-determination was reserved for the so-called 'non-self-governing territories': territories geographically separated from the metropolitan State, ethnically distinct and politically subordinated to the referred State. These territories qualified to decide freely their destiny,

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remains a diffused and inspirational concept, with undoubted power and resonance in world politics, but without a conclusive agreement about its precise meaning. Alexander M. Johnston, 'Self-Determination in comparative perspective: Northern Ireland and South Africa' (1990) 17 (2) Politikon: South African Journal of Political Studies 5, 7. See also Xabier Arzoz and Markku Suksi, 'Comparing constitutional adjudication of self-determination claims' (2018) 25 (4) Maastricht Journal of European and Comparative Law 452, 453: 'On the one hand, the content of the right to self-determination remains insufficiently determinate, at best alleged.'

[26] Radan, 'Secessionist Referenda in International and Domestic Law' (n 5) 11. Markku Suksi explains previous historical examples of referendums linked to self-determination: 'One of the first instances where the population's right of self-determination […] might have had any practical implications was the annexation of Toul, Metz, and Verdun to France in 1552. It was probably the first time in such a context that a procedure was used which could be referred to as a referendum. During the seventeenth century, natural-law theorists, such as Grotius and Pufendorf, expressed the opinion that transfer of territory from one state to another required the consent of the people living on the territory in question.' Suksi (n 25) 238.

[27] Hannum (n 22) 28.

[28] Suksi (n 25) 243.

[29] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 65.

[30] ibid.

[31] Van Driest (n 22) 36.

either through integration within the colonial power, through a free association agreement or through independence, this latter being the mechanism chosen by the majority of the old colonies and the one mostly promoted by the UN.[32] In 1966 the legislative process culminated in the adoption of the two international covenants on Human Rights, the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Social, Economic and Cultural Rights ('ICSECR'), whose common Article 1 proclaimed the right 'of all peoples to self-determination'. At first glance, it might seem that the wording of the article was highly inclusive. However, how was that right understood and applied? Even well-known proponents of human rights like Eleanor Roosvelt warned about the risk of instability attached to such right: '[j]ust as the concept of human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos.'[33] The content of the right is analysed below.

1.2.2 Content of the right to self-determination: limited to colonial situations

Buchheit affirms that it would be a mistake to assume that Article 1 of both the ICCPR and the ICSECR meant the general acceptance of secession. On the contrary,

> Article 1 of the covenants appears in spite of its possible secessionist interpretation, rather than as a confirmation of that interpretation. The felt need for a strong, sweeping statement of the right to self-determination as a weapon against colonialism overcame the implorations of the Western powers for cautious draftsmanship.[34]

[32] Hanum explains the UN clear preference for independence: 'The clear preference for independence as the normal result of exercise of the right to self-determination is evidenced by detailed requirements for the free and informed consent of the peoples concerned if either free association or integration is chosen.' Hannum (n 22) 40.
[33] Eleanor Roosvelt, 'The Universal Validity of Man's Right to Self-Determination' (1952) XXVII (702) Department of State Bulletin 891, 919. Available at < https://babel.hathitrust.org/cgi/pt?id=msu.31293008121307;view=1up;seq=395> accessed 3 November 2016.
[34] Lee C. Buchheit, *Secession: The Legitimacy of Self-determination* (Yale University Press 1978) 84.

The *travaux préparatoires* show that the right was merely invoked for the liberation of colonial territories, not construed as implying a general new right of creation of States.[35] Thus, self-determination was a vehicle for decolonization, not an authorization of secession.[36] As Margaret Moore explains:

> Whereas self-determination in the Wilsonian period was conceived of as the political independence of ethnic or national communities – a conception that still has force today – the principle has been elaborated in international law in the post-Second World War period to make clear that the 'peoples' in question are not ethnic or national groups, but, rather, multi-ethnic people under colonial rule.[37]

In this regard, note the comments made by UN Secretary General U Thant at a press conference in Dakar on January 9, 1970 regarding the conflict between Biafra and Nigeria:

> You will recall that the United Nations spent over 500$ million in the Congo primarily to prevent the secession of Katanga from the Congo. So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocable [sic]. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.[38]

As Musgrave explains, this conflict illustrates the problems surrounding the proper meaning of self-determination:

> Nigeria maintained that the right of self-determination was simply that of decolonization in a non-self-governing territory, and that once this had occurred the territorial integrity of the emergent independent state was inviolable. Biafra, on the other hand, asserted that the right of self-determination was available to any people with a grievance, and that it included the right to secede.[39]

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[35] ibid 84. Note the reservation included by India: 'With reference to Article 1…, the Government of the Republic of India declares that the word 'the right to self-determination' appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.' To be found in the website of the UN Office of the Higher Commissioner for Human Rights: <http://indicators.ohchr.org/> accessed 20 October 2016. Hurst Hannum explains that such reservation 'represents in direct terms the view of many countries which support a restricted interpretation of self-determination' and that only three States filed objections to the Indian reservation. Hannum (n 22) 42.

[36] Buchheit (n 34) 87.

[37] Margaret Moore, 'Introduction' in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 3.

[38] (1970) VII (2) UN Monthly Chronicle 36.

[39] Musgrave (n 10) 197.

In addition, as it has been shown, the UN did not accept the position of Biafra. Thus, despite the references of 'all' peoples in the UNGA Resolutions and in the two International Covenants, in practice the right of self-determination has been limited to peoples under colonial or alien domination. No State has accepted the right of 'all' peoples to self-determination. In fact, it is the principle of national unity that has been almost universally followed by the international community, which, after all, is composed of states whose interest is to protect their own boundaries. 'State practice and the overwhelming view of States remain opposed to secession. Indeed, it seems that this is one of the few areas on which full agreement exists among all States.'[40] In effect, it became evident that the definition of peoples 'was that of non-European inhabitants of former colonies, without further regard for ethnicity, language, religion, or other objective characteristics of such colonized peoples (apart from the fact of colonization itself).'[41] Cassese reminds us that States have consistently opposed an understanding of the right to self-determination that goes beyond three areas: as an anti-colonialist standard, as a ban on foreign military occupation and as a standard requiring that those racial groups be given full access to government.[42] These two latter fields refer, basically, to the cases of Namibia when it was subject to military occupation and to the apartheid regime of South Africa. Apart from these two examples, 'a brief look into the historical evolution of the right of self-determination tells us that there is only one clear core area where the bearer of the right is beyond dispute: the case of decolonization.'[43]And decolonization referred to the whole territory under colonial rule. An example of this shared approach can be found in the view expressed by the British Foreign Minister in 1983 in Westminster when replying to a question about the problem of self-determination for Somalis in Ethiopia:

[40] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 123,124.
[41] Hannum (n 22) 36.
[42] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 319.
[43] Oeter (n 18) 53.

> Our position is one of support for the Organisation of African Unity policy of accepting the colonial boundaries inherited by the newly-independent African states: indeed, it has been widely accepted at the United Nations that the right of self-determination does not give every distinct group or territorial sub-division within a State the right to secede from it and thereby dismember the territorial integrity or political unity of sovereign independent States.[44]

African States, who were among the leaders in developing the post-1945 right in the context of decolonization, have been the ones adopting an extraordinary narrow interpretation. Because of the extreme ethnic heterogeneity of most African states and the resulting difficulties in developing a sense of statehood in the immediate post-independence period, the principles of territorial integrity and unity have been determined to be more fundamental than that of self-determination. As Pomerance says, the UN 'has opted for the *territorial* over the ethnic criterion'.[45] In effect, the 1964 Cairo Declaration of the Organisation of African Unity established as a principle the intangibility of borders inherited from colonisation. Thus, the idea of ethnic self-determination, or the creation of new nations out of the existing States, was rejected categorically by recently independent African states.[46] The fear was that the same right that had enabled their freedom would end up carving up their territory.[47] The conclusion is very simple: ethnic groups within States, indigenous populations or minorities have never been recognized as holders of a right to self-determination involving secession,[48] but only the colonial people as a whole.[49] Self-determination is a child of the UNGA and in the eye of the GA, as

[44] [1983] British Yearbook of International Law 409.
[45] Michla Pomerance, *Self-Determination in Law and Practice. The new doctrine in the United Nations* (Martinus Nijhoff 1982) 18.
[46] For instance, the 1963 Constitution of Senegal prohibited 'any act of racial, ethnic or religious discrimination and any regionalist propaganda prejudicial to the internal security of the State or to the integrity of the territory of the Republic.' This provision is still in force and can be found in Article 5 of the current Constitution of Senegal, proclaimed in 2001.
[47] 'It is precisely those States which benefited from the principle of self-determination when they liberated themselves from colonial rule, which now rank among the staunchest supporters of a strict interpretation of self-determination.' Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 318.
[48] Christian Tomuschat, 'Secession and self-determination' in in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2012) 34-37.
[49] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 331.

Tomuschat explains, 'external self-determination as a right to establish an independent State does not exist for ethnic communities which constitute integral elements of a sovereign State.'[50] Koskenniemi, for instance, admits (although in his view this is somehow arbitrary) the 'domestication' of national self-determination, since it is limited to decolonisation and Weller has recently pointed out that 'the immense power of the doctrine of colonial self-determination is however balanced by its restrictive field of application in the colonial context.'[51]

1.2.3 Recent cases of independence endorsed by the UN: delayed decolonisation

Recent cases of independence like the ones from East Timor and South Sudan, that have received the endorsement of the UN, do not reflect changes in the international law position regarding secession. Needless to say, these countries became independent because they received at some point, and for different reasons, the support of some powerful States. But their independence processes also had some normative support. It could be argued that both situations, considered by many as examples of secession, enjoyed a normative backing since both are cases of delayed decolonisation, and therefore cases that could fall within the scope of the UN right to self-determination.

East Timor

In the 190s the UN Security Council began to deal with the situation in East Timor, a former Portuguese colony until 1975 and then, immediately, Indonesia occupied the

[50] Tomuschat (n 48) 37.

[51] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 International and Comparative Law Quarterly 241, 242; Marc Weller, 'Secession and Self-determination in Western Europe: The Case of Catalonia' (*Blog of the European Journal of International Law*, 18 October 2017) <https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/> accessed 30 November 2018. See also Fabry: 'there is continuing general agreement that self-determination cannot be made into a universal positive right.' Mikulas Fabry, *Recognizing States. International Society and the Establishment of New States Since 1776* (Oxford University Press 2010) 220

territory.[52] In 1999 Indonesia, Portugal and the UN negotiated and signed agreements authorizing the people of East Timor to choose between autonomy within Indonesia and independence through a popular referendum. In a UN monitored referendum with huge turnout, out of 438,968 valid votes, 78.5 per cent were in favour of independence while 94,388 backed retaining ties with Jakarta.[53] Indonesia protested the results and backed violent militias to attack and intimidate the East Timorese. Indonesia was in the midst of a democratisation process, but still proved reluctant to surrender control of East Timor.[54] UN SC Resolution 1264 (1999) established a peace-keeping force and after some years of international transitional administration, East Timor finally achieved independence in 2002. Legally speaking, it is hard to talk about secession, since the UN Security Council had already in the 1970s admitted the 'inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples.'[55] The ICJ also confirmed the view that East Timor fitted in within the decolonization paradigm when in 1995, in a case between Portugal and Australia concerning maritime resources, it affirmed, after concluding its lack of jurisdiction, that '[t]he Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.'[56] Thus, clearly, the 1999 independence of East Timor cannot be considered a departure from the traditional UN doctrine on self-determination, but a reassurance, although delayed.

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[52] Milena Sterio, *The Right to Self-Determination under International Law. "Selfistans", secession, and the rule of the great powers* (Routledge 2013) 105.

[53] Security Council Press Release, 3 September 1999 Available at < http://www.un.org/press/en/1999/19990903.sc6721.html> accessed 24 January 2017.

[54] Sue Downie, 'The United Nations in East Timor: Comparisons with Cambodia' in Damien Kingsbury (ed), *Guns and ballot boxes. East Timor's vote for independence* (Monash Asia Institute 2000) 131.

[55] UN Security Council Resolution 384 (1975), of 22 December. See also UN Security Council Resolution 389 (1976), of 22 April.

[56] *East Timor (Portugal v. Australia),* Judgment, I. C.J. Reports 1995 90, para 37.

South Sudan

In 1947, the British colonial ruler decided to unite the North and the South Sudan into a single administrative unit, against the will of the Southerners[57] and despite their acute differences. The South (Christian or Animist black Africans) was considered more underdeveloped, rural and culturally unsophisticated than the North (Muslim Arab descendants). After independence in 1957, Sudan was a divided country. The South was ethnically, culturally, religiously and linguistically similar to Uganda, Ethiopia and Kenya rather than to the Northern Sudan.[58] The world began to look at Sudan in the 21st century, after an unsuccessful independence war fought by South Sudan in the 1960s and failed attempts to reach satisfactory political agreements.[59] In 2005 as a result of international pressure the Comprehensive Peace Agreement ('CPA') was signed. The CPA provided for autonomy in the South, as well as for the holding of referendum for self-determination on January 9, 2011.[60] The UN and the great powers became engaged in the referendum process, where an overwhelming majority of the population voted for independence. Sudan quickly recognized South Sudan as a new State. The recent independence of South Sudan and its quick incorporation into the international community as a sovereign and independent State cannot be confused with a broad acceptance of secession in international law.

First, the independence process was a consensual one. South Sudan counted on the backing of North Sudan. Secondly, as in the case of East Timor where the territory

[57] Riek Machar Teny-Dhurgon, 'South Sudan: A History of Political Domination – A Case of Self-Determination' (*University of Pennsylvania African Studies Center*, 19 November 1995) <http://www.africa.upenn.edu/Hornet/sd_machar.html> accessed 30 October 2016.
[58] '[T]he South Sudanese do not necessarily constitute a homogeneous people. More than religion or race, it is marginalisation and oppression by the North that has, throughout the years, forged unity among the Southerners.' Mupenda Wakengela and Sadiki Koko, 'The Referendum for Self-Determination in South Sudan and its Implication for the Post-Colonial State in Africa' (2001) 3 Conflict Trends 20, 25.
[59] After 9/11, the Western World became concerned of strong Muslim regimes. Furthermore, civil society movements, especially in the US, launched a media campaign to highlight the atrocities committed, allegedly with the support of Al-Bashir's government, in the region of Darfur. Sterio (n 52) 170.
[60] ibid 164.

was clearly considered a non-self-governing unit, it could also be argued that South Sudan was a case of delayed colonialism. 'It is possible to argue that the South Sudan's exercise of self-determination is a case of delayed decolonization: that South Sudan should have been granted independence at decolonization and should not have been incorporated into the larger state of Sudan.'[61]

1.2.4 How was self-determination read in Europe, outside the colonial context?

The European Convention on Human Rights and Fundamental Freedoms (1950) contains no provision regarding self-determination. Later, both the 1975 Helsinki Final Act[62] and the 1990 Charter of Paris[63] refer to the right to self-determination, since it had already crystallized as a key principle of international law. However, both documents emphasized the need to implement it in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States. How then to reconcile self-determination and territorial integrity? Europe turned its eyes to the concept of internal self-determination by promoting pluralistic democratic societies where minority rights are protected and promoted.[64] In effect, international organizations across Europe have promoted 'the development of *internal* self-determination, namely, the guaranteeing of democratic, representative government

[61] ibid 167. Having said that, although South Sudan independence might not have altered the state of the law, it should not be ignored the political impact of the process in the region. 'The quest for secession in South Sudan, which is generally regarded as a case of a failed attempt at equal participation and socio-economic opportunities among people of different identities, may become a reference point for other excluded or marginalised groups and communities in other African countries. The South Sudanese experience may thus inspire such groups and communities to explore secession as a means to address their perceived political exclusion and socio-economic marginalisation sustainably.' Wakengela and Koko (n 58) 26.

[62] 1975 Helsinki Final Act, Principle VIII: 'The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.'

[63] 1990 Charter of Paris: 'We reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.'

[64] Dinah Shelton, 'Self-determination and secession: the jurisprudence of International Human Rights Tribunals' in Julie Dahlitz (ed), *Secession and International Law* (T.M.C. Asser Press 2003) 55.

for all groups residing in the State.'[65] The Council of Europe, either through the European Court of Human Rights or the Venice Commission[66], has never recognized a right to secede to minorities.[67] This reluctance 'reflects the state of the law.'[68] Neither has the Badinter Commission, an international Arbitration Commission set up by the then European Community to legally deal with the Yugoslav crisis, dared to recognize any right to secede, despite the fact that the preamble of the 1974 Constitution of Yugoslavia recognized the right to secede to the nations of Yugoslavia.[69] In fact, as Pazartzis explains,

> [T]the legal justification given to the events by the Arbitration Commission, namely the treatment of the disintegration as an instance of dissolution rather than as an exercise of self-determination, served as the legal basis to international recognition, and thus the international response in this case is not seen as creating a precedent in favour of a right of secession.[70]

It is true, however, that the rhetoric of self-determination had an impact in legitimizing the separation of the Yugoslav republics.[71] '[S]elf-determination has operated at the level of *political rhetoric*, as a *set of political principles* legitimizing the secession of national States from central, oppressive States structures.'[72] Cassese argues that despite the fact that demands for secession by minorities do not find any basis in legal norms, 'national and ethnic groups do find support in, and indeed vociferously rely upon, the tenets of political philosophy underpinning the international legal standards (or, alternatively, they

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[65] Pazartzis (n 2) 359 - 360.
[66] In 2000, the Venice Commission stated that '[t]he principle of territorial integrity commands very widespread recognition - whether express or tacit - in constitutional law. On the other hand, constitutional law just as comprehensively rules out secession or the redrawing of borders. This should come as no surprise since that branch of law is the very foundation of the state, which might be deprived of one of its constituent parts if such possibilities were provided for.' Venice Commission, 'A general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe', CDL-INF (2000) 16, 3.
[67] Pazartzis (n 2) 361.
[68] Shelton (n 64) 67.
[69] We will deal in detail with the Badinter Commission and the disintegration of Yugoslavia in chapter 6, when explaining the position of the then EC towards the conflict. In any event, as Karl Lowenstein explained, the content of the Constitution of a communist country cannot be considered normative, but semantic. Instead of the fundamental norm of a country, communist Constitutions tend to be propaganda, being the commands of the ruling Communist party the real source of law. Karl Loewenstein, *Political Power and the governmental Process* (University of Chicago Press 1957).
[70] Pazartzis (n 2) 372.
[71] Shelton (n 64) 62.
[72] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 273.

invoke what the ordinary man in the street erroneously considers to be self-determination.)'[73] Self-determination started to be used by politicians, journalist and laymen in general as 'a reference point for undermining the territorial integrity of multi-ethnic States.'[74] To sum up, outside the colonial context,

> [t]he international community has been extremely reluctant to accept unilateral secession of parts of independent States if the secession is opposed by the government of that State. In such cases the principle of territorial integrity has been a significant limitation. Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State. By contrast there are many examples of failed attempts at unilateral secession, including cases where the seceding entity maintained *de facto* independence for some time.[75]

This is exemplified by the fact that in October 2015, bearing in mind the Catalan pro-independence movement, the former UN Secretary General Ban Ki Mun admitted in an interview to a Catalan newspaper that although the UN has accepted the right to self-determination under certain circumstances, 'Catalonia does not fit within the category of territories entitled to self-determination.'[76] He made clear that those territories enjoying self-government (internal self-determination) within a well-established State do not benefit from the right to external self-determination.

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[73] ibid 339-340.

[74] Rein Müllerson, 'Sovereignty and Secession: then and now, here and there' in Julie Dahlitz (ed), *Secession and International Law* (T.M.C. Asser Press 2003) 141.

[75] Crawford (n 3) 390. Pazartzis reaches the same conclusion: 'State practice with regard to secessionist movements witnessed in Europe does not support the existence of a right of secession as an aspect of self-determination. The strongly prevailing view of the international community is that, beyond the right of peoples under colonial or other comparable alien domination, self-determination support will not be given to secession from an existing State against the will of the government of that State.' Pazartzis (n 2) 371.

[76] Fernando García, 'Ban Ki Mun: "Cataluña no está en la categoría e territorios con derecho a la autodeterminación"' *La Vanguardia* (Barcelona, 30 October 2015) <https://www.lavanguardia.com/politica/20151030/54438498099/ban-ki-moon-catalunya-derecho-autodeterminacion.html> accessed 24 November 2018.

1.3 Unilateral secession rejected almost unequivocally by the international community: Kosovo as a unique case

The end of the Cold War has not modified the previously established practice.[77] '[P]ractice has continued to inhibit secession without consent of the sovereign government in question as a legitimate way of acquiring statehood.'[78] The secessionist movements in Nagorno-Karabakh (Azerbaijan), Abkhazia and South Ossetia (Georgia) and Transnitria (Moldova) have all been met with general foreign non-recognition, except for Russia. In addition, the 2014 crisis in Crimea is an example of the traditional reluctance of the international community to accept unilateral declarations of independence.[79] This latter case is aggravated by the fact that the referendum process was backed by foreign troops. However, it is true that the major Western powers recognized the unilateral independence of Kosovo in 2008[80], although they 'went to extraordinary lengths to justify their move as a special, non-precedent-creating exception to, rather than as a qualification or abandonment of, the post-decolonization norm of territorial integrity.'[81] Recall that in the Kosovo Opinion the ICJ did not address a general question about the right to secede in a post-colonial scenario. It assumed that this was not covered by the narrow and specific General Assembly question. The Court limited the scope of its opinion to the question whether Kosovo's declaration as such violated international law. In an exercise of self-restraint, the ICJ avoided treating the case as a leading opinion that could settle a contested issue. The Court might have feared that sanctioning the unilateral Declaration of Independence as lawful might open Pandora's Box, and that is

[77] Oeter (n 18) 59.
[78] Fabry (n 51) 179.
[79] All these cases are addressed in chapter 6, when reviewing the European Union attitude to secessionist movements in neighbouring countries.
[80] Although the Kosovo case will be dealt with in this section due to its relevance, it will also be addressed in depth in chapter 6.
[81] Fabry (n 51) 180.

why it avoided any pronouncement on the legality of secession, and just admitted that such declaration did not violate international law.[82] The US and the rest of recognizing states tried to avoid labelling the case as a legal situation. 'There simply did not exist any normative argument that could override Serbia's legitimate interest in territorial integrity.'[83] Instead, they preferred to insist on the uniqueness of Kosovo: the Western intervention, at least in part, was motivated by human rights concerns.[84]

Explicit in this message was that Kosovo could never be a model for any other separatist movement, and that Kosovo was not about remedial secession or external self-determination. Rather, Kosovo was simple unique – because the great powers had decided so. Kosovo illustrates the great powers' rule at its best, as well as the evisceration of legal rules on self-determination in favour of political determination and strategic factors.[85]

In any case, the recognition of Kosovo has met strong resistance and 'the international community remains divided over whether such recognition makes sense (or is even legally feasible).'[86] As a proof of such division, note that Kosovo is not yet a UN member. Tierney asks himself whether Kosovo is an example of the international community adopting a wider approach to self-determination.[87] Clearly, for recognizing States, Kosovo was not meant to be a precedent, but it remains to be seen to what extent it has an impact on the future self-determination struggles and on the perception of individual states on this.[88]

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[82] Walter (n 14) 25.
[83] Oeter (n 18) 66.
[84] Stephen Tierney, 'The Long Intervention in Kosovo: A Self-Determination Imperative?' in James Summers (ed), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff 2011) 249.
[85] Sterio (n 52) 125.
[86] Oeter (n 18) 45.
[87] Tierney, 'The Long Intervention in Kosovo: A Self-Determination Imperative?' (n 84) 276.
[88] Snezana Trifunovska, 'The Impact of the Kosovo Precedent on Self-Determination Struggles' in Summers (ed), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff 2011) 375. In fact, not everyone agrees that Kosovo is not setting a dangerous precedent: '[t]o accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it

1.4 Current theories of the right to self-determination. Is there an evolution? Does international law admit a right to remedial secession?

Some claim that the current conception of self-determination fails to pay regard to the aspirations of nations and minorities.[89] However, other argue that international law offers a last resort option for entities outside the colonial context, the so-called safeguard clause of Paragraph 7 of the principle of self-determination of (1970) UNGA 2625 Resolution:

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

It has been said that paragraph 7 seems to recognize the legitimacy of secession under certain circumstances outside the colonial context.[90] What are these circumstances? *A contrario*, a government not representing the whole people belonging to the territory without distinction as to race, creed or colour.

> [I]f a government does not represent the whole people it is illegitimate and thus in violation of the principle of self-determination, and this illegitimate character serves in turn to legitimate 'action which would dismember or impair, totally or in part, the territorial integrity or political unity' of the sovereign and independent State.[91]

Based on these stipulations in the (1970) UNGA 2625 Resolution, many scholars and commentators have argued that there exists a so-called 'remedial' right of secession.[92]

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amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms.' Dissenting Opinion of Judge Koroma to be found in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 13).

[89] Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (n 8) 325.

[90] Buchheit (n 34) 92, 93.

[91] ibid.

[92] Radan, 'Secessionist Referenda in International and Domestic Law' (n 5) 11. Probably it is in the field of political philosophy where this theory has found more adherents. In 1991 Allen Buchanan launched the contemporary moral debate about secession with *Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*. In this work, he advanced the idea of remedial secession. Also, Wayne Norman has become a famous defendant of this theory. See, for instance, Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in Margaret Moore (ed), *National Self-determination and Secession* (Oxford University Press 1998).

1.4.1 What is remedial secession?

There is no international document, apart from UNGA Resolution 2625, that clarifies the meaning and scope of remedial secession. In fact, there is a considerable legal debate.[93] Some commentators maintain that it is narrowly worded as to provide very little real basis for secession. Pomerance, for example, notes that the racial context of the period might have influenced the wording of the paragraph and that one possible interpretation could be to deduce that paragraph 7 restricts this right to racist regimes.[94] Other authors have also referred to the limited requirements of non-discrimination only on the grounds of race, creed or colour.[95] Yet other commentators have interpreted paragraph 7 much more broadly. For them, 'paragraph 7 represents only one aspect of a wider rationale for secession. Therefore, even if the criteria of paragraph 7 are not strictly satisfied, secession will still be legitimate if there have been other serious violations of fundamental human rights.'[96] Thus, 'the parameters of oppression […] extend far beyond the strict confines of paragraph 7 of Resolution 2625 (XXV).'[97] For Tomuschat, the threshold must be high:

> A mere lack of representativeness of a government would not suffice to bring about a right to secession as a form of a right of resistance. The phrase employed rightly conveys the idea that exceptional circumstances are capable of sustaining a claim for secession-circumstances which may roughly be summarized as a grave and massive violation of the human rights of a specific group in a discriminatory fashion.[98]

In the same line, Oeter believes as follows:

> Only if the fundamental right to survival of such distinct groups are put in danger, by forms of genocide, massive 'ethnic cleansing', gross and consistent patterns of violations of fundamental human rights that threaten to destroy the group, may a legal claim directed towards separate statehood makes sense. Separate statehood

[93] Not everyone accepts that a qualified right to secession can be deduced from the safeguard clause. See Daniel Thürer and Thomas Burri, 'Secession' (Max Planck Encyclopedia of Public International Law, 2009) para 17. Also, James Summers, *Peoples and International Law: How Nationalism and self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff 2007).
[94] Pomerance (n 45) 39.
[95] Musgrave (n 10) 188.
[96] ibid 189.
[97] ibid 191.
[98] Tomuschat (n 48) 35.

> is 'remedial' in these cases since it cures a proven impossibility to live together in one state.[99]

Thus, remedial secession becomes a tool for genuine cases of extreme emergency.[100] At the same time, the same authors admit that state practice is extremely reluctant to accept such reasoning[101] or at least it does not show sufficient and compelling support.[102] In conclusion, even if we side with those authors accepting the existence of a right to remedial secession, we must concede that there is not enough consistent international practice, as was made clear by the 2010 Kosovo Advisory Opinion. The ICJ was presented with the opportunity to clarify the law on this issue. Nevertheless, as has been noted, the Opinion avoided dealing with the substantive question of whether there exists a right to remedial secession. The Court considered that there is no consensus 'regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances.'[103] Moreover, the Court realized that it was not necessary to resolve such question to deliver an opinion in the case at hand.[104] Thus, in an exercise of judicial minimalism[105] and self-restraint, the Court decided to leave open the issue of remedial secession. This case, with hugely diverse written statements, is the best example that States have not yet reached a consensus around this issue.[106]

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[99] Oeter (n 18) 57.
[100] ibid 60.
[101] ibid 58-59.
[102] Van Driest (n 22) 187.
[103] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (n 13) para 82.
[104] ibid para 83. However, in two separate opinions, Judge Yusuf and Cancado-Trincade endorsed the view that a remedial right of secession did exist in international law, while Judge Koroma came to the opposite conclusion.
[105] Walter (n 14) 19.
[106] 'While the claim that there is a 'right of secession of last resort' has been supported by some writers and by *a contrario* reasoning […], it is without support in State practice. It has not emerged as a rule of customary law. It is not found in any treaty. And it has no support from the practice of the UN.' Written Statement of the Republic of Cyprus, 3 April 2009, para. 143. Available at <http://www.icj-cij.org/docket/files/141/15609.pdf> accessed 30 November 2016. Similar claims to be found in the written statements of Argentina, China, Spain, Romania, Iran or Venezuela. On the other hand, Germany concluded that while the right to self-determination should as a rule be exercised internally, the same right 'may exceptionally legitimize secession if this can be shown to be the only remedy against a prolonged and rigorous refusal of internal self-determination.' Written Statement of Germany, 15 April 2009, para VI.2. Available at <http://www.icj-cij.org/docket/files/141/15624.pdf> accessed 30 November 2016. Similar

1.4.2 What have other international bodies said about remedial secession?

No Court has until now granted the right to remedial secession. However, there are different cases where international bodies have admitted the existence of such right, although the circumstances at hand did not convince them of the suitability of its application. In 1995 after a request to recognise the independence of Katanga, the African Commission on Human and People's Rights considered the following:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[107]

Reasoning *a contrario*, arguably, it could be inferred that the African Commission admitted the possibility of remedial secession if there was i) evidence of violations of human rights and/or ii) denial to participate in government. However, in the case at hand it did not consider that those circumstances were present. In 2009, the African Commission reasserted this view when referring to the right of self-determination of the population of Southern Cameroon. It noted that the test set out in the Katanga case (i.e. violations of human rights and/or denial to participate in government) had to be met in order to have a basis for the exercise of an external self-determination (i.e. secession).[108] Although the European Court of Human Rights has never addressed this issue explicitly

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arguments to be found in the written statements of Albania, Estonia, Finland, Ireland, the Netherlands, Poland, Slovenia, Switzerland or Jordan. France, the United Kingdom and the United States expressed their opposition to the existence of a legal entitlement to remedial secession in less unequivocal terms, adducing what may be called the 'legal neutrality argument'. According to these States, 'international law remains 'neutral' as regards the issue of secession as it does neither explicitly permit, nor explicitly prohibit it. Under this view, an attempt to secede through a declaration of independence is considered to be a matter of fact rather than of law.' Van Driest (n 22) 270.

[107] *Katangese Peoples' Congress v. Zaire,* African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995) para. 6.

[108] *Kevin Mgwanga Gunme et al / Cameroon,* African Commission on Human and Peoples' Rights, Comm. No. 266/03 (2009) para. 194.

or directly, in the l996 landmark case *Loizidou v Turkey* Judge Wildhaber, joined by Judge Ryssdal, admitted in their concurring Opinion as follows:

> Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to [external] self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way.[109]

The reference to remedial secession was only to be found in a separate opinion. Yet, it shows how this theory has been gaining support among international judges. In conclusion, 'to date, no judicial body has accepted a (qualified) right to unilateral secession as an entitlement of a particular people in a specific case.'[110]

1.4.3 Could sub-national entities within well-functioning democracies (including EU Member States) qualify for a right to remedial secession?

Even if we accept the existence of the right to remedial secession, 'what seems to be required is a denial of political freedom and/or human rights as a *sine qua non for*.'[111] Would Quebecers, Welsh, Scots, Catalans or Flemish qualify for such a right? As Buccheit admits:

> Their respective States are under no obligation imposed by international law to recognize their demands beyond providing protection for human rights, a representative government that does not discriminate on the basis of race, creed, or colour, and the other requirements set forth in the declaration.[112]

It is difficult to imagine that in 'prosperous and fairly stable and just multinational states' like Canada, Spain, Great Britain and Belgium[113] any sub-national entity could qualify for such a right. As stated in the well-known 1998 Supreme Court of Canada Opinion on Quebec:

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[109] *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996).
[110] Van Driest (n 22) 186.
[111] Buchheit (n 34) 94.
[112] ibid.
[113] Daniel Weinstock, 'Constitutionalizing the Right to Secede' (2001) 9 (2) Journal of Political Philosophy 182, 200.

> The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. […][114]

Moreover, what is more important, '[t]he continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination.'[115] Particularly, within the EU it would be unsustainable to argue that sub-national communities within EU Member States can qualify for a right to remedial secession, provided it exists, for respect for democracy, Rule of Law or protection of minorities is a pre-condition of EU accession.[116] In this sense, Weller, in a post based in a Legal Opinion commissioned by the Catalan pro-independence party *Esquerra Republica de Catalunya*, argued that Catalonia could be tempted to invoke the doctrine of remedial secession following the suspension of autonomy. Nevertheless, he admits firstly that remedial secession is a contested doctrine and secondly that it is unclear whether the amount of 'repression' is sufficient to trigger the referred doctrine:

> According to that still contested doctrine, repression of a population, or its exclusion from representation in the state, generates a self-determination entitlement in the sense of secession. However, it is not clear that the gravity of repression or exclusion is sufficiently well established as yet to trigger the application of the doctrine.[117]

In any event, as will be explained in depth in chapter 4, if we ever face a situation of gross violations of human rights or significant denial of internal self-determination within an EU Member State that can qualify for remedial secession, there would be a need to trigger Article 7 TEU.

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[114] *Reference re Secession of Quebec* [1998] 2 SCC 217, para 136.
[115] ibid 137.
[116] In chapter 4, when addressing to what extent EU law should defer to national constitutional legal orders when dealing with regional secessionist challenges, we will have to deal with the topic about the tools of the EU to guarantee the respect of its foundational values within EU Member States.
[117] Weller, 'Secession and Self-determination in Western Europe: The Case of Catalonia' (n 51).

1.5 Primary Right Theories: national and choice theories. The variant of the 'right to decide'

Primary right theories conceive of the right to secede as a general right. Nationalist theory of secession claims that 'nations have a right to self-determination, including a right to a state in which the members of the nation form a majority.'[118] The choice theory of secession, a more radical approach, simply states that if the majority in a region express a desire to secede, such withdrawal of consent serves as sufficient and effective ground for separation. Unlike in the previous nationalist theory, there is no need to prove that the group is a nation, culturally or ethnically distinct. In both cases, there is no need to prove any injustice or wrongdoing from the central government. Both theories anchor the legitimacy of secession in the value of democracy and of individual autonomy.[119] What generates this right is simply the same feature that generates all States and political groupings, namely freedom of association. The critical element to political obligation is consent. Secession occurs by virtue of the withdrawal of consent to be bound to a particular political body. It is a no-fault divorce.[120] Following that, a majority voting in a referendum or its functional equivalent (democratic elections) could be enough to trigger an independence process. As Nielsen explains,

> The right of secession should be treated like the right to a no-fault divorce. […] No prior or imminent injustice need be shown in either case. If the parties want to split in either case, they have the right to split provided certain harms (not all harms) do not accrue to the other party.[121]

However, the very same authors who defend this position, acknowledge that '[t]he mainstream international law position holds that the right of peoples to self-determination

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[118] Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in Moore (ed) (n 38) 35.
[119] Daniel Philpott, 'In Defense of Self-Determination' (1995) 105 (2) Ethics 352, 367.
[120] Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter To Lithuania and Quebec* (Westview 1991)134. Buchanan, unlike those philosophers who argue in favour of primary right theories, holds that secession is only legitimate if there is a just cause. In fact, for him not all forms of oppression justify secession: only a few are sufficient and necessary. ibid 108-110.
[121] Kai Nielsen, 'Secession: The Case of Quebec' (1993) 10 Journal of Applied Philosophy 29, 35.

does not accord a right to statehood, even when there is a democratic vote for independence or its functional equivalent.'[122] Although these theories have some defenders within the field of political philosophy, few lawyers sustain these arguments. In fact, no international treaty, Resolution, document, or international Court has ever defended this possibility. The reason is straightforward: territorial integrity is a key principle governing international relations and States only accept it to be trumped if there are strong justifications. If it were otherwise, order and stability would be put seriously at risk.

These primary right theories have found particularly strong advocates in the Catalan pro-independence movement. The Catalan government, in its attempt to legitimize its unilateral strategy, has been pushing to introduce in the legal agenda the concept of 'the right to decide', which is closely connected with the choice right theory. It is a legal-political term different from the classic notion of self-determination created, precisely, due to the difficulties of including the Catalan case in the classic doctrine of the right to self-determination under international law.[123] As explained in a report sponsored by the Foreign Affairs Department of the Catalan government and authored by international scholars, the democratic 'right to decide' would justify the Catalan popular demand for holding a referendum on political independence. According to the authors of such report, the so-called democratic 'right to decide' 'has evolved from the more

[122] Steven Wheatley, 'Modelling Democratic Secession in International Law' in Stephen Tierney (ed), *Nationalism and Globalization* (Hart 2015) 133. Wheatley admits 'no serious academic' argues that Crimea has a right to determine unilaterally its own status, as it did in 2014. However, he is in favour of applying a constitutional model that recognise a general right of democratic secession, provided that the authorities and the populations engage in reasoned, democratic deliberations concerning the allocation of political authority. ibid 154. This argument, marginal in terms of international support, should not be confused with the growing international requirement of due process, i.e., that the seceding entity needs to adopt some kind of due process (e.g., negotiating in good faith, no use of force, granting minority rights to its own minorities) before it declares independence. This is a requirement that finds some support in the practice and in scholar circles. Antonello Tancredi, 'A normative 'due proces' in the creation of States through secession' in in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2012) 194.

[123] Xavier Pons Ràfols, *Cataluña: Derecho a decidir y derecho internacional* (Reus 2015) 306.

traditional and long-standing legal framework to the "national right to self-determination". In other words, demands for political independence have been legitimized by a democratic principle invested in the Catalan people'.[124] Again, the problem with this concept is, as Gaudreault-DesBiens explains, that 'no general and absolute legal right to decide exists under international law.' However, certain sectors among the Catalan pro-independence movement constantly affirm its existence because it 'represents a politically efficient discursive strategy.'[125] To speak constantly of a 'right' might have a performative effect, it can convince those who hear about it that their desire is in accordance with the law. However, as said, this right can at best be characterized as a moral one:

> It may very well be that an international legal regime governing the conditions of exercise of the right to external self-determination by sub-states nations incorporated in democratic states is warranted. […] But it does not exist yet, and affirming the contrary, based on an overstretched interpretation of the ICJ's Kosovo opinion, is at best misleading.[126]

Conclusions

Since the ICJ 2010 Advisory Opinion on Kosovo, it could be argued that international law does not prohibit secession. However, when it comes to recognize a unilateral right to external self-determination, or a right to secede, 'States continue to be the prime actors, demarcating their own playing field and the applicable rules of play',[127] among them the principle of territorial integrity. And that is why outside the colonial context and the

[124] Nicolas Levrat, Sandrina Antunes, Guillaume Tusseau and Paul Williams, *Catalonia's Legitimate Right To Decide. Paths to Self-Determination* (Catalan Government 2017) 138. Available at <http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/FULL-REPORT-Catalonias-legitimate-right-to-decide.pdf> accessed 28 November 2018.
[125] Jean-François Gaudreault-DesBiens, 'The Law and Politics of Secession: From the Political Contingency of Secession to a "Right to Decide"? Can Lessons Be Learned from the Quebec Case?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (forthcoming, Palgrave 2019) 58.
[126] ibid 62. Probably, the constant referral to a right 'seeks to assuage the fears of citizens who could otherwise have doubts'. ibid 59.
[127] Van Driest (n 22) 319.

emergent theory of remedial secession, 'there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory.'[128] In effect, at present there are no international mechanisms or specific norms of international law (either treaty or customary law) which could be used to determine whether a given people has the right to secession, or which would regulate the relationship between a secessionist movement, a State and third parties.[129] Recently, some authors have tried to advance the idea of a primary right to democratic secession. However, there is no practice, nor international documents nor case law supporting this trend. Nor is the position sustained by a large number of scholars.

To conclude, i) unilateral declarations of independence by sub-national units (even within well-functioning democracies) could be considered not in violation of international law, but ii) it cannot be argued that such entities qualify for a right to self-determination, since they do not fall within the well-established categories of non-self-governing territories nor within the emerging category of remedial secession. That is why where there is a reasonably well-functioning constitutional order, like, for instance, within EU Member States, public international law yields the site to national constitutional law. This international law analysis leads to the conclusion that, as for the position of EU law towards secession, EU institutions are not constrained by any binding international norm of relevance.

[128] Crawford (n 3) 417.
[129] Stanislav V. Chernichenko and Vladimir S. Kotliar, 'Ongoing global legal debate on self-determination and secession: main trends' in Julie Dahlitz (ed), *Secession and International Law* (T.M.C. Asser Press 2003) 78, 79.

Chapter 3: Constitutional law regarding secession

Introduction

The aim of this chapter is to contribute to the research question with the analysis of constitutional law towards secession. If, as we claim and will develop in depth in chapter 4, the EU duty to respect national identity (Article 4(2) TEU) generates obligations in the context of secession to respect Member States constitutional orders, we will have to examine closely EU Member States' constitutional regulations on secession.

Usually, constitutional law is silent when it comes to secession. But certain EU Member States have been obliged to develop a legal approach to secession, since they have faced, or are currently facing, secessionist challenges and the organization, or attempted organization, of referendums on independence, namely the United Kingdom and Spain. However, as indicated in the introduction of the thesis, the intention is to offer legal reflection that goes beyond a case-specific approach, which could be of relevance to any EU Member State in the future. Therefore, we should offer a broader analysis of constitutionalism and secession that might be useful under different scenarios.

First, we will review theoretically the link between constitutionalism and secession. Then, we will analyse those constitutional orders that have emerged as the two main paradigms in this debate: on the one hand, the US (the classic paradigm), and the one followed by Spain. On the other hand, the Canadian legal order (the new paradigm)[1], and the one followed to certain extent by the UK. After reviewing the British and the Spanish orders, we will also, although briefly, take into account the Italian and German

[1] The Supreme Court of Canada's 1998 Reference Re Secession of Quebec became a turning point in the comparative constitutional law on secession. 'Until then, the overwhelming prevailing constitutional thought assumed that constitutions are based on an inherent principle of self-preservation.' Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (forthcoming, Palgrave 2019) 265.

legal orders' position towards secession, since they are the only other EU Member States legal orders that have expressed a position on this issue. As we be seen, the common trend of all these constitutional legal orders is that none recognize a unilateral right, or a procedure to secede. At maximum, we find the acceptance of consensual secession, as in the cases of Canada and the UK. This acceptance might appear due to a judicial process, as in the case of Canada, or as the result of a political negotiation, as in the case of the UK. However, in both cases the prominent position of the central or national authorities is uncontested. At the same time, it will be shown that the strict Spanish response, following the classic US paradigm of not allowing for a referendum on secession, is not unique in the EU. Although the circumstances vary, since none of them face the same type of secessionist challenge, Italian and German constitutional legal orders have similar strict or classic responses to secession.

1. Constitutional law and secession

When dealing with constitutional law, unlike in the previous chapter of international law, one must bear in mind that there is no single or global constitutional legal order regulating secession. Necessarily we will find diverse responses depending on the concrete constitutional legality that we review. However, as it will be shown, there are many common trends in the way liberal constitutional orders have faced secessionist challenges. In the past only a few Constitutions from communist countries formally included a right to secede (e.g.: Union of Soviet Socialist Republics, Burma).[2] However, as in any right included in the Constitution of a communist State, their inclusion cannot be considered normative, but semantic,[3] since the ultimate source of legal authority is not

[2] See, for instance, Chapter X of the 1948 Constitution of the Union of Burma or Article 72 of the 1977 Constitution of the Union of Soviet Socialist Republics.

[3] Karl Loewenstein, *Political Power and the governmental Process* (University of Chicago Press 1957).

the Constitution, but the Communist Party. That is why framing these rights in legal terms is pointless.[4] At present, the examples of a right or a procedure to secede are very limited: Ethiopia[5], Liechtenstein[6] and St. Kitts & Nevis[7]. This scarcity should not surprise. As we have mentioned in chapter 1, secession challenges some of basic foundations of the constitutional pact, of our living together. At first glance it does not seem that a Constitution is a good place to include secessionist clauses. In fact, for many years secession was understood as a sort of 'constitutional taboo'.[8] This debate about the suitability of dealing with secession on a constitutional level is far from new. Back in the 1990s, Sunstein made a clear statement, upon which he insisted years later: regardless of the grounds that might justify secession, a right to secede should not be placed in a founding document, since that would increase partisan politics and reduce the prospects for compromise. According to Sunstein, such a clause would degrade day-to-day politics and what is more dangerous it would create a risk of blackmail endangering the prospects for long-term commitments. His approach seems highly pragmatic: a constitution should be committed to the success of the social enterprise of our common life together:

> The right to secede is different from other potential vetoes on national legislative action precisely because it raises fundamental and often emotional issues having to do with the claims of ethnicity, territory, and history to separation and self-determination. These issues have a peculiar tendency to inflame both subunits and those who want them to remain part of the nation. They tend to raise emotional stakes in such a way as to make the ordinary work of politics – not to mention day-to-day interactions in other spheres – extremely hard to undertake.[9]

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[4] In chapter 6, when explaining the independence process of the Baltic States, we will see that despite the inclusion of a secession clause in the 1977 USSR Constitution, the Baltic States were not allowed by Moscow to separate from the USSR.

[5] See Article 39 (4) c) of the Ethiopian Constitution.

[6] See Article 4 (2) of the Constitution of the Principality of Liechtenstein.

[7] See Article 113 (2) b) of the St Kitts and Nevis Constitution. In 1998 Nevis attempted to secede, but it failed to meet the constitutional requirements: 'only' 61,7% of the voters supported independence, whereas the Constitution requires at least two-thirds of all the votes cast at the referendum.

[8] Susanna Mancini, 'Secession and self-determination' in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 494.

[9] Cass R. Sunstein, 'Constitutionalism and Secession' (1991) 58 University of Chicago Law Review 633, 650-651.

Buchanan shares this view. For him, democratic values tell against a majoritarian right to secede: '[r]ecognition of such a right would tend to undermine the conditions for a flourishing democracy, by stimulating destructive behaviour and by weakening the incentives citizens have for principled political participation.'[10] According to Buchanan, following Sunstein's view, if such a right is recognized, a territorially concentrated minority could use the threat of secession as a strategic bargaining tool. Besides, a unilateral right to secede would mean the rejection of a deliberative process where all constituent parties (not only a subunit) could take part. It would mean the abandonment of the idea of having the entire population working in the formation of the democratic will.[11]

Other authors, such as Weinstock and Norman, have expressed disagreement with this view, since a constitutional secession clause would force secessionists to make a cold and lucid cost/benefit analysis. Besides, such a right, as Weinstock reminds, would allow secessionists to engage in the kind of debate they want to be part of, one that refers to their own destiny. Understanding that symbols matter, Weinstock believes that the right to secede would take away one of the main sources of dissatisfaction national minorities have with the state to which they belong, which is, basically, that they are not allowed to decide whether they want to stay or go.[12] And, above all, by constitutionalizing the right to secede 'one can attempt to control a process which would otherwise go uncontrolled.' Since 'secessionist politics will occur anyway, regardless of legal silences and prohibitions, and that its occurring in a legal vacuum will be more harmful than were it

[10] Allen Buchanan, 'Democracy and Secession' in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 21. However, Buchanan also admits that maybe under certain special circumstances a heavily proceduralized constitutional right, with special exit costs, waiting periods, and super-majority requirements, may be appropriate. ibid 31.
[11] David Haljan, *Constitutionalising Secession* (Hart 2014) chapter 7.
[12] Daniel Weinstock, 'Constitutionalizing the Right to Secede' (2001) 9 (2) Journal of Political Philosophy 182, 201-202.

to occur within well thought out legal and procedural parameters.'[13] Norman, for instance, believes that 'a secession clause in a constitution would serve a similar function to rules for elections or amending the constitution. It would regulate a form of politics by specifying clear criteria for success and failure.'[14] In his view, a reasonable secession clause would take the following form: it would specify: which sorts of regions or groups would have access to the procedure; the question or strict guidelines to the question; the entity that has authority to negotiate the terms of secession; and the voting procedure that should be applicable in such instances.[15]

In any event, this discussion is mainly circumscribed to scholarly or political debates. As has been noted, only few Constitutions allow for secession to take place, but this does not mean that the other constitutional legal orders exclude the possibility of secession. In fact, there are some judicial opinions, as in Canada, or political experiences, as in the UK, from which it could be inferred that secession can be governed and subjected to constitutional principles. Radan, for instance, sees the Canadian 1998 Advisory Opinion on Quebec as the recognition of an implicit right of secession.[16]

As explained in the introduction of this chapter, we shall review different responses of liberal constitutional legal orders to secessionist challenges below. Since almost no constitutional text addresses the issue, we will focus mainly on case law. However, secessionist attempts rarely arise in case law. 'When it has, it has been in the

[13] ibid 196.
[14] Wayne Norman, 'The Ethics of Secession as the Regulation of Secessionist Politics' in Margaret Moore (ed), *National Self-Determination and Secession* (Oxford University Press 1998) 48.
[15] ibid 53-54. Norman also admits that it is unlikely that States will include such a clause. If they are not currently experiencing a regional pro-independence movement, 'they are not going to tempt fate by opening up a national debate about fair terms for secession; and if a secessionist movement is under way, it would be difficult to get the secessionists' agreement to legitimize a clause based on anything but a choice or nationalist theory.' ibid 55.
[16] Peter Radan, 'Secessionist Referenda in International and Domestic Law' in Matt Qvortrup (ed), *Nationalism, Referendums and Democracy. Voting on Ethic Issues and Independence* (Routledge 2014) 16.

context of federal states where a sub-unit of such a state has attempted to secede.'[17] We only find judicial decisions specifically addressing an attempt to secede in the US, Canada, Spain, Italy and Germany. The British case is also an essential case study that enriches the analysis, notwithstanding the fact that there is no relevant case law and despite the fact that British constitutionalism (without a rigid and supreme Constitution) departs from the common trends of liberal constitutionalism and therefore its suitability in comparative terms is limited. However, the British case is an interesting constitutional model, since it offers two slightly different responses to pro-secession attempts within the same territory, Northern Ireland and Scotland, which underlines the idea that secession clauses are not just the product of abstract legal theories, but institutions rooted in the history and the concrete circumstances of each country.

2. The classic and the new paradigm: USA and Canada

2.1 USA

Secession as a contested issue in US constitutionalism was at its height in the mid-19th century, when the discussion around slavery became a hot political issue. In the decades leading up to the Civil War the question as to whether the Constitution permitted a state to secede was subject to a lively debate.[18] It was the American statesman John C. Calhoun, from South Carolina, who made popular the idea that the Federation was still, like the Confederation, composed and legitimized by states, not by citizens. Southerner politicians considered that if the Union was a pact between parties with equal rights and duties (i.e. states), each state could unilaterally decide whether the rest had violated some

[17] Aleksander Pavkovic and Peter Radan, *Creating New States* (Ashgate 2007) 221. The reference here to 'federal states' has to be understood in a broad meaning, as decentralized states. Neither Spain, nor the UK or Italy can be technically considered (constitutionally speaking) 'federal' states.
[18] David A. Strauss, 'The irrelevance of constitutional amendments' (2001) 114 (5) Harvard Law Review 1457, 1486.

of the clauses of the pact, through for example lack of respect to the Southern institution of slavery, and, therefore, unilaterally withdraw from the pact.[19] In other words, if the states were independent sovereigns prior to ratifying the Constitution, they should therefore be able to reclaim their political independence. In fact, in the past 'there was a widespread acceptance across the American political spectrum of the right of unilateral secession and secession was often threatened by various states over a variety of issues.'[20] But the American Civil War radically changed the political atmosphere and settled the issue.[21] In effect, the Union's triumph provided the final settlement of the legality of state secession from the Union.

Shortly after the Civil War, in 1869 the US Supreme Court dealt with the legality of the attempted secession of Texas in *Texas v White*. Texas had just joined the Union in 1845 and attempted to secede in February 1861. The key argument underpinning the ruling was that Texas became part of an 'indestructible Union, composed of indestructible States.'[22] The Supreme Court recalled that Article XIII of the Articles of Confederation and Perpetual Union of 1777 declared that the US union was to be perpetual, while the Preamble to the US Constitution of 1787 established that such Constitution was proclaimed 'to form a more perfect union.' As the Supreme Court observed, 'it is difficult

[19] Judah P. Benjamin, 'The right of Secession (December 31, 1860)' in Jon L. Wakelyn (ed) *Southern Pamphlets on Secession. November 1860 – April 1861* (The University of North Carolina Press 1996), 107-108.

[20] Peter Radan, 'An Indestructible Union… of Indestructible States: The Supreme Court of the United States and Secession' (2006) 10 Legal History 187, 196. In fact, although usually secessionihas been considered a purely southern phenomenon, there had been some previous New England's flirtation with secession, as well. Craig S. Lerner, 'Saving the Constitution: Lincoln, Secession, and the Price of Union' (2004) 102 (6) Michigan Law Review 1263, 1267.

[21] 'The law is made – its interpretations settled – by great events, not law review articles; by wars, not words; by presidents, not professors. The Constitution we have today is in substantial measure the result of the single most decisive legal interpretative event of American history: the Civil War. The outcome of *Grant v Lee* resolved the most important issue of antebellum constitutional dispute – the nature of the Union – in favour of the nationalist view of sovereignty and against the South's state-sovereignty view.' Michael Stokes Paulsen, 'The Civil War as Constitutional Interpretation' (2004) 71 University of Chicago Law Review 691, 691. In the same line, '[t]he person on the street would say that the Civil War settled it, and that person would be right. The Civil War settled it, even though no formal amendment was added to the Constitution.' Strauss (n 18) 1486.

[22] *Texas v White* 74 US 700 (1869) 725.

to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?'[23] The issue about the legality of secession in the US has been settled since then[24] and as Sunstein admits, 'no serious scholar or politician now argues that a right to secede exists under American constitutional law.'[25] The response offered by the US Supreme Court was highly influenced by the political thinking of the winning side of the Civil War, the Northern states and their leader, Abraham Lincoln, who advanced the idea of federal sovereignty instead of a state-sovereignty approach. When reviewing the First Inaugural Address, one can see how Lincoln argued that a constitutional order is not an agreement from which the parties could unilaterally withdraw. A democratic government is based on the will of a majority limited by the rules that the people has given itself, the Constitution. For him secession was to be ruled out in order to prevent anarchy:

> Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.[26]

In *Texas v White*, however, the Supreme Court recognized that a state could secede from the Union through revolution or through the consent of the States: '[t]he 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.'[27]

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[23] ibid.
[24] Subsequent decisions of the Supreme Court followed the same approach: *White v Hart* 80 US 646 (1871) 651; *Taylor v Thomas* 89 US 479 (1874) 491; *Daniels v Tearney* 102 US 415 (1880) 418.
[25] Sunstein (n 9) 633.
[26] Roy P. Basler et al (eds), *Collected Works of Abraham Lincoln* (Vol 4, Rutgers University Press 1954) 256-257.
[27] *Texas v White* (n 22) 726.

Secession through revolution

The idea of revolution was obviously not alien to US constitution, since the very foundation of the country lay in a revolutionary war against the colonial power. What is key in the event of a revolution is the ultimate success of the enterprise. In 1877 in *Williams v Bruffy*, when discussing the validity of acts in the event of secession, the Supreme Court ruled as follows:

> The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.[28]

The Court is not admitting here any right: a revolution is a question of fact, not law. As the Canadian Supreme Court also admitted, in the context of secession, what matters is the efficacy principle: 'the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states'[29].

Secession through consent of the States

When the Supreme Court referred to 'consent', what did it mean? Unanimous consent of all the states of the US? Some consider that 'consent' means unanimous agreement of all the states of the US. Other authors believe that '[t]he consent of the States requirements could, however, be taken to mean their consent to a constitutional amendment approved by three-quarters of the states as set in Article V of the US Constitution.'[30] Article V stipulates that a constitutional amendment needs to be proposed by a resolution passed by a two-thirds majority of both Houses of Congress or by the legislatures of two-thirds of the number of states. This is 'an almost impossible political hurdle for any state wishing

[28] *Williams v Bruffy* 96 US 176 (1877) 186.
[29] *Reference re Secession of Quebec* [1998] 2 SCC 217, para 142.
[30] Pavkovic and Radan, *Creating New States* (n 17) 223.

to secede.'[31] Thus, according to some interpretations, '[t]he decision in Texas v. White only renders unilateral secession illegal and leaves it open for constitutionally legal secession to take place.'[32] Others, however, consider that amending the Constitution to provide a clause for secession is also against the spirit of the US Constitution. Thus, an amendment process cannot include the right to secede, since the amendment capacity is a limited power within the Constitution itself and secession is a revolutionary process linked with the dissolution of the people that sustains the Constitution.[33]

Secession is no longer an issue in US constitutionalism ('[h]istory is written by the victors, and the idea of secession has been dead since Appomattox'[34]). There is no strong independence movement within the US and there is an overall rejection of secession.[35] There are some regional parties or movements in certain states (California, Texas, Vermont, Alaska, New Hampshire, Hawaii…) advocating for secession, yet their popular support is very low. However, the debate about sovereignty goes on and the issue remains unsettled, even today.[36] What is clearly the common orthodox position of judicial bodies and law professors is, and it is called the classic paradigm of secession, that the US Constitution does not provide for a unilateral right to secede.[37] And even if we accept

[31] Radan, 'An Indestructible Union… of Indestructible States: The Supreme Court of the United States and Secession' (n 20) 195.
[32] Radan, 'Secessionist Referenda in International and Domestic Law' (n 16) 19. Also, Radan, 'An Indestructible Union… of Indestructible States: The Supreme Court of the United States and Secession' (n 20) 191.
[33] Daniel Farber, *Lincoln's Constitution* (The University of Chicago Press 2003), chapters 2 and 4.
[34] ibid 81.
[35] As Craig Lerner points out, '[i]t is difficult for Americans today to take seriously the legal claims in favour of a right of secession. The cause of secession in 1860 became commingled with a defence of slavery, and our repugnance for that institution carries over into our rejection of secession. Furthermore, there is a sense among many Americans that our country has, on balance, had a salutary influence on global affairs. Any suggestion that we might have been better off as separate nations prompts a lecture on the United States' role in the twentieth century as an agent of freedom and the inevitable lament that, had America not been united, Germany would have won World War II.' Lerner (n 20) 1264.
[36] Mike McPhate, 'California today: Secessionist Groups Seize the Moment' *New York Times* (New York, 10 November 2016) <https://www.nytimes.com/2016/11/10/us/california-today-secession-trump.html?_r=0> accessed 30 November 2016.
[37] A recent case in Alaska confirms this view. In 2006, the Supreme Court of Alaska rejected the organization of a popular referendum on secession, since under Alaskan law a popular referendum cannot take place if it proposes something unconstitutional. The concrete question that was intended to be posed to the public was the following: 'Shall the State of Alaska obtain independence from the United States of

that the US constitution would permit a constitutional amendment to include a secession clause, one must admit that such a process is, from a political point of view, a hugely difficult task.

2.2 Canada

In order to understand the position of Canadian constitutionalism towards the secessionist attempts of the French speaking province of Quebec, which has been called a 'new paradigm',[38] or a 'major departure from the practice of liberal-democratic states',[39] it is necessary to become acquainted with Canadian history.

To start with, it must be pointed out that '[t]he French community in what is now the Canadian Federation predates all but the aboriginal settlement.'[40] In effect, in the second half of the 18th century the British began to rule over a territory that had been mainly settled by inhabitants with French origins since the early 1600s. Very rapidly the British realized the need to secure the loyalty of French settlers and accepted the survival of Catholicism and French civil law. Even in 1840 when the divided territories of Upper Canada (majority of English speaking settlers) and Lower Canada (majority of French speaking settlers) were united, '[f]ar from submerging the French-Canadian identity, the Act of Union and its aftermath reaffirmed the central position of French-Canadian law, language and leaders in the Canadian constitutional system.'[41] This dualism, and the self-

America, and become an independent nation, if such independence is legally possible, and if such independence is not legally possible under present law, shall the State of Alaska seek changes in existing law and Constitutional provisions to authorize such independence, and then obtain independence?' According to the Court, the proposed referendum was *ultra vires*. The decision was based on *Texas v White* and the idea that secession is against the US Constitution. *Kohlhaas v State, Office of Lieutenant Governor (Kohlhaas I),* 147 P.3d 714 (Alaska 2006).

[38] Alberto López Basaguren, 'Estado democrático y secesión de territorios. Un análisis comparado sobre el tratamiento democrático de las reclamaciones secesionistas' in Joseba Arregi Aranburu (ed), *La Secesión de España* (Tecnos 2014) 51.

[39] Zoran Oklopcic, 'Independence referendums and democratic theory in Quebec and Montenegro' in Matt Qvortrup (ed), *Nationalism, Referendums and Democracy. Voting on Ethic Issues and Independence* (Routledge 2014) 28.

[40] Peter Oliver, 'Canada's Two Solitudes' in Stephen Tierney (ed), *Accommodating National Identity. New Approaches in International and Domestic Law* (Kluwer Law International 2000) 65.

[41] ibid 71-73.

perception of the Quebecers as founding people, justify the central position of the principle of federalism in Canadian constitutionalism. At least since the British North America Act of 1867 Canada can be described as a federal system[42] where, apart from the formal constitutional arrangements, many conventions guarantee the role of the provinces and the special status of Quebec.[43]

Quebec separatism began in the late 1950s[44] when after years of political conservatism Quebec elected a liberal government committed to change: the Quiet Revolution that pretended to promote further the special treatment of French language and culture. The francophone fear concerning their minority situation within the Canadian federation was and still remains mainly cultural and linguistic ('feelings of attachment'), but at least in the past it is also embodied economic demands.[45] As Gaudreault-DesBiens explains, Quebec nationalism

> emerged in a context where the province's French-speaking majority was marginalized both in Canada as a whole and in the province's economic sphere. This precarious situation combined with the unique linguistic and religious characteristics of that group, led to the development of a nationalism that revolved around the defence of the majority's cultural, political and economic interests.[46]

Quebec organized sovereignty referendums in 1980 and 1995.[47]It should be noted that those plebiscites were organized according to the Quebec competences, and, therefore,

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[42] According to the Canadian Supreme Court, '[f]ederalism was the political mechanism by which diversity could be reconciled with unity.' *Reference re Secession of Quebec* (n 29) para 43.

[43] For instance, according to Article 6 of the 1985 Supreme Court Act '[a]t least three of the [nine] judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.' The reason that justifies this special treatment is that Quebec is the only province using civil law, while the rest of the country follows common law.

[44] Quebec's secessionist movement is one of the oldest of the sort in any democratic country. Jean-François Gaudreault-DesBiens, 'The Law and Politics of Secession: From the Political Contingency of Secession to a "Right to Decide"? Can Lessons Be Learned from the Quebec Case?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (forthcoming, Palgrave 2019) 33.

[45] André Blais and Richard Nadeau, 'To be or not to be sovereignist: Quebeckers' perennial dilemma' (1992) XVIII (1) Canadian Public Policy/Analyse de politiques 89, 96. See also Stephane Dion, 'Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec' (1996) 26 (2) British journal of Political Science 269, 279.

[46] Gaudreault-DesBiens (n 44) 48.

[47] After the 1980 referendum, the Canadian government negotiated and attempted to recognize Quebec's distinctiveness within the body of the Constitution. In the 1987 Lake Meech accord, it offered a 'distinct

without the opposition of the central government. In Canadian constitutional law, though, referendums had no legal effect, which flows from the principle of parliamentary supremacy, inherited from the UK.[48] The questions posed to the public in those referendums were not clearly asking about the independence of Quebec,[49] but it was read this way throughout the country and abroad.[50] After the tight results of 1995 the Canadian government sent a reference case to the Supreme Court ('SC'), in order to obtain an advisory opinion in the form of a judgment on the legality of the Quebec government's secession plans.

1998 Supreme Court Opinion on Quebec

The reference became known as one of the most important cases in Canadian history and it has also exercised an enormous influence in comparative law.[51] As Martinico points out, it was a crucial decision, because the Court dealt frontally with secession, 'going

society' clause. But this offer was rejected by some provinces. The 1992 Charlottetown Accord was rejected both by Quebec and by other provinces. No accommodation attempt was successful. See, among many others, Peter W. Hogg, *Meech Lake Constitutional Accord annotated* (Carswell 1988) and Alan C. Cairns, 'The Charlottetown Accord: multinational Canada vs. Federalism' in Douglas E. Williams (ed), *Reconfigurations: Canadian Citizenship and Constitutional Change – Selected Essays by Alan C. Cairns* (McClelland and Stewart 1995).

[48] Gaudreault-DesBiens (n 44) 35.

[49] The question in the 1980 referendum was the following: 'The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad - in other words, sovereignty - and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?' The results were 40,44% Yes and 59,56% No. Available at <http://www.canadahistory.com/sections/eras/trudeau/1980_referendum.htm> accessed 30 November 2016. The question in the 1995 referendum was the following: 'Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?' The results were 49,42% Yes and 50,58% No. Available at <http://www.canadahistory.com/sections/eras/moderncanada/1995_referendum.htm> accessed 30 November 2016.

[50] For instance, US officials supported Canadian unity through several declarations: US Secretary of State Warren Christopher suggested than an independent Quebec might not enjoy the same economic relationship with the US that it enjoyed as part of Canada. Peter Morici, 'A Sovereign Quebec and US National Interests' (1997) 27 (1) The American Review of Canadian Studies 143, 147-148.

[51] As for its influence in the 2006 Montenegro referendum on independence, Oklopcic (n 39) 28.

beyond a formalist reading of its constitutional text(s), i.e. rejecting the argument according to which secession was banned since no written provision provided for that'.[52] In effect, after carefully reviewing Canadian history, the SC, in a unanimous decision, admitted that there was no constitutional provision addressing secession, and rejected the right of Quebec to secede unilaterally under both the Canadian Constitution and international law, but established that the secession of a province from Canada was permitted following a constitutional amendment.[53] However, the Court said something else. It identified four implicit constitutional principles that underpin Canadian constitutionalism: federalism; democracy; constitutionalism and the Rule of Law; and respect for minorities[54]. They led the Court to admit that

> [t]he clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations[55].

A clear repudiation meant, in the Court's view, a referendum 'free of ambiguity both in terms of the question asked and in terms of the support it achieves'.[56] With this warning, the Court might have implicitly suggested that the 1980 and 1995 referendums did not meet that standard.[57] The requirement of more than a simple majority ('clear repudiation') is 'justifiable in terms of establishing procedural barriers against a too easy right to exit that may undermine the very basis of democratic politics.'[58] The Court holds a complex

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[52] Giuseppe Martinico, '"A Message of Hope": A Legal Perspective on the Reference' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (forthcoming, Palgrave 2019) 249.
[53] *Reference re Secession of Quebec* (n 29) para 84.
[54] 'These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any principle trump or exclude the operation of any other.' ibid para 49.
[55] ibid para 88.
[56] ibid para 87.
[57] Pavkovic and Radan, *Creating New States* (n 17) 228. See also Gaudreault-DesBiens (n 44) 40. In effect, 'the first two referendums questions were not unambiguous, as both referred, directly or indirectly, to the possibility of a renewed partnership between Quebec and Canada. The reason they were formulated as such by avowedly secessionist governments is simple: they knew very well that Quebecers overwhelmingly preferred renewed federalism or a EU-like agreement over outright separation from Canada.' ibid 47.
[58] Margaret Moore, 'The ethics of secession and a Normative Theory of Nationalism' (2000) 13 Canadian Journal of Law & Jurisprudence 225, 247.

notion of democracy that cannot be reduced to the majority rule. Constitutional democracies should honour a strong counter-majoritarian nature. There is a need to understand democracy 'as a mosaic where the will of majority cannot be treated as a trump card against other constitutional values.'[59] The SC might have opted for a straightforward prohibition of secession, probably the expected response of the Canadian government. Or as Tierney puts it, the Court delivered a 'complex opinion that was far from the unequivocal statement sought by the federal government.'[60] Instead, the SC opted for encouraging discussions and negotiations to sort out a political conflict. In fact, according to the Court, all constitutional participants have a binding, constitutional duty to negotiate. The Court emphasized that 'a functioning democracy requires a continuous process of discussion.'[61] As Hogg points out, the obligation to negotiate was a new idea in Canadian constitutionalism and the Court 'found it to be a corollary of the fundamental, but unwritten, constitutional principles of democracy and federalism.'[62] One of the difficulties of the decision lies in determining whether the Court 'is referring to legal or political rights and obligations, and whether even legal rights and obligations always produce clear legal consequences.'[63] In effect, in an exercise of self-restraint, and being aware that this type of conflicts could only be resolved by politics and not by Courts, the concrete content of the obligation to negotiate was not specified. Specifically, the Court admitted the following:

> The workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so.[64]

[59] Martinico, '"A Message of Hope": A Legal Perspective on the Reference' (n 52) 256.
[60] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 143.
[61] *Reference re Secession of Quebec* (n 29) para 68.
[62] Peter W. Hogg, *Constitutional Law of Canada* (St edn, Carswell 2015) 5-36.
[63] Oliver (n 40) 80.
[64] *Reference re Secession of Quebec* (n 29) para 100.

It seems that the obligations inferred from the constitutional principles by the Court are legal indeed, but its details and enforcement are to be left entirely to the political sphere.[65] For instance, the unwillingness to negotiate following a clearly expressed will to secede would undermine the default party's legitimacy in the eyes of the international community.[66] Haljan has warned against a common misreading of the Opinion:

> That a clear majority approving secession on a clear question entails that Parliament and the other provinces must negotiate the terms of secession without room to reject the proposal, or without the ability to call for amendments to vary it in any degree. That is, the Supreme Court has recognised a 'right to secede'.[67]

Thus, 'a proposal for change is just that: a suggestion. It is accordingly by definition mutable, variable and open to acceptance or rejection.'[68] Haljan is correct in his approach, since the Court highlighted the following:

> No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate.[69]

Therefore, a right to negotiate does not imply automatically a right to secede. Thus, the SC 'did not recognise a proper right to secession; rather it treated secession as an option that may be tolerated only in the presence of some important safeguards.'[70] The Court refrained from advising on failed negotiations. Probably because this was beyond its judicial duty. The legal title granted by the Court was simply a right to negotiate in good faith. The concrete results of the negotiations have to be sorted out by the diverse political actors. But one should also bear in mind the following: while the democratic principle provided the foundation for the duty to negotiate, it cannot obscure another important

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[65] Oliver (n 40) 80.
[66] *Reference re Secession of Quebec* (n 29) para 103: 'Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community.'
[67] Haljan (n 11) 343.
[68] ibid 341.
[69] *Reference re Secession of Quebec* (n 29) para 91.
[70] Martinico, '"A Message of Hope": A Legal Perspective on the Reference' (n 52) 251.

obligation, which is the need to respect the Rule of Law. Accordingly, 'if negotiations were to fail and a unilateral declaration of independence ensued, that declaration would be illegal under domestic law.'[71] The decision of the Court not only garnered an extreme amount of attention among Canadians, but has also been considered a 'landmark decision for worldwide constitutionalism.'[72] As part of a larger constitutional moment, the decision developed a constitutional doctrine to accommodate a political tension.[73] The Court 'produced a compromise which gave half a loaf to each side.'[74] It became a turning point and since then the debate has been about how to constitutionalise secession 'and how to tame something which had been considered for a long time as a sort of "beast" that is hard to domesticate.'[75] Later on, the Canadian Government attempted to encapsulate the SC doctrine in the 2000 Clarity Act. This Act accepted the constitutional duty to negotiate but established strict requirements to trigger such obligation.[76] In sum, Canadian provinces are free to organize referendums on independence, and, provided that the question submitted is free of ambiguity and there is a clear majority in favour of independence, there is a constitutional duty to negotiate for both sides.

[71] Gaudreault-DesBiens (n 44) 54.
[72] Peter H. Russell, *Constitutional Odyssey: can Canadians become a sovereign people?* (3rd edn, University of Toronto Press 2004) 244.
[73] Jonathon W. Penney, 'Deciding in the Heat of the Constitutional Moment' (2005) 28 Dalhousie Law Journal 217, 221.
[74] Russell (n 72) 245.
[75] Martinico, '"A Message of Hope": A Legal Perspective on the Reference' (n 52) 250.
[76] Article 1 establishes that the Canadian House of Commons shall consider the question featured in the referendum and shall set out (unilaterally) its determination on whether the question is clear. Likewise, Article 2 provides that the Canadian House of Commons shall consider whether there has been a clear expression of a will by a clear majority of the population of that province. Thus, the decision on whether there is a clear will to secede is left entirely in the hands of the Canadian House of Commons.

3. EU Member States constitutional responses to secession

3.1 United Kingdom

Scotland

On 18 September 2014 Scotland organized what is, so far, the last referendum on independence in the Western world, at least, a legal one that is accepted by all the members of the political community. The results are well-known: contrary to what the polls suggested, the 'no' side prevailed, by a margin of 55,3 to 44,7 percent, with an enthusiastic turnout of 84,6 percent.[77] However, the issue is far from being settled, since the Brexit turmoil has led the Scottish Premier to urge for a second referendum in the near future.[78] Yet, beyond political uncertainties, our focus here is to review the flexible response offered by British constitutionalism. In effect, in the eyes of foreign observers, what was probably most astonishing was how the flexibility of British constitution enabled a solution: the referendum was agreed upon between the Scottish and the British government in October 2012.[79] Since the Union between Scotland and England took place, in 1707, all power residing in the Scottish Parliament was transferred to the UK Parliament at Westminster. Even legislation that only pertained to Scotland was enacted by Westminster.[80] However, there has been a wide acceptance about a Scottish right to

[77] Results available at <http://www.bbc.com/news/events/scotland-decides/results> accessed 30 November 2016.
[78] Jessica Helgot, 'Sturgeon: second Scottish referendum is likely to be held in event of hard Brexit' *The Guardian* (London, 16 October 2016) <https://www.theguardian.com/politics/2016/oct/16/nicola-sturgeon-second-scottish-referendum-likely-in-event-of-hard-brexit> accessed 30 November 2016.
[79] The UK and the Scottish Premiers signed an Agreement on a referendum for Scotland on 15 October 2012. The referendum legislation had to decide i) the date of the referendum, ii) the franchise, iii) the wording of the question, iv) the rules on campaign financing and v) other rules for the conduct of the referendum. Although the agreement insisted on holding a legal and fair referendum 'producing a decisive and respected outcome', no reference was made to the required majority to secede. As Palermo explains, 'the very concept of entrenched majorities is alien to the political nature of the British constitution and it was never really considered as an option.' Palermo (n 1) 270.
[80] Matt Qvortrup, 'The Referendum Challenge to Constitutional Sovereignty: The Case of Scotland' (*Jus Politicum*, 2013) <http://juspoliticum.com/uploads/pdf/JP9-Qvortrup.pdf> accessed 29 November 2018.

decide their own destiny 'implicit in the concept of union'.[81] The Union was formally an international treaty between the Scottish and the English parliaments and this legal reality underpins the Scottish understanding that an international treaty can always be renegotiated.[82] The general perception is that the United Kingdom is a nation composed of several nations.[83] This is so even when it is hard to talk about a sovereign, independent and national Scotland before the Union treaty, since those terms are difficult to apply to European units of the Middle Age when the nation State model was not yet consolidated. In any event, what cannot be denied is that Scotland has a long history of statehood elements and a Scottish sense of common identity.[84] It is hard to tell whether Scottish history, centuries of almost uninterrupted British parliamentary tradition, pragmatic economic reasons or all together are behind the tolerant and flexible way British politics faces Scottish secession.[85] In any event, even opponents of Scottish devolution accept the right of Scotland to decide its own destiny. The very same Margaret Thatcher, who showed no interest in promoting a second referendum on Scottish devolution,[86] admitted that

> As a nation, they [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way, however much we might regret their departure.[87]

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[81] Michael Keating, *The Independence of Scotland. Self-government and the Shifting Politics of Union* (Oxford University Press 2009) 81.
[82] ibid 18.
[83] Colin R. Munro, 'Scottish Devolution: Accommodating a Restless Nation' in Stephen Tierney (ed), *Accommodating National Identity. New Approaches in International and Domestic Law* (Kluwer Law International 2000) 134
[84] ibid 135.
[85] 'Most English people [think] that Scottish independence would make no difference to England's prosperity'. Keating (n 81) 45. Keating admits that this is a remarkable thing, since in other comparable liberal democracies like Canada or Spain, the idea of secession 'stir powerful passions on the sides of both minority nations and the state majority, who see secession as an existential threat to their political identity and being.' ibid 46.
[86] In 1979, under a Labour Government, the first attempt to devolve powers to Scotland by re-establishing the Scottish Parliament failed because the threshold requirements were not met. Only in 1997 with another Labour Government a second referendum was organized and this time, despite the lack of popular enthusiasm, the Scotland Act was passed.
[87] Margaret Thatcher, *The Downing Street Years* (HarperCollins 1995) 624.

Thus, given that the Westminster parties agree that a Scottish desire for independence should be respected,[88] the only decision to be made refers to the concrete constitutional procedure. Any discussion about British constitutionalism starts with the famous (and contested) doctrine of Parliamentary Sovereignty.[89] In the recent a *R. (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin),[90] the Divisional Court reminded us that '[t]he United Kingdom does not have a Constitution to be found entirely in a written document. This does not mean there is an absence of a constitution or constitutional law. On the contrary, the United Kingdom has its own form of constitutional law'.[91] Some of it is written and some of it is reflected in fundamental rules of law recognised by both Parliament and the Courts, says the Court. The Court then identified the meaning of Parliamentary Sovereignty:

> It is common ground that the most fundamental rule of UK constitutional law is that Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme […]. Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen.[92]

[88] In January 2012, the UK Government presented to the Parliament a statement entitled 'Scotland constitutional future'. Michael Moore, then Secretary of State for Scotland, announced that '[t]he Scottish National Party entered the May 2011 election with a manifesto pledge for a referendum on independence. They have campaigned consistently for independence, and while the UK Government does not believe this is in the interests of Scotland, or the rest of the United Kingdom, we will not stand in the way of a referendum on independence: the future of Scotland's place within the United Kingdom is for people in Scotland to vote on.' Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/39248/Scotlands_Constitutional_Future.pdf> accessed 30 November 2016. The debate that followed on the House of Commons is remarkable in the sense that it only lasted approximately one hour (from 5.09pm to 6.22 pm) and no member of the Parliament (57 took the floor) showed his opposition to the organization of such a referendum. The concerns brought up were about the fairness of the referendum, the instability that the interim situation would create or the concrete legal procedure. HANSARD, 10 January 2012, Col. 51-72. Available at <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120110/debtext/120110-0002.htm#12011056000001> accessed 30 November 2016.

[89] There is currently among British constitutional lawyers a lively debate about the role of Parliament in the Brexit process that culminated in the 24 January 2017 decision of the UK Supreme Court. *R. (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

[90] *R. (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

[91] ibid para 18.

[92] ibid para 20.

Parliamentary sovereignty, thus, is opposed to the Western widespread idea of democracies governed by a supreme and rigid Constitution. This is a powerful tool that provides the system with an enormous amount of constitutional flexibility, unlike in many other legal orders. A second important characteristic of British constitutionalism that has to be taken into account when reviewing Scotland's secessionist attempt is the distribution of competences between Westminster and Holyrood. '[T]he scheme is not federal, and the Scottish Parliament is merely a devolved institution. There is no reason, legally, why the Scottish Parliament could not be abolished by a later Act of the Parliament at Westminster.'[93] Unlike in federal systems or other regional orders (like Spain), the unilateral abolition of Scottish autonomy by Westminster is legally possible.[94] But the key issue here is not so much the legal subordination of the Scottish Parliament, but the limits of its powers, with certain competences 'reserved' to Westminster. According to Section 29 (2) (a) of the Scotland Act, the Scottish Parliament cannot enact laws on reserved matters. Reserved matters are listed in Schedule 5 of the Act and include among other issues (e.g. defence, foreign affairs, monetary policy, …) the Union and the constitution. This restriction is significant, since Scotland has therefore no competence to legislate for independence, or even to hold a referendum on independence.[95] This was the position of the UK government, as established in the 2012 statement 'Scotland

[93] Munro (n 83) 147.
[94] Do not confuse this prerogative with the possibility of enforcing coercive measures against a Spanish region acting against the Constitution. See section on Spanish constitutionalism and Catalonia.
[95] Neil MacCormick had argued in the past that an advisory referendum on independence would have no direct legal effects and that the Scottish government was constitutionally allowed to organize it. Neil MacCormick, 'Is There a Constitutional Path to Scottish Independence?' (2000) 53 Parliamentary Affairs 721, 725-726. Nick Barber also argued that 'the Scottish Parliament can hold a referendum on independence. But it would only be an advisory referendum: it would be open to the United Kingdom Parliament to ignore the vote.' Nick Barber, 'Scottish Independence and the Role of the United Kingdom' (*UK Constitutional Law Association Blog*, 11 January 2012) <https://ukconstitutionallaw.org/2012/01/11/nick-barber-scottish-independence-and-the-role-of-the-united-kingdom/> accessed 30 November 2016. However, other authors have contested such a view. See Qvortrup (n 80). And it seems that the prevailing political view has been that an agreement with the UK Parliament at Westminster is needed even if the referendum does not have any binding legal effects.

constitutional future'.[96] After reaching an agreement on holding the referendum in October 2012, the debate turned on the procedure. There were basically two procedural options to organize a legal referendum, outlined in the January 2012 statement: i) either legislate to give the Scottish Parliament the power to deliver a referendum (amending the Scotland Act) or ii) legislate directly in the UK Parliament for a referendum on Scottish independence. The UK Government opted for option i), formalised by the Scotland Act 1998 (Modification of Schedule 5) Order 2013, which devolved to the Scottish Parliament the competence to legislate for a referendum on independence which had to be held no later than 31 December 2014.[97] This temporal detail is not a trivial issue. The Order in Council was an *ad-hoc*, temporary devolution, only valid to hold the 2014 referendum, but not a general, unspecific and unlimited modification that would allow Scotland from then on to organize referendums on independence. In October 2016 the Scottish Government published a 'Consultation on a Draft Referendum Bill', where it implicitly admitted that Westminster approval is necessary if a second referendum is to be held: 'it would be expected that a section 30 order would be sought and agreed, as in 2014.'[98] However, the British Premier May warned the Scottish Premier Sturgeon that she has 'no mandate' to hold a second plebiscite.[99] In short, even a flexible constitution like the British has made sure that Scotland does not exercise a unilateral and uncontrolled right

[96] '[I]t is the UK Government's view that any Bill introduced in the Scottish Parliament providing for a referendum on independence would be outside the powers of the Scottish Parliament and, if challenged, would be struck down by the courts.' UK Government, 'Scotland's constitutional future' (n 88) 11.

[97] Besides, with that *ad hoc* devolution the UK government also addressed and settled some other main concerns such as (i) the question of the referendum had to be clear and direct about independence ('the ballot paper must give the voter a choice between only two responses'), despite the will of the then Scottish Premier Salmond to organize a multiple-choice referendum and (ii) the British general electoral rules (i.e., the 2000 Political Parties, Elections and Referendum Act) were to be applied.

[98] 'Consultation on a Draft Referendum Bill' (Scottish Government 2016) 6. Available at <https://consult.scotland.gov.uk/elections-and-constitutional-development-division/draft-referendum-bill/supporting_documents/j456862.pdf> accessed 30 November 2016.

[99] Jill Castle, 'Theresa May tells Nicole Sturgeon she has 'no mandate' for second independence referendum' *The Herald* (Glasgow, 21 October 2016) <http://www.heraldscotland.com/news/14816446.Theresa_May_tells_Nicola_Sturgeon_she_has__no_mandate__for_second_independence_referendum/> accessed 30 November 2016.

to secede, and it is far from clear whether the UK Government would agree on a second referendum in the near future.

Northern Ireland

The Northern Ireland case is another example to test the British approach to self-determination and secession. In this case, however, self-determination is not so much linked to secession and independence, but to the attempt of joining another country, Ireland. Following Irish independence in 1922, the Northern part of the island (with a Protestant majority) remained part of the United Kingdom. The Protestant majority in Northern Ireland had traditionally tried to keep the union with Britain, while the significant Catholic minority, which considers itself distinctly Irish, had consistently sought to promote greater integration and potential union with Ireland.[100] Unlike in the Scottish case, where the possibility to secede depends on the political will of the parties involved (i.e. Scottish and British government), in Northern Ireland the British Government is constitutionally obliged to permit such a right under certain conditions. In effect, on 10 April 1998 the Belfast Agreement, a peace agreement also known as the Good Friday Agreement, was reached between the British and Irish governments and most of the political parties in Northern Ireland. It was an agreement made up of two inter-related documents. First, there is the 'Agreement reached in the multi-party negotiations', also known as the Multi-Party Agreement ('MPA'), to which is annexed the 'British-Irish Agreement' ('BIA'). Second, there is the BIA, which also includes the MPA as Annex 1. The two combined are the Belfast Agreement (or the Good Friday Agreement). While the BIA is legally a treaty, or international agreement, made between two contracting states, and signed by the United Kingdom and the Irish governments, the

[100] Paul R. Williams and Sabrineh Ardalan, 'The Northern Ireland Peace Agreement: Evolving the Principle of Self-Determination' (1999) 12 Leiden Journal of International Law 155, 156.

MPA is a political or moral agreement between the political parties. The two states are legal parties, but only through Annex 1, and only to the extent that the content of the MPA contains obligations binding on the states parties in international law. In effect, the BIA contains an annex (the political agreement) that is also legally binding under international law, as established by Article 2 of the BIA.[101] Article 1 of the BIA permits the people in Northern Ireland to exercise the right of external self-determination – by seceding from the United Kingdom and joining with the Republic of Ireland upon a majority vote of the population.[102] Importantly, and before examining in depth such question, we must underline the constitutional relevance of the Belfast Agreement: 'it cannot be changed piecemeal or unilaterally. It is constitutional in its provision for a complex institutional unity with multiple checks and balances that are difficult to undo.'[103] In effect, the current devolved political system of Northern Ireland, the 1998 Northern Ireland Act, which includes the right to self-determination, is based on the 1998 Belfast Agreement. After decades of a long and bloody conflict and attempts to solve the *Troubles*[104] between the two communities in the region, peace process negotiators[105] were able to produce a strongly consociational agreement.[106] Such agreement (in particular the MPA) provides for,

[101] A detailed legal analysis of the Belfast Agreement to be found at Austen Morgan, *The Belfast Agreement: a practical legal analysis* (The Belfast Press 2000).
[102] ibid 164.
[103] Bill Kissane, *New Beginnings: Constitutionalism and Democracy in Modern Ireland* (University College Dublin Press 2011) xii-xiii. Furthermore, in a landmark case (*Robinson v. Sec'y of State for Northern Ireland and others*, 2002) the GFA was accepted as the necessary frame for understanding and interpreting the Northern Ireland Act (1998). Kieran McEvoy and John Morison, 'Beyond the "Constitutional Moment?: Law, Transition, and Peace-making in Northern Ireland' (2002) 26 (4) Fordham International Law Journal 961, 967.
[104] Williams and Ardalan (n 100) 157.
[105] The agreement, however, is not so much the product of a negotiation, but the product of a planning process. Donald Horowitz, 'Explaining the Northern Ireland Agreement: The Sources of an Unlikely Constitutional Consensus' (2002) 32 British Journal of Political Science 193, 199.
[106] 'The peace process is based on the conviction that a system of shared autonomous government offers the best framework for resolving the conflict.' Rogelio Alonso, 'Pathways Out of Terrorism in Northern Ireland and the Basque Country: The Misrepresentation of the Irish Model' (2004) 16 (4) Terrorism and Political Violence 695, 706.

> a grand coalition, power sharing by proportional inclusion of parties in the executive, a certain amount of cultural autonomy (particularly in education and language), and group vetoes to assure Protestant and Catholic communities that important decisions will only be made with the broad consent of representatives of the relevant community.[107]

The need for a wide consensus is one of the key relevant characteristics of the devolved political system, but as stated above, our focus here is on the right to secede conceded to Northern Ireland. The Belfast Agreement (both Article 1 of the BIA and Annex A of the Constitutional Issues of the MPA) affirms the right to national self-determination for the Irish people and redefines it so that it must be exercised by agreement between the two parts of the island:

> 1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo- Irish Agreement, they will:
>
> (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
>
> (ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland; [108]

Annex A of the Constitutional Issues of the MPA (incorporated in Section 1 of the 1998 Northern Ireland Act and, therefore, constitutionally binding as part of the United Kingdom Constitution) further states the following:

> (1) Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
> (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to

[107] Horowitz (n 105) 194.
[108] Jennifer Todd, 'Contested Constitutionalism? Northern Ireland and the British-Irish Relationship since 2010' (2017) 70 Parliamentary Affairs 301, 303.

> that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

Interestingly, Schedule 1 provides that 'the Secretary of State [belonging to the British Government] may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.' Moreover, it establishes that the Secretary of State shall exercise such power if 'it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.'[109] There are two issues that should be highlighted: the question about the demos, and the presumed unilateral character of the right.

First, these provisions address the difficult question about the demos, which has been a matter of contestation in Northern Ireland, 'the question at the very heart of disputes about sovereignty and self-determination, a question known locally as the "constitutional question"'[110]. In short, is there one single demos in the whole island, as Irish republicanism has always argued[111], or two separate demoi: an Irish demos and a Northern Ireland demos? The Belfast Agreement resolves the question in the latter sense, by declaring that Northern Ireland itself is entitled to decide. This approach is known as the 'principle of consent'. It assumes that a united Ireland can only come about with the consent of a majority of the population in Northern Ireland.[112] It acknowledges the traditional Ulster Protestant approach: 'Ulster Protestants seek recognition of what to them is an inescapable historical fact, that Ireland has two peoples having the right to self-determination, not one.'[113] Second, the right to withdraw from the United Kingdom and

[109] Such provisions are to be found both in the 1998 Belfast Agreement and in the 1998 Northern Ireland Act.
[110] Arthur Aughey, 'Northern Ireland narratives of British democracy (2012) 33 (2) Policy Studies 145, 147.
[111] Throughout its history, IRA and Sinn Fein had rejected the possibility of providing Northern Ireland alone with a right to self-determination. Alonso (n 106) 700.
[112] ibid 700.
[113] Alexander M. Johnston, 'Self-determination in comparative perspective: Northern Ireland and South Africa' (1990) 17 (2) Politikon: South African Journal of Political Studies 5, 8.

join the Republic of Ireland is not a unilateral right, in the sense that it can be decided by the Northern Ireland government at any time. As has been said, there is an '[i]mplicit distinction between the ground of sovereignty in self-determination, and the exercise of sovereignty (presently by the British state).'[114] It is the British Government the one entitled to decide if there is a majority within Northern Ireland wishing to break its ties with the United Kindgom.[115] In sum, Northern Ireland has constitutional recognition of a right to change its status quo (internationally binding provision, as well, since it was firstly established in an international agreement). However, such a right is going to be monitored by the British Government, it cannot be exercised unilaterally.

3.2 Spain

At this moment, Spain is the European country that is facing a most serious secessionist crisis.[116] The 2017 secession attempt of the Catalan government and the reactions thereto across the rest of Spain, at both the judicial and the political levels, have created an atmosphere of tension. The emotional bonds between Spain and Catalonia seem to be increasingly fragile. Since 2012 the government of Catalonia has attempted to organize a referendum or consultation on independence, but the Spanish government has challenged these attempts before the Spanish Constitutional Court ('SCC'), which has declared them contrary to the Spanish constitution. We will review below the different Resolutions,

[114] Todd (n 108) 306.

[115] As Qvortrup points out, 'one of the most persistent and controversial questions regarding national self-determination and the referendums, is who is allowed to initiate a vote'. Qvortrup (n 80). The British Secretary of State has a similar role than the one hold by the Canadian House of Commons when having to verify (although in this case a posteriori) the existence of a majority, notes Martinico. Martinico, '"A Message of Hope": A Legal Perspective on the Reference' (n 52) 257.

[116] Apart from Catalonia, there is another Spanish region with a noted pro-independence movement, the Basque country. In the last years, however, the Basque Government has not shown any interest in following a pro-independence path, although currently it is negotiating deepening the Basque self-government but in an agreed manner and within the legal limits. Ironically, the approaches of both nationalist movements seem to have interchanged. Thus, during the second half of the 19th century, the Basque nationalist leader Sabino Arana 'publicly denounced what he termed the "Catalanist error" of seeking autonomy and co-operation within the Spanish framework, insisting that the Basque movement demanded total separation.' Stanley Payne, 'Nationalism, Regionalism and Micronationalism in Spain' (1991) 26 (3/4) Journal of Contemporary History 479, 485.

which show that Spanish constitutionalism concerning secession follows the classic paradigm inaugurated by the US in the 19th century. Before doing so, the law should be placed in context.

Unlike in the case of Canada, where Quebec has already organized two referendums without the opposition of the central government and unlike in the British scenario, where the British and the Scottish governments agreed on the organization of one referendum in the recent past, in Spain the lack of political will, along with rigid constitutional impediments, have prevented holding such a referendum. Tierney rightly noted that 'the very act of staging a constitutional referendum is itself both a declaration that a people exists and a definition of that people'[117] and that constitutional referendums in general, and independence referendums in particular, can have a 'vital nation-building role.'[118] In Spain, accepting the organization of such a referendum would mean admitting the national and sovereign character of Catalonia. Many feel that this would threaten the national sovereignty of the Spanish people as a whole. This is one of the main reasons that underpins the Spanish government's opposition to the organization of such a referendum. The current legislative decentralization of Spain, which is a quasi-federal polity,[119] was only recently established with the democratic restoration in 1978. Yet, decentralization is not totally alien to Spanish history.

It is true that since 1714 Spain was a highly-centralized State, however, decentralization dates back to the very origins of Spain as a political unit. Throughout the Middle Ages, Hispania was just a factitious unity to a complex of Crowns and kingdoms – Castile and León, Navarre, Aragon (that included the kingdoms of Aragon, Valencia

[117] Stephen Tierney, 'Constitutional Referendums: A theoretical inquiry' (2009) 72 (9) The Modern Law Review 360, 374-75.
[118] ibid 366.
[119] Víctor Ferreres Comella, *The Constitution of Spain. A Contextual Analysis* (Hart 2013) 161-199. See also Eliseo Aja, *Estado Autonómico y Reforma Federal* (Alianza Editorial 2014).

and Mallorca and the Principality of Catalonia), Portugal and the Moorish Kingdom of Granada, each having its own institutions. But this fragmentation changed in 1469. 'The marriage of Ferdinand and Isabella in 1469 and their joint rule over Castile and Aragon from 1479 signalized to the world at large the emergence of a new European nation, the birth of Spain.'[120] The Spanish monarchy established then a confederal structure called *Unión Real,* where Catalonia and other territories enjoyed a certain level of self-government and autonomy within the Spanish Crown. After the Spanish Succession War (1702-1715) the new King, Philiph V,[121] grandson of French King Louis XIV, abolished public local laws and institutions of the territories of the Crown of Aragón, (in Catalonia, Mallorca and Aragon local private law was maintained, while in Valencia both local public and private law was abolished), and introduced French centralist patterns in Spain in its attempts to rationalize the bureaucracy and to limit local freedoms.[122] During the period of the second Spanish Republic (1931-1936) there was an initial attempt to decentralize Spain,[123] but the Franco dictatorship (1939-1975) that followed the Civil War (1936-1939) brought an end to that attempt and continued with a highly centralized State.

As for Catalonia, Elliot admits that in the Middle Age 'Catalonia was a distinctive national community, whose inhabitants were united by ties of language, culture and history.'[124] But he has also criticized the misuse of modern words such as 'nation' or 'sovereignty' to medieval or early modern entities.[125] Catalanism, or the political

[120] John H. Elliot, *The Revolt of the Catalans. A study in the Decline of Spain (1598-1640)* (Cambridge University Press 1963) 2.
[121] The Bourbon Philiph V came to power after winning the Spanish Succession War in which Catalans fought against him in favor of the Habsburg Dynasty. Barcelona was finally defeated after a fourteen months siege on 11th September 1714.
[122] David D. Laitin, 'Linguistic revival: Politics and Culture in Catalonia' (1989) 31 (2) Comparative Studies in Society and History 297, 305.
[123] Payne, 'Nationalism, Regionalism and Micronationalism in Spain' (n 116) 484.
[124] Elliot, *The Revolt of the Catalans. A study in the Decline of Spain (1598-1640)* (n 120) 43.
[125] John H. Elliot, *History in the making* (Yale University Press 2012) 60.

movement that demanded Catalan self-government within Spain, only originated in the second half of the nineteenth century.[126]

In any event, and despite the decentralized origins of Spain as a country in the 15th century, the current Spanish constitutional legal order does not admit that the inhabitants of a Self-Autonomous Community can decide by themselves the dismemberment of the country. Spanish constitutionalism has been tested with a severe secession attempt carried out by Catalan institutions.[127] In order to simplify the picture, one could highlight two Resolutions and two laws of the Catalan Parliament that have been challenged by the Spanish Government before the SCC. The review of the subsequent judicial decisions will shed light on the Spanish legal order.[128]

Judgment 42/2014

The SCC rendered this judgment on a resolution that had been passed by the Catalan Parliament on January 23, 2013. Basically, the referred Resolution proclaimed that the Catalan people is sovereign and that therefore it has the 'right to decide' its own future. The SCC held that considering the Catalan people as sovereign is against Articles 1.2 and

[126] Catalanism was born due to four major influences: the rebirth of Catalan vernacular literature in a period of cultural effervescence known as *Renaixença*; concerns of the Catalan bourgeoisie because of the Spanish economic decline (especially after the disaster of 1898); the influence of federalist and progressive ideals and the anti-Bourbon traditionalism (residues of Catalan Carlism). This is the widely-accepted thesis about the origins of Catalanism. It was developed for the first time by a Jesús Pabón, who became the biographer of one of the most important Catalan politicians of the 20th century, Francesc Cambó. Jesús Pabón, *Cambó. 1876-1947* (Alpha 1999) 71-127. His thesis is accepted by Payne, who considers Pabón's work the best Spanish biography of the century. Stanley Payne, 'Catalan and Basque Nationalism' (1971) 6 (1) Journal of Contemporary History 15, 20.

[127] There are hundreds of books and articles dealing with the current Catalan pro-independence movement. While some scholars tend to accept the reasoning advanced by many pro-independence supporters that the current crisis has its main origins in a lack of political accommodation (See Karlo Basta, 'The State between Minority and Majority Nationalism: Decentralization, Symbolic Recognition, and Secessionist Crises in Spain and Canada' (2017) 48 (1) Publius: The Journal of Federalism 51, 63), others also point out the impact of the huge economic crisis suffered in Spain in 2010-2012 and how it enabled the pro-independence movement to present secession as a way out of the situation. See, for instance, Kathryn Crameri, 'Do Catalans have 'the right to decide'? Secession, legitimacy and democracy in twenty-first century Europe' [2015] Global Discourse 1, 7.

[128] In the past, the Spanish Constitutional Court had already dealt with self-determination demands from the Basque Government: Constitutional Court Judgments 76/1994, 14 March and 103/2008, 11 September.

2 of the Spanish Constitution. Article 1.2 of the Spanish Constitution establishes that '[n]ational sovereignty belongs to the Spanish people, from whom all State powers emanate.' Thus, national sovereignty cannot be divided.[129] Article 2 proclaims that '[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards'. The Court held[130] that an Autonomous Community cannot unilaterally call a referendum of self-determination to decide on its integration in Spain, because sovereignty is only reserved to the Spanish nation. The Court accepts that the so-called 'right to decide' is a legitimate political aspiration. However, this aspiration, since precluded in the current constitutional framework, should be channelled through the appropriate procedure: constitutional amendment. The Court nonetheless accepted that, unlike in Germany with its model of militant democracy, in Spain there are no constitutional principles excluded from the constitutional amendment procedure. The Court also considered, using imprecise and vague wording, that some preparatory measures towards secession are possible before the amendment of the Constitution. The Court does not explain further what type of measure would be legally acceptable. It only rules out the possibility of a proper referendum on secession. It could be argued that the Court might accept some other type of consultations.[131] In this decision the SCC referred explicitly to the 1998 Opinion of the Canadian Supreme Court and asked the involved authorities to start a political dialogue ('there is a cry here for the political branches to assume the burden of negotiating a political solution to a deep constitutional

[129] In fact, in 1978 during the drafting of the Constitution a Basque Member of the Spanish Parliament, Francisco Letamendía, proposed including the right to self-determination. However, even the Catalan nationalist rejected the proposal. Diario de Sesiones de las Cortes Generales. Congreso de los Diputados, 91, 16 June 1978, 3427-3435. Available at <http://www.congreso.es/public_oficiales/L0/CONG/DS/C_1978_091.PDF> accessed 30 November 2016.

[130] The main reasoning of the Court is to be found in *Fundamentos Jurídicos* 3 and 4.

[131] Josep Maria Castellà Andreu, 'Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional' (2016) 37 Teoría y Realidad Constitucional 561, 575.

crisis'[132]), but also reminded the political actors about the constitutional framework within which political decisions must ultimately be made. The Court, following the Canadian example, was eager to speak to the actors by examining the constitutionality of the parliamentary resolution, even if it could easily have avoided the case.[133]

Judgment 259/2015

In this decision the Court followed, essentially, the reasoning of the previous judgment. The Court, again, was asked about the constitutionality of another Resolution passed by the Catalan Parliament on November 9, 2015. The referred Resolution, with strong rhetoric, proclaimed the beginning of a democratic disconnection from Spanish institutions to move toward independence from Spain. To that end, Catalan institutions would no longer be bound by the central government's edicts or the decisions of the SCC. In the Court's opinion, this Resolution was contrary to the Spanish Constitution, since it represented a foundational act of the creation of a Catalan independent State. Referring to its own consolidated case law, the Court noted that the unity of sovereignty is the foundation of the Spanish Constitution. Moreover, the Court reminded us of the supremacy of the Constitution in the Spanish constitutional legal order and considered that the democratic principle was subordinated to the constitutional text: there is no democracy outside the Rule of Law.

[132] Víctor Ferreres Comella, 'The Spanish Constitutional Court Confronts Catalonia's "Right to Decide"" (Comment on the Judgment 42/2014)' (2014) European Constitutional Law Review 571, 585.
[133] 'According to its case law, parliamentary acts can only be challenged before the Constitutional Court if they generate legal effects. It is hard to specify what exactly are the legal effects that the Declaration of sovereignty produces. It rather looks like a purely political act, to be understood as part of the political game, which does not give rise to any legal effects on the institutions or on citizens. The Court, however, concluded that the resolution could be reviewed against the Constitution.' ibid 579.

These two judgments are the main decisions that express the Spanish constitutionalist position towards attempts at secession.[134] The Court's position was very clear: (i) Self-Autonomous Communities do not hold the right to organize unilaterally a referendum on independence and (ii) the organization of such a referendum requires amendment of the Constitution. This position is based on the fact that Spain is a constitutional democracy, where ordinary laws have to be subject to a supreme norm, the Constitution. This line of reasoning has been largely accepted by Spanish legal scholarship.[135] However, some authors have even rejected the possibility of including a secession clause in a future constitutional reform, since the unity of the country is an (implicit) immanent limit to such reform,[136] following the approach adopted by the Italian Constitutional Court, which is considered below.

Despite the clarity and severity of the Constitutional Court's position, in September 2017 the pro-independence majority in the Catalan Parliament[137] passed two laws: 19/2017, on a referendum on self-determination and 20/2017, on the foundation of the Republic. Both laws, ordinary Catalan laws, established that they prevailed over the Catalan Statute of Autonomy and over the Spanish Constitution. Note here that according to Article 222.1.b) of the Catalan Statute of Autonomy, the approval of its reform requires the favourable vote of two-thirds of the members of Parliament, namely 90 MPs (out of 135). Since the Catalan Statute is considered a fundamental law of the Catalan community

[134] There are also other decisions issued by the Spanish Constitutional Court regarding public consultations or secessionist activities carried out by the Catalan government. For instance, Constitutional Court Judgments 31/2015 and 32/2015, 25 February and 138/2015, 11 June.
[135] José María Castellà Andreu, 'Constitution and Referendum on Secession in Catalonia' in Alberto López Basaguren and Leire Escajedo (eds), *Claims for Secession and Federalism* (forthcoming, Springer 2019).
[136] Javier Ruipérez Alamillo, 'La nueva revindicación de la secesión de Cataluña en el context normative de la Constitución española de 1978 y el Tratado de Lisboa' (2013) 31 Teoría y Realidad Constitucional 89, 131.
[137] Something that deserves to be mentioned is that although pro-independence political forces enjoy an absolute majority position in the Catalan Parliament (70 seats out of 135 after the 2017 elections; 72 seats in the 2015 elections) they do not enjoy the same type of popular support (47,5% in the 2017 elections; 47,8% in the 2015 elections). The reason for this mismatch is that, like in many other electoral systems, rural areas have an overrepresentation in terms of seats in the Catalan Parliament and it is precisely in these areas, unlike in the area of Barcelona and surroundings, where the support for independence is higher.

a qualified majority is required in order to amend it. Bear in mind that these laws that challenged the fundamental order of Catalonia (and Spain) were passed by 'only' 72 MPs. Thus, from a procedural standpoint they were considered ordinary, while its scope and impact clearly exceeded the limits of the Catalan autonomy. Besides, the extraordinary parliamentary procedure used to approve those norms reduced the period for discussion and amendment to less than a day for each bill. The Catalan Legal Advisory Council itself unanimously rejected the move.

Both laws were immediately challenged before the SCC, which suspended the laws and their effects, based on the preceding doctrine of the Court. However, the referendum took place on 1st October 2017, although without procedural guarantees. The voting led to harsh confrontation and some violent clashes with police, who were trying to prevent its occurrence, pursuant to Court orders. According to the Catalan government, 43% of the population went to the polls to vote in favour of independence.[138] The former Catalan President Carles Puigdemont declared unilaterally the independence of Catalonia on 27th October. In response, the Spanish Senate enacted coercive measures (Article 155 of the Spanish Constitution), namely: the dissolution of the Catalan Parliament and the Catalan Cabinet and the call for early elections on December 21st. Meanwhile, Supreme Court judges initiated criminal actions against the main Catalan authorities with the preventive imprisonment (pending trial) of some of them. After the elections and the formation of the new Catalan government the legal situation has been normalized, but political tension remains high.

As we have seen, the Spanish approach follows the classic paradigm (represented by the US) and diverts from the Canadian and British perspectives in the sense of not even permitting a referendum on independence. However, both in Canada (as in Italy and

[138] Detailed results to be found at <https://govern.cat/salapremsa/notes-premsa/303541/govern-trasllada-resultats-definitius-referendum-l1-doctubre-parlament-catalunya> accessed 30 November 2018.

Germany) and in Spain, respect for institutions and authorities of the Rule of Law and the Constitution are considered key principles of the Constitution:

> In all these legal orders, the final decision on secession necessarily implies a constitutional reform. Thus, unilateral secession is excluded, for the sovereignty power is the Spanish people as a whole and not the territorial entities that constitute Spain.[139]

3.3 Italy

Italy has not yet faced a serious and persistent secessionist challenge like Spain, but has a long tradition of pro-independence movements in the North of the country. However, the issue of secession has not raised public discussions and has remained completely out of the national political debate[140] except among certain constitutional scholars. Yet, it is interesting to take a look, though brief, at the position of the Italian Constitutional Court, since it is very similar to the Spanish position. In June 2014, the regional council of the Veneto, a rich Northern-Eastern Italian region, passed two laws (15/2014 and 16/2014) regarding consultative referendums on (i) improving the autonomy of Veneto and (ii) the independence of Veneto. Both laws were immediately challenged before the Italian Constitutional Court by the central government. In April 2015, the Italian Constitutional Court rendered its decision in a joint case.[141] The reasoning of the Court regarding the Veneto Regional Law no. 16 of 19 June 2014 (Calling of the consultative referendum on independence for Veneto),[142] which was declared unconstitutional, is particularly interesting. First, the Court noted that 'it is legally mistaken to assert that a consultative

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[139] Castellà Andreu, 'Constitution and Referendum on Secession in Catalonia' (n 135).

[140] Cristina Fasone, '"Italian-style" secession and the semi-indifference of national politics' (*Verfassungsblog*, 21 April 2015) <https://verfassungsblog.de/italian-style-secession-and-the-semi-indifference-of-national-politics/> accessed 30 November 2018.

[141] Italian Constitutional Court Judgment 118/2015, 29 April. The conclusions of the decision are available in English <http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S118_2015_en.pdf> accessed 30 November 2016.

[142] That law provided for the calling of a consultative referendum in order to establish the wishes of the voters of Veneto concerning the following question: 'Do you want Veneto to become an independent and sovereign Republic? Yes or No?'.

referendum is equivalent to any other spontaneous exercise of freedom of expression by citizens in a coordinated manner.' (§ 5) This was because even in the case of consultative referendums without immediate legal effects, the Court argued the following:

> A referendum performs the function of activating, initiating or opposing public decision making processes, which largely have legislative status. For this reason, popular referenda on national or regional level, including consultative referenda, are typified institutions and must be conducted in the manner and subject to the limits laid down by the Constitution or stipulated on the basis of the Constitution. (§ 5)

In sum, a referendum is not a qualified poll, it implies much more. The Court also rejected the argument that the constitutional principles of pluralism and autonomy justify 'initiatives involving the consultation of the electorate – albeit only for consultative purposes – concerning prospective secession with a view to the creation of a new sovereign body.' (§ 7.2) Furthermore, the Court continues, a consultative referendum on independence concerns fundamental choices on the constitutional level,

> [W]hich are as such precluded from the scope of regional referendums according to the case law of the Constitutional Court cited above, but seeks to subvert the institutions in a manner that is inherently incompatible with the founding principles of the unity and indivisibility of the Republic laid down in Article 5 of the Constitution. The unity of the Republic is an aspect of constitutional law that is so essential as to be protected even against the power of constitutional amendment (see Judgment no. 1146 of 1988) (§ 7.2) (emphasis added).

The Court here implicitly reminds us of the distinction between autonomy (granted to regions) and sovereignty[143] (granted to the Italian people as a whole). It is also pointing out that a referendum on secession is revolutionary in the sense that it challenges state sovereignty.[144] Besides, unlike in Spain, the Italian Constitutional Court considers that there are implicit limits to the constitutional amendment process. One of these limits is

[143] Xabier Arzoz and Markku Suksi, 'Comparing constitutional adjudication of self-determination claims' (2018) 25 (4) Maastricht Journal of European and Comparative Law 452, 457.

[144] It has been labelled as a 'direct attack against the unity and indivisibility of the Italian Republic'. Fasone (n 150). As Fasone points out, 'the question posed is not limited to reaching a condition of strengthened autonomy, but it aims to secede.' Furthermore, in execution of the contested Law, the regional government of the Veneto promptly adopted a series of provisions dealing with the propaganda, the voting procedures in the referendum and the steps to be taken for the official proclamation of the results and those concerning the economic and financial aspects of the referendum.

the unity of the Republic, the territorial integrity of the Italian State. Therefore, the Court excludes secession even from a future constitutional amendment, or as Martinico underlines, excludes secession in such a manner in the name of the principles of unity and indivisibility that, from this perspective, he argues, the Italian Constitutional Court seems to be more radical than the Spanish Constitutional Court.[145] This restrictiveness, although with the exceptions we will mention, is also to be found in the German constitutional legal order.

3.4 Germany

Secessionist movements are almost non-existent in Germany.[146] Yet, there has been a recent case that shows the legal reaction of the German constitutional order to a secessionist challenge. This issue, like in Italy, has rarely been commented on by the press, or in academic legal literature. However, it is relevant for our analysis, since it indicates that the German legal approach is similar to the Spanish or Italian approaches.[147] On 16 December 2016, the German Constitutional Court[148] unanimously deemed inadmissible a claim filed by a citizen of the Southern and rich land of Bavaria whereby

[145] Giuseppe Martinico, 'Identity conflicts and secession before Courts: Three case Studies' (2017) 21 Revista de Derecho Público Comparado 1, 27. It should also be mentioned that the Italian Constitutional Court had already faced similar cases in the past, although they were not as subversive of the constitutional order as the Veneto Laws no. 15 and 16/2014. In those decisions (decisions no. 470/1992 and 496/2000) the Court had already established some of the main principles that were recalled in 2015. For instance, in the decision 496/2000 the Court stated that 'when dealing with great questions of general interest, in the relationships with state institutions, it is the [national] electoral body as a whole that is called to express its will, at the same time. It is not admissible to acknowledge to a regional consultative referendum, given the participation of the only regional population, the same value as a national consultative reerendum'. Fasone (n 140).

[146] Bavarian Independence is currently not a political issue in Germany, but it is true that historically it has been an uneasy region for the consolidation of the German unity. Klaus-Jürgen Nagel, 'Bavaria: another case of a right to decide?' (2017) 19 GRTP Political Theory Working Paper <https://repositori.upf.edu/bitstream/handle/10230/28277/GRTwp19.pdf?sequence=1&isAllowed=y> accessed 28 November 2018.

[147] Ragone points out that the three legal orders can be compared in the sense that all of them have rigid Constitutions that do not provide for secession. Sabrina Ragone, 'Los *Länder* no son "señores de la Constitución": el Tribunal Constitucional Federal Alemán sobre el referéndum separatista bávaro' (2018) 41 Teoría y Realidad Constitucional 407, 417.

[148] Decision only available in German <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/12/rk20161216_2bvr034916.html> accessed 17 December 2016.

he requested the possibility to organize a referendum on secession in the referred territory (a petition he had filed before the regional government and had been rejected). The Court issued a short, categorical and unappealable statement (to be precise: only three sentences) holding that,

> In the Federal Republic of Germany, which is a Nation-State based on the constituent power of the German people, *Länder* are not 'masters of the constitution'.[149] Therefore, there is no room for individual *Länder* to attempt to withdraw [from the Federation]. They would be infringing the constitutional order. (my own translation)

It can be clearly inferred that the German Basic Law does not recognize a right or a procedure for secession, which is in line with the German tradition (no right to secede can be found in the 1871 Constitution or in the 1919 Weimar Constitution). Most German legal scholars share this view.[150] This is, moreover, in accord with German constitutionalist ideas of federal loyalty. The principle of federal loyalty has been developed and understood by the German Constitutional Court as a key component of the German constitutional order: it refers to the duty of loyal, constructive and positive behaviour of the components of the Bund (the *Länder*) towards the State.[151] It is true, though, that in the current text there is no express clause regarding the indissolubility of the German territory. Yet, the preamble clearly states that the constituent power lies in the German people as a whole. In any event, it still remains unclear if, as in the Spanish case, the German Basic Law could be amended so as to permit a secession clause. In this regard, it should be noted that the territorial integrity or the unity of the State are not included in the so-called eternity clauses of Article 79.3 of the German Constitution. This

[149] The expression 'masters of the Constitution' is typical in German law, used not only with respect to *Länder* but also with regard to the EU. Thus, in a multi-level scenario, German constitutionalism places the State and its Constitution 'as a reference both bottom-up (European Union) and top-down (*Länder*)' José Antonio Montilla, 'The independence referendum in Germany' (*Instituto de Derecho Público*, 16 December 2016) <http://idpbarcelona.net/docs/blog/referendum_germany.pdf> accessed 29 November 2018.

[150] Ragone (n 147) 412.

[151] Francisco Sosa Wagner, 'Bávaros y Referéndum por la independencia' (2017) 202 Revista de Administración Pública 157, 164.

provision sets forth that any amendment affecting the federal organization of the State, the protection of human dignity and the definition of the State as democratic and social shall be inadmissible. Thus, in principle, an amendment introducing a secession clause would be permitted. However, it could also be argued that, like in the Italian case, if ever confronted, the German Constitutional Court would end up establishing an implicit material limit to the constitutional amendment procedure that would prevent the inclusion of any secession procedure.

Conclusions

National constitutional law offers different approaches to secession, although with some common trends. Secessionist attempts are the most acute political crisis a State can endure, because they affect the integrity and continuity of the political subject that founds the State. That is why constitutional legal orders tend to be highly restrictive, as the Venice Commission noted in 2014 concerning the Crimea case: '[i]f the Constitution of Ukraine does not allow a referendum on secession, this does not in any way contradict European constitutional standards. Rather, it is typical for constitutions of Council of Europe member states not to allow secession.'[152] Spain, Italy and Germany are good proof of that. In this sense, the Canadian and British approaches constitute outstanding exceptions to the classic paradigm inaugurated by the US. Quebec's secessionist attempts are being grasped by a legal regime largely anchored in the common law tradition and, in that, it is much closer to Scotland than it is to Catalonia.[153] According to both the British and Canadian approaches, (i) there is only a right to negotiate, not to secede; (ii) the process will have to be subject to the law and (iii) the central authorities of the State will

[152] Venice Commission, 'Opinion on Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles', CDL-AD (2014) 2, 4.
[153] Gaudreault-DesBiens (n 44) 34.

have to play a critical role in it. But even the flexible common-law constitutional tradition rejects a unilateral right to secede, since the democratic principle has to be tempered with other principles like the Rule of Law, or (in the Canadian case) the supremacy of the Constitution.[154] This is in fact the common approach of liberal constitutional democracies to secession.

[154] 'It seems safe to affirm that unilateral secession is not permissible anywhere'. Arzoz and Suksi (n 142) 469.

Chapter 4: EU law towards a secessionist challenge

Introduction

After having reviewed the position of both public international law (chapter 2) and constitutional law regarding secession (chapter 3), the aim of the current chapter is to explore the position of European Union law towards secession within an EU Member State. The intention of the chapter is to provide a general interpretation and identify common legal issues that go beyond a case-specific approach and that could be of relevance to any EU Member State. The position of EU law once the former sub-national unit becomes a recognized independent state, recognition policy, succession of states, and legal routes to membership, will be analysed in chapter 5.

The chapter will start by briefly exploring the reactions that the EU institutions have had when faced by secessionist challenges in EU Member States, namely, Scotland in 2014 and, particularly, Catalonia in 2017. The focus thereafter shifts to finding the basis for such positions, and whether such reactions were grounded on EU law. However, the analysis goes beyond real cases, and at the end of the chapter it will address imagined scenarios that will test the hypothesis advanced in this chapter. The review of EU law will begin by examining whether there is any EU law provision regarding secession within an EU Member State, any precedent or any ECJ case law attached. There is none, as will be seen, and, therefore, the first conclusion is that EU law position, if any, is an implicit one. We will then examine past statements and responses of EU representatives concerning this issue. Although such statements do not constitute legally binding acts, they do offer valuable guidance as to the EU law position. It will be seen that the EU institutions have followed these past statements in recent Scottish and Catalan cases.

The second part of the chapter will review the work of those scholars who have found implicit responses to a secessionist challenge within EU provisions and values. There is a range of views in this regard, from those who consider that any secessionist movement is against the ethos of the European integration, to those who believe that welcoming new States that have emerged from democratic secessionist processes is a duty of the EU institutions. The view proffered in this thesis is that there is and should be a distinction between lawful secessions and unlawful secessions. Lawfulness is based on the legal criteria established by each EU Member State constitutional legal order, as explained in the previous chapter.[1] The key provision that justifies the EU law response to secession is to be found in the principle of respect for fundamental constitutional structures (Article 4(2) TEU). Drawing on such provision, it will be explained that EU law should respect domestic constitutional orders, with the consequence that if domestic law considers that secession is unlawful, EU law should respect that position by not recognizing the statehood of the secessionist entity. If, on the contrary, the domestic legal order regards the secessionist attempt as lawful, EU law should respect that outcome by recognizing the new entity as a sovereign State and by entering negotiations in good faith.

We will also analyse other far-fetched cases that might cast doubts on the preceding approach. For example, what happens if it is the EU Member State that contravenes its own constitutional order? Does this amount to constitutional mutation, the evolution or the amendment of a certain Constitution? What if the values of Article 2 TEU are not respected while enforcing the national constitutional legal order, or when amending the constitutional legal order? What is then the position of the EU? Article 2 TEU appears as the limit to the deferential attitude. As long as the content of Article 2 TEU is respected, the EU should respect the enforcement of national constitutional law

[1] The issues that this national constitutional reference might arise (e.g. whereas a certain EU Member State does not respect its own constitutional legal order) will be addressed later on.

and any amendment, evolution or mutation in the constitutional legal order of the EU Member States. Otherwise, the EU institutions should take into consideration the triggering of Article 7 TEU.

1. EU reactions to secessionist attempts within EU Member States

Scotland (United Kingdom)

In December 2012, in response to a question posed by Lord Tugendhat, Member of the House of Lords and former Member of the European Commission and the European Parliament, the then President of the European Commission, Jose Manuel Barroso, argued that 'scenarios such as the separation of one part of a Member State or the creation of a new state would not be neutral as regards the EU Treaties.' And he reminded us of the 2004 Prodi position:

> If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.[2]

In February 2014, in an interview with the BBC, Barroso insisted that 'it will be extremely difficult to get the approval of all other member states to have a new member coming from one member state'.[3] According to Barroso, EU Member States seeking to prevent their own sub national entities from seceding would almost certainly block Scotland's membership. Barroso also added that Scotland would have to apply for EU membership in the usual way.[4] Later in the chapter we will argue that the statements of Barroso were

[2] Ref. Ares(2012)1469619 - 10/12/2012 <http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf> accessed 9 August 2017.

[3] '"Extremely difficult" for Scotland to join EU – Barroso' (*BBC*, 16 February 2014) <http://www.bbc.com/news/av/uk-politics-26215579/extremely-difficult-for-scotland-to-join-eu-barroso> accessed 14 February 2017.

[4] ibid.

legally correct, in the sense that he rejected the 'automatic enlargement' theory, and simply iterated the obvious political difficulties of achieving unanimity within the Council whenever the accession of a new EU Member State is discussed (Article 49 TEU).

Catalonia (Spain)

The events in Catalonia in September and October 2017, briefly reviewed in the previous chapter, led to a much more prominent position for the EU institutions than the 2014 Scottish referendum. As Ignacio Molina explains, although during the first stage of the pro-independence process (from 2012 to 2014) the European Commission resisted all attempt to be drawn into the conflict, since 2014 (when it became clear that the Catalan government contemplated unilateralism) the new President Jean Claude Juncker responded firmly supporting the constitutional order of Spain. During those years, the Catalan government representatives were not even allowed to meet high-ranked EU civil servants at the European Commission.[5]

On 15 September 2017, two weeks before the so-called referendum on independence of Catalonia (to be held on 1st October 2017), outlawed by the Spanish Constitutional Court, Franz Timmermans, Vice-President of the European Commission, declared in a press conference, after having been asked by Spanish journalists, that 'within the rule of law, we ask for the respect of the Constitution of each Member State. If within these Constitutions new realities are created, they will be taken into account by

[5] A detailed analysis of the position of the different EU institutions and their leaders on the Catalan secession crisis is to be found at Ignacio Molina, 'La crisis catalana y la influencia de España en Bruselas' (*Real Instituto Elcano*, 25 April 2019) <http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari42-2019-molina-martin-la-crisis-catalana-y-la-influencia-de-espana-en-bruselas>
accessed 18 June 2019.

the EU.' And he insisted: 'the main principle is the respect to the constitutional legal order of each EU Member State. That is what we expect both from citizens and Member States.' In the aftermath of 1st October, the European Commission issued a statement stating that under the Spanish Constitution, Catalonia's vote was not legal and that this was an issue that had to be dealt with in accord with the Spanish constitutional legal order.[6] On 4th October, the European Parliament organized a debate to discuss the events. Franz Timmermans, again on behalf of the European Commission, delivered a speech in which he argued the following:

> In Europe [...] we have shaped our democratic societies based on three principles: democracy, respect for the Rule of Law and human rights. The three need each other. They cannot exclude each other. […] Respect for the Rule of Law is not optional, it is fundamental. If the law does not give you what you want, you can oppose the law, you can work to change the law, but you cannot ignore the law. So, it is fundamental that the Constitutions of every one of our Member States are upheld and respected. This is the basis for the debate today.[7]

Not surprisingly, EU institutions disregarded the unilateral declaration of independence of Catalonia of 27th October and did not recognize the existence of a new polity.[8] Later in the chapter it will be argued that the behaviour of the EU institutions was in accordance with EU law, since it has shown a deferential attitude towards the Spanish constitutional legal order. Despite some criticism,[9] because of the manner in which the Spanish police enforced court rulings when trying to prevent the 1st October referendum from happening, the European Commission did not consider that Spain was violating values contained in

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[6] European Commission, 'Statement on the events in Catalonia' (2 October 2017). Available at <http://europa.eu/rapid/press-release_STATEMENT-17-3626_en.htm> accessed 1 March 2018.

[7] European Parliament, 'Catalonia: Political group leaders discuss situation with Frans Timmermans' (4 October 2017) Available at <http://www.europarl.europa.eu/news/en/press-room/20171003IPR85246/catalonia-political-group-leaders-discuss-situation-with-frans-timmermans> accessed 1 March 2018.

[8] The tweet of the President of the European Council, Donald Tusk, was very clear in this regard: 'For EU nothing changes. Spain remains our only interlocutor.' Available at <https://twitter.com/eucopresident/status/923914819631271936?lang=es> accessed 1 March 2018.

[9] Note the second part of the abovementioned Donald Tusk tweet: 'I hope the Spanish government favours force of argument, not argument of force.' ibid. Note also the following comment included in the 2th October 2017 European Commission Statement: 'Violence can never be an instrument in politics'.

Article 2 TEU. Neither has the European Commission put into question the criminal procedures initiated in Spain against the political leaders responsible for the organization of the unlawful referendum and the unilateral declaration of independence of Catalonia.

Now that we have outlined the EU reactions to the most recent (and only) attempts to secede within EU member states we can proceed with the more thoroughgoing analysis of EU law towards secession, and assess to what extent these reactions were in accordance with EU law.

2. Treaty provisions, case law and precedents

There is no treaty provision dealing with the secessionist challenge of a sub-national entity belonging to an EU member State, as representatives of the Commission have repeatedly stated. For example, in June 2012 Ms Catherine Day, the former Secretary General of the Commission, stated the following: 'There is no legal base in the EU Treaties which would allow for secondary legislation to deal with the consequences of a secession of part of Member State.'[10] In effect, there are no explicit provisions regarding secession within an EU Member State in the EU treaties. Article 50 has been labelled as an internal secession provision, but it only affects Member States wishing to withdraw from the EU.[11]

There is no precedent of (successful) secession within an EU Member State. As Crawford and Boyle point out, '[t]here is no clear precedent for a metropolitan part of an EU Member State becoming independent and then either claiming automatic membership or seeking in its own right to join the EU'.[12] Since there is no precedent, there is no case

[10] Commission, 'Your request for registration of a proposed citizens' initiative' COM (2012) 701396.
[11] Josu de Miguel, 'La cuestión de la secesión en la Unión Europea: una visión constitucional' [2014] 165 211, 214.
[12] Alan Boyle and James Crawford, *Annex A Opinion: Referendum on the Independence of Scotland - International Law Aspects* (UK Government 2013) para 143 <https://www-test.pure.ed.ac.uk/portal/files/14540285/Boyle_A_Annex_A_Opinion.pdf.> accessed 12 August 2017. In

law either. However, some episodes of territorial changes affecting EU Member States (the independence of Algeria, the withdrawal from Greenland and the unification of Germany) deserve our attention, since they can provide 'approximate guidance',[13] or at least they can be used to test the hypothesis developed in this thesis. These examples will be analysed in chapter 6.

3. Statements and responses from EU officials

The fact that there is no EU legislation explicitly assessing the secession of a region within an EU Member State, nor any direct precedent has not prevented EU representatives from expressing their opinion about secession within an EU Member State. The statements have already been analysed by some scholars, but it is essential to highlight some of them in order to assess the position of the EU institutions, basically, the European Commission. For the sake of clarity, the different responses are organized chronologically:

In February 2004, Eluned Morgan, a then Member of the European Parliament asked the European Commission whether, in the event of the division of a Member State as a result of a region democratically gaining independence, the newly independent region would have to leave the EU and then apply for accession afresh. Romano Prodi, then President of the European Commission, responded in the following terms:

> When a part of the territory of a Member State ceases to be a part of that state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.[14]

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the same line Alfredo Galán, 'Secesión de Estados y Pertenencia a la Unión Europea' (2013) 1 Istituzione del Federalismo 95, 111.

[13] Boyle and Crawford (n 12) para 143.

[14] Written Question by Eluned Morgan (PSE) to the Commission, 12 February 2004, P-0524/04 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2004-0524&language=EN> accessed 9 August 2017.

This approach could be labelled as the automatic expulsion theory. This was, as we have seen, the approach taken by Barroso when addressing the Scottish case. This was also the approach adopted by the European Commission on 2th October 2017 after the outlawed Catalan referendum on independence:

> We also reiterate the legal position held by this Commission as well as by its predecessors. If a referendum were to be organised in line with the Spanish Constitution it would mean that the territory leaving would find itself outside of the European Union.[15]

However, in the following years the Commission changed its responses. In a series of questions posed in 2007, 2010, 2011 and 2012 the Commission responded that 'these questions raise a number of issues concerning international law. It is not the Commission practice to give an opinion on purely hypothetical cases'[16]; or that '[t]he issues referred to by the Honourable Members come entirely under the responsibility of the Member State concerned. The Commission cannot take the initiative in this respect.'[17] The Commission also stated that,

> Article 49 of the Treaty on the European Union sets out the conditions and procedure for the accession of States to the EU. The same conditions and procedure apply to any State that applies to become a member of the EU. There are no provisions in the Treaties that refer to the secession from a Member State.[18]

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[15] European Commission, 'Statement on the events in Catalonia' (n 6).

[16] Oral question by Frank Vanhecke (ITS) to the Commission, 10 January 2007, H-0011/07 <http://www.europarl.europa.eu/sides/getDoc.do?type=QT&reference=H-2007-0011&language=EN> accessed 9 August 2017; Written question by Roger Helmer (NI) to the Commission, 1 February 2007, E-0314/07 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-0314&language=LT> accessed 9 August 2017; Written question by Eluned Morgan (PSE) to the Commission, 22 March 2007, P-1625/07 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2007-1625&language=EN> accessed 9 August 2017; Written question by Robert Kilroy-Silk (NI) to the Commission, 16 April 2007, E-2021/07 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-2021&language=LT> accessed 9 August 2017.

[17] Question for written answer by Raul Romeva (Verts/ALE), Oriol Junqueras (Verts/ALE) and Ramon Tremosa (ALDE) to the Commission, 26 July 2010, E-6073/2010 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-6073&language=EN> accessed 9 August 2017.

[18] Question for written answer by George Lyon (ALDE) to the Commission, 20 October 2011, P-009664/2011 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-009664&language=ES> accessed 9 August 2017.

In the first months of 2012 the Commission continued with its cautionary approach, stating that,

> At the present time, the Commission is not able to express any view on the specific issue raised by the Honourable Member given that the terms and result of any future referendum are unknown, as is the nature of the possible future relationships between the parties concerned and between those parties and European Union partners.[19]

In April 2012, following a European Citizens' Initiative, the Commission affirmed that '[i]n the event of secession of part of a Member State, the solution would have to be found and negotiated within the international legal order.'[20] In July 2012, in light of the response given by the Commission to the European Citizens' Initiative, the Commission was asked whether in case of secession, citizens would immediately lose their status as EU citizens and the resultant rights and obligations. The Commission stated that 'in accordance with Article 20 of the Treaty on the Functioning of the European Union (TFEU), EU citizenship is additional to and does not replace national citizenship (that is, the citizenship of an EU Member State).' Yet, again, the Commission refused to provide further guidance: 'in the hypothetical event of a secession of a part of an EU Member State, the solution would have to be found and negotiated within the international legal order. Any other consideration related to the consequences of such event would be of a conjectural nature.'[21] Also in September 2012 the Commission refused several times to offer an opinion over the issue:

> The Commission would express its opinion on the legal consequences under EC law, on request from a Member State detailing a precise scenario;[22] It is not

[19] Question for written answer by Ramon Tremosa (ALDE) to the Commission, 23 January 2012, E-000395/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-000395&language=EN> accessed 9 August 2017.
[20] Commission, 'Your request for registration of a proposed citizens' initiative' COM Ares(2012)701396 (English translation). Full text available at <http://ec.europa.eu/citizens-initiative/files/non-registered/Fortalecimiento_de_la_participacion_ciudadana_en.pdf> accessed 19 February 2017.
[21] Question for written answer by Mara Bizzotto (EFD) to the Commission, 25 Juy 2012, E-007453/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN> accessed 9 August 2017.
[22] Question for written answer by Izaskun Bilbao (ALDE), Ramon Tremosa (ALDE), Salvador Sedo (PPE) and Raul Romeva (Verts/ALE) to the Commission, 12 September 2012, E-008133/2012

> the role of the Commission to express a position on questions of internal organisation related to the constitutional arrangements in the Member States.[23]

However, the cautionary tone used in the previous years changed at the end of 2012. In various answers the Commission confirmed the defiant view against secession within Member States expressed in 2004 by Romano Prodi[24], then President of the European Commission:

> The legal context has not changed since 2004 as the Lisbon Treaty has not introduced any change in this respect. Therefore, the Commission can confirm its position as expressed in 2004 in the reply to the written Question P-0524/04.[25]

The timing for such a change cannot be a coincidence: in October 2012, the UK government and Scotland had reached an agreement on holding an independence referendum in Scotland in the following years. Furthermore, September 2012 meant also the real start of the pro-independence movement in Catalonia.[26] Secession within an EU Member State did not look unlikely anymore. It had become a real possibility. The Commission has maintained this approach since late 2012.[27] Moreover in 2013, the

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<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-008133&language=EN> accessed 9 August 2017.

[23] Question for written answer by Ana Miranda (Verts/ALE), Ramon Tremosa (ALDE) and Raul Romeva (Verts/ALE) to the Commission, 21 September 2012, E-008324/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-008324&language=EN> accessed 9 August 2017; Question for written answer by Francisco Sosa Wagner (NI) to the Commission, 28 September 2012, E-008752/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-008752&language=EN> accessed 9 August 2017; Question for written answer by Auke Zijlstra (NI) to the Commission, 8 October 2012, E-009009/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-009009&language=EN> accessed 9 August 2017.

[24] See note above.

[25] Question for written answer by David Martin (S&D) to the Commission, 25 October 2012, P-009756/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2012-009756&language=EN> accessed 9 August 2017 and Question for written answer by Gerard Batten (EFD) to the Commission, 29 October 2012, P-009862/2012 http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2012-009862&language=EN> accessed 9 August 2017.

[26] Xavier Pons Ràfols, *Cataluña: Derecho a decidir y Derecho Internacional* (Reus 2015) 24.

[27] Among others, Question for written answer by Ramon Tremosa (ALDE) to the Commission, 27 September 2013, E-011023/2013 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-011023&language=EN> accessed 9 August 2017; Question for written answer by Francisco Sosa Wagner (NI) to the Commission, 27 January 2014, E-000796/2014 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000796&language=EN> accessed 9 August 2017; Question for written answer by George Lyon (ALDE), 14 February 2014, P-001676/2014 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2014-

Committee of the Regions, the EU institutional chamber of sub-national entities, was very clear:

> [I]f a region [where independence movements have recently been gaining strength], having achieved independence, wanted to join the EU, it would be required to make a formal application to the Council and to follow the accession procedure under Article 49 TEU in the same way as any other country that wished to become an EU Member State.[28]

However, it is difficult to argue that this position (i.e. automatic expulsion theory)[29] constitutes a fully articulated policy.[30] Until now, it has proved correct in both the Scottish and Catalan scenarios, in the sense that it has been the approach adopted by the EU institutions. But both scenarios are very limited; in no case has the EU seen the creation of a new territorial entity. In this regard, let us imagine a 'Yes' vote in the Scottish referendum. It is then difficult to legally justify the automatic expulsion theory especially

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001676&language=DE> accessed 9 August 2017; Question for written answer by Mara Bizzotto (EFD) to the Commission, 21 February 2014, E-002111/2014 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-002111&language=EN> accessed 9 August 2017; Question for written answer by Izaskun Bilbao (ALDE) to the Commission, 24 September 2014, E-007129/2014 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-007129&language=EN> accessed 9 August 2017; Question for written answer by José Blanco (S&D) to the Commission, 11 November 2014, E-009058/2014 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-009058&language=EN> accessed 9 August 2017; Question for written answer by Santiago Fisas (PPE) to the Commission, 21 July 2015, E-011776/2015 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-011776&language=EN> accessed 9 August 2017; and Question for written answer by Gerolf Annemans (ENF) to the Commission, 9 February 2016, P-001148/2016 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-001148&language=EN> accessed 9 August 2017; Question for written answer by Beatriz Becerra (ALDE) to the Commission, 23 May 2017, E-003486-17 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-003486&language=EN> accessed 9 August 2017.

[28] Committee of the Regions, 'Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery' 2013/C 139/08.

[29] Other members of the Commission have expressed this same view while attending the press. For instance, in 2013 the then vice-president of the European Commission, Joaquín Almunia affirmed that 'a part that segregates itself is not a member' and later his spokesperson confirmed that 'an independent state will be, by its very independence, regarded as a tertiary by the EU and European treaties will not apply to its territory from the moment it declares independence'. Stephen Burgen, 'Catalan EU claim may impact on Scots independence' *Scotsman* (Edinburgh, 17 September 2013) <http://www.scotsman.com/news/politics/catalan-eu-claim-may-impact-on-scots-independence-1-3096498> accessed 10 August 2017. The same approach was followed by the then Commissioner on Internal Market, Michel Barnier. Pablo Allendesalazar, 'Brussel.les insisteix que una Catalunya independent quedarà for a de la UE' *El Periódico* (Barcelona, 20 September 2013) <http://www.elperiodico.cat/ca/politica/20130920/brusselles-insisteix-catalunya-fora-ue-si-independent-2675309> accessed 10 August 2017.

[30] In the same line, Carlos Closa, 'Secession from a Member State and EU Membership: the View from the Union' (2016) 12 (2) European Constitutional Law Review 240, 241.

after the incorporation of Article 50 TEU, that provides for negotiations before the withdrawal from a Member State in order to avoid a major disruption. Does it make any sense that automatically all the relationships between the secessionist part and the rest of the EU come to an end when, in the case of withdrawal, the treaty provides for an extended period of negotiations? This is more particularly so, when the territorial entity wishes to keep its ties with the EU. It would be odd, in the light of Article 50 TEU, if there were automatic expulsion in the event of lawful secession, while there is negotiation in the context of withdrawal. Some temporary or transitional period should be established and this requires, necessarily, some type of negotiations. This is also the position of former ECJ judge David Edward.[31] Later in the chapter we will offer further arguments against the automatic expulsion approach. Some have even argued that the European Commission declarations look more like political warnings against pro-secession movements rather than statements that necessarily anticipate the policy that European institutions would follow.[32]

4. Implicit responses within EU provisions?

The fact that there is no explicit provision, no precedent or no fully articulated EU institutional policy, does not mean that we cannot infer reasonable EU law responses through the interpretation of certain legal provisions and EU values. As Closa suggests, '[w]hile it is true that the EU treaties do not contain explicit rules on how to deal with a seceding territory seeking membership, EU provisions do contain sufficient contents from

[31] David Edward, 'EU law and the separation of Member States' (2013) 36 (5) Fordham International Law Journal 1151, 1167.

[32] This seems to be also the hope of some pro-independence scholars, who expect the answers of the Commission to be only political disincentives for secession but do not anticipate the afterwards policy. Pau Bossacoma, *Secessió i integració a la Unió Europea. Catalunya nou Estat de la Unió?* (Institut d'Estudis de l'Autogovern 2016) 57.

which to deduce a clear policy on secession.'[33] This is what some scholars have been seeking to explicate in the last few years, especially when addressing the cases of Scotland before the Brexit referendum and Catalonia. Scholars have underscored the need to take a look at EU law itself, even despite the lack of express provisions, given the autonomy of EU law:[34]

> The solution to any problem for which the Treaties do not expressly provide must be sought first within the system of the Treaties, including their spirit and general scheme'.[35]

After review of the different scholars' positions, we can distinguish between 1) restrictive views on secessionism, 2) generous legal approaches to secessionism and 3) those views that make a distinction between different types of secession and therefore adjust the legal response to the circumstances. As stated in the introduction, our view is in accord with scholars who make a distinction between those pro-independence movements conducted lawfully in accordance with the national constitutional order, and those secessionist attempts that violate their own constitutional order. This position is grounded in Article

[33] Closa, 'Secession from a Member State and EU Membership: the View from the Union' (n 29) 246. In the same vein, Kenealy and MacLennan, 'the solution to the problem posed to the EU by an independent Scotland must first be sought in the Treaties, spirit and general principles of the EU as well as the jurisprudence of the ECJ.' Daniel Kenealy and Stuart MacLennan, 'Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?' (2014) 20 (5) European Law Journal 591, 598. Thus, they disagree with Kochenov's position: 'there are no legal grounds for the Union to take sides in the internal processes of the Member States potentially leading to their territorial reconfiguration and even eventual secessions of their parts, resulting in the articulation of new statehood on the European continent.' Dimitry Kochenov and Martijn Van den Brink, 'Secession from EU Member States: The Imperative of Union's Neutrality' (2016) 6 University of Edinburgh School of Law Research Paper Series 1. This initial statement offered by Kochenov is, nonetheless, misleading, since immediately he admits that this is the case 'assuming that the process of the territorial reframing of statehood is taking place in a non-violent fashion and in full conformity with the law'. The present thesis (and in particular this chapter) aims at covering any type of secession, either unilateral and unlawful or consensual and lawful. And, as will be shown, EU policy differs depending on the type of secessionist challenge. Therefore, claiming for neutrality is inaccurate. At best, one could argue for neutrality in the event of lawful and consensual secession.

[34] EU law autonomy has been constantly affirmed by the ECJ since the very beginning with the notorious Van Gend & Loos decision. More recently, Joined Cases C-402/05 P and C-415/05 P *Kadi v. Council* [2008] E.C.R. 1225 para. 281: 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community'.

[35] Edward (n 31) 1162.

4(2) TEU, which requires the EU to show a deferential attitude towards national constitutional law. The grey zones scenarios where it is the parent State that is violating the law, or where there is a political agreement that trumps the legal order, unlawful but consensual secession, will also be considered.

4.1 Restrictive approach to secessionism

As we will see, Weiler is the leading scholar within this intellectual camp. His thesis has been enthusiastically welcomed by many Spanish scholars, whereas he has been criticized by other colleagues. Although we understand and value the teleological interpretative effort made by Weiler, we share some of the concerns raised by Closa, Walker and Edward. In 2012, in a famous editorial at the Blog of the European Journal of International Law, Weiler linked Catalan secessionist attempts with social and economic egoism. He argued that such pro-independence movements in Europe run diametrically contrary to the historical ethos of European integration:

> The commanding moral authority of the Founding Fathers of European integration – Schumann, Adenauer, de Gasperi and Jean Monnet himself – was a result of their rootedness in the Christian ethic of forgiveness coupled with an enlightened political wisdom which understood that it is better to look forward to a future of reconciliation and integration rather than wallow in a past.'[36]

He went on to say that the EU struggles with a highly complex decision making procedure that involves many members and players, but more importantly with a deep political and cultural division between rich Northern countries and poorer Southern countries[37] 'which makes it difficult to persuade a Dutch or a Finn or a German that they have a human and

[36] Joseph H. H. Weiler, 'Catalonian Independence and the European Union' (*Blog of the European Journal of International Law*, 20 December 2012) <https://www.ejiltalk.org/catalonian-independence-and-the-european-union/> accessed 22 August 2017.

[37] Other scholars have also emphasized the deep economic culture divisions among Member States. For instance, Fabrizio Tassinari refers to the 'widening gap between the fiscally pious nations above of the Alps and the profligate countries in the South'. Fabrizio Tassinari, 'What really divides Northern and Southern Europe?' (2014) 31 (3) New perspectives quarterly 18, 18.

economic stake in the welfare of a Greek or a Portuguese, or, yes, a Spaniard.'[38] According to Weiler, the EU should not be interested in taking into the Union a polity predicated on a nationalist ethos 'which apparently cannot stomach the discipline of loyalty and solidarity that one would expect it owed to its fellow citizens in Spain'.[39] Thus, Weiler regards as particularly relevant the values of loyalty and solidarity within the EU:

> The very demand for independence from Spain, an independence from the need to work out political, social, cultural and economic differences within the Spanish polity, independence from the need to work through and transcend history, disqualifies morally and politically Catalonia and the likes as future Member States of the European Union.[40]

For Weiler, it would be hugely ironic if the prospect of an easy or qualified membership access within the Union ended up providing an incentive for disintegration:

> There really is a fundamental difference in the welcoming into the Union of a Spain or a Portugal or a Greece emerging from ugly and repressive dictatorships and a Catalonia, part of a functioning democracy which at this very moment is in need of the deepest expression of internal and external solidarity. In seeking separation, Catalonia would be betraying the very ideals of solidarity and human integration for which Europe stands.[41]

As said, Weiler's position has found support among some scholars, notably Spanish ones. His conviction that secessionist demands stem not from a remedial situation or lack of self-government, but rather from the aspiration to avoid sharing the economic burden of less developed regions in their own States is also explicitly shared by other authors, like Josu de Miguel.[42] De Miguel even recommends that since the secession of a territory

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[38] Weiler (n 36).
[39] ibid. Piris shares this view: 'The European ideal tends towards more solidarity between European peoples, while the key objective of Catalan and Scottish independentists is less solidarity with the rest of the State to which they belong.' Jean-Claude Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (I)' in Carlos Closa (ed), *Secession From a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 78.
[40] ibid. For some authors the principle of solidarity has even become 'a constitutional element within European Union's cooperative architecture.' Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimmel and Susanne My Giang (eds), *Solidarity in the European Union: A Fundamental Value in Crisis* (Springer 2017) 41.
[41] Weiler (n 36).
[42] De Miguel (n 11) 221.

within an EU Member State has a clear EU effect and impact, it would be highly advisable to regulate the issue within the EU treaties.[43] In his view, EU Member States should amend the treaties to include a new provision that establishes by analogy with Article 50.5 TEU that in the event of a new independent State emerging by way of secession the State would be out of the EU, irrespective of the mode of secession.[44] In the same vein, Francesc de Carreras agrees with Weiler. De Carreras says that 'there are a lot of reasons to believe that secession within an EU Member State is contrary to Europeanism.'[45] So too Linde Paniagua, who argues that a secessionist project like the one currently in vogue in Catalonia goes contrary to the values enshrined in Article 2 TEU.[46] Javier Tajadura emphasizes that 'any secessionist project within an EU Member State is at odds with EU law', since it has effects, by reducing the internal market.[47] José María de Areilza affirms that EU law and the institutional functioning of the European Union contain an anti-secession regime, both from a political and a legal point of view, since leaving or withdrawing from an EU Member State, either through consensus or unilaterally, contradicts the principles, values and basic norms upon which the EU is based.[48] For him, the evolution of the European integration process opposes the idea of secession. All the EU checks and balances system is aimed at facilitating plural loyalties: EU level, national and regional levels.[49] Areilza argues that a sub national political community could only

[43] ibid 244.
[44] ibid 245. See also Javier Tajadura, 'Más allá de un asunto interno: secesionismo e integración europea' (*Real Instituto Elcano*, 22 December 2014) <http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari64-2014-tajadura-mas-alla-de-asunto-interno-secesionismo-e-integracion-europea > accessed 30 August 2017.
[45] Francesc de Carreras, 'Unión Europea y secesión de Estados Miembros. ¿Deben intervenir las instituciones europeas? (2014) 33 Teoría y Realidad Constitucional 271, 278.
[46] Enrique Linde, 'Contestación al trabajo de Ridao-González: la secesión de territorios de Estados Miembros de la Unión Europea, que se fundan en ideologías nacionalistas, son contrarias a los principios democráticos que rigen en los Estados occidentales y en la Unión Europea' (2015) 28 Revista de Derecho de la Unión Europea 391, 403.
[47] Javier Tajadura, 'Los Procesos Secesionistas y el Derecho Europeo' (2016) 37 Teoría y Realidad Constitucional 347, 369.
[48] José María de Areilza, *Poder y Derecho en la Unión Europea* (Civitas 2014) 193.
[49] ibid 197.

ask for secession within the EU in the event of clear violations of Article 2 TEU, firmly established by the EU following the Article 7 TEU procedure.[50]

Weiler's view has however been subject to considerable criticism. Since Weiler accused Catalan pro-independence movement of being linked to a 'regressive and outmoded nationalist ethos', Krisch pointed out that Weiler's intervention was 'heavily misguided in substance, in part because of a misunderstanding of the reasons behind the Catalan drive, in part because of a misreading of the nature of independence claims in general.'[51] This is not the place to analyze Krisch's defence of Catalan pro-independence movement ('it is not some form of tribalism', but 'a form of democratic self-government, born out of frustration with the processes of a larger entity that often enough ignore the wishes and concerns of minorities').[52] Suffice it to say that from a legal point of view (and in this particular regard we agree with Krisch) there is no inconsistency with the following statements: i) a certain subnational community within a State wishes to leave that State and become an independent, sovereign State; and ii) at the same time that community wishes to become a Member of a sui generis international organization predicated on political integration and solidarity, like the EU. As Krisch notes, many Catalans 'have no doubt that they owe solidarity to Europe as a whole, but they don't see why they should owe that much more to people in Andalucía than to those in Southern France (who, geographically and probably also culturally, are closer).'[53] Although there

[50] ibid 194.
[51] Nico Krisch, 'Catalonia's Independence: A Reply to Joseph Weiler' (*Blog of the European Nournal of International Law*, 18 January 2013) <https://www.ejiltalk.org/catalonias-indepence-a-reply-to-joseph-weiler/> accessed 22 August 2017. In the same vein, Kochenov: 'They seek to create a democratic society, defined and united by a common language and sense of history. I think this is what most Québécois nationalists seek, as well as most Catalan, Scottish, and Flemish nationalists. They are not trying to avoid modernity; they are precisely trying to create a modern democratic society.' Kochenov and Van den Brink (n 33) 17.
[52] Krisch (n 51).
[53] ibid.

are many historical, cultural and political reasons to contradict this argument, it is difficult to oppose legal reasons.

Pau Bossacoma also replied to Weiler in a recently published monograph sponsored by the Catalan government. He argues that European integration and secession are compatible for various reasons.[54] First, according to Bossacoma, EU law does not contain rules that prohibit or limit secession within EU Member States. However, one could argue that this is obvious, since territorial integrity is an exclusive competence of EU Member States, as stated in Article 4.2 TEU.[55] Bossacoma also argues that the demand of disintegration from the parent State, and the demand for integration within the EU have different territorial scope and, therefore, can be compatible. However, the incompatibility pointed out by Weiler remains, since he refers to the fact that a political community aimed at independence due to the lack of solidarity and willingness to resolve political controversies within the current legal order is not legitimized to ask for membership within an organization aimed at, precisely, these two objectives: solidarity and legal resolution of conflicts. Thirdly, Bossacoma also indicates that the EU itself has promoted the relevance of the nation-State by undermining the aspirations of European regions to take part in the EU governance system. There is strong evidence in this regard.[56] It is, however, unclear how this argument about the unintended side-effects of

[54] Bossacoma (n 32) 25 and following.

[55] As Mangas notes, 'the increase or decrease of the territory of a Member State affects primarily and exclusively to the referred State. It is not an EU issue; that is why secession from a Member State is not covered by EU law.' Araceli Mangas, 'La secesión de territorios en un Estado Miembro: efectos en el derecho de la Unión Europea' (2013) 25 Revista de Derecho de la Unión Europea 47, 57.

[56] In the introduction of this thesis we referred to the paradox that the EU integration has promoted, unintendedly, pro-independence movements throughout EU Member States. The EU provides a unique framework for the feasibility of new states in Europe in the sense that it has created a safety net that makes it easier for those with statehood aspirations to contemplate independence. See Christopher K. Connolly, 'Independence in Europe: Secession, Sovereignty and the European Union' (2013) 24 Duke Journal of Comparative & International Law 51, 54. As Alesina and Spolaore argued, 'Catalonia is a region that may not 'need' Spain if it were to become a member of the European Union. To put it differently, once a region is a member of a large common market, including even a common currency area, and can enjoy free trade, the incentives for the region to seek independence or autonomy increases. The national government is much less important for the economy of the region. […] the cost of being politically small is decreasing with economic integration. In Europe, we see that many regions can afford to be independent if they enjoy the

EU integration can be used to justify a certain approach towards secession where no EU law provision points into that direction.

Also, Kochenov has put into question ('principled disagreement') Weiler's approach:

> Taking sides in the national secession/territorial rearrangement debates by preventing and / or fostering – either directly or indirectly – particular outcomes in the context of the national constitutional arrangements – is simply not among the EU's constitutional prerogatives: intervening in the resolution of these issues – thus shaping the Member States with no regard to their internal constitutional process, is not merely an *ultra vires* action: it amounts to tyranny.[57]

Neil Walker, David Edward and Carlos Closa, are more modest in their criticism. Walker admits that there are other rival views of the purposes and missions of the EU. Given these competing narratives, he considers that there is not enough consensus about this issue and, therefore, EU policy should remain more agnostic.[58] Edward follows the same approach: 'the moral arguments are ambivalent and it seems to me to be more fruitful to focus on the legal issues.'[59] And as Closa rightly points out, 'the crucial point is to establish whether EU norms reflect such a moral stance.'[60]

The principal difficulty with Weiler's approach, and related approaches, is that they do not make a clear distinction between different types of secession and deprive EU Member States of a fundamental margin of political decision, which is the possibility to decide who joins the EU. Why should EU Member States tie their hands with such a radical position against secession when in the future, in the event of a lawful and

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benefits of the European common market.' Alberto Alesina and Enrico Spolaore, *The Size of Nations* (MIT Press 2003) 213-214. Keating and Harvey share a similar opinion when they remind that '[t]he European Union, the European Economic Area and partnership agreements with non-EU states have secured large domestic markets and provided external economies of scale through cooperation.' Michael Keating and Malcolm Harvey, 'The Political Economy of Small European States: And Lessons for Scotland' (2014) 227 (1) National Institute Economic Review 54, 55.

[57] Kochenov and Van den Brink (n 33) 2.

[58] Neil Walker, 'Internal enlargement in the European Union: Beyond Legalism and Political Expediency' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 40.

[59] Edward (n 31) 1154.

[60] Closa (n 30) 246.

consensual secession within the EU, or even in the event of an illegal but consensual secession, they might wish to maintain the EU membership of the seceding entity when it becomes an independent State? As legal scholars, it is difficult to disregard as illegitimate a political option that is considered lawful in certain constitutional legal orders. Bearing in mind now the Scottish case, where everything was agreed between Scotland and the United Kingdom and subject to the law (chapter 3), how can EU law oppose a political option that has been blessed by a national constitutional legal order when the EU is obliged by virtue of Article 4(2) TEU to respect the constitutional identity of Member States? This issue will be discussed again later.

4.2 Generous approach to secession. EU membership based on the democratic principle, the so-called EU internal enlargement

A group of Catalan scholars have argued that in the event of a democratic secession, regardless of the position of the EU Member State affected, the EU should welcome the new entity. By 'welcome' they refer to the acceptance of continued EU membership of the new independent polity. I do not share this view because, as will be clear at the end of this section, there is a need to make a distinction between different types of secessionist process. Under EU law it is not enough to be 'democratic': the process has to respect the constitutional legal order of the EU Member State affected. We should, in any event, begin by reviewing the argument. The starting point is the unique nature of the EU, 'which shares elements characteristics of international organisations and federal structures.'[61] They are particularly interested in highlighting the federal elements of the

[61] Jordi Matas, Alfonso González, Jordi Jaria and Laura Román, 'The Internal Enlargement of the European Union' (Centre Maurits Coppieters 2011) 9 <http://www.ideasforeurope.eu/wp-content/uploads/2013/01/The-internal-enlargement-of-the-EU-Final.pdf.pdf> accessed 20 August 2017. A related argument that supports the idea of an EU accommodating approach to secession is to be found in Aidan O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU' (*Eutopialaw*, 14 November 2011), where the author sustains the idea that the doctrine of EU citizenship can by itself engender automatic membership of the EU for an independent Scotland. We will review (and reject) this approach in chapter 5, when dealing with nationality issues and EU law after successful secession.

EU ('many of the characteristics of European Union's organisational structure and legal system are closer to federal models than those of international organisations'[62]). Then, they point out the importance of the democratic principle within the EU:

> [T]he European Union is an international organisation devoted to the integration of its member states and the defence of democratic principles and values. […] This entire ideological foundation for the European Union has meant an effort in defending democracy not only within the member states but also throughout the world. The furtherance of democracy is therefore one of the chief objectives of European Union's foreign policy.[63]

For them, the democratic principle that the EU honours means that 'there is a possibility of expressing collective will in sub-state spheres, as well as the obligation to take into account this legitimately expressed will'.[64]

> Indeed, as stated before, the European Union is based on respect for democratic values and principles, and adopts a democratic internal functioning that is intended to disseminate and promote democracy throughout the world. It is clear that this ideological basis for the nature of the European Union included respect for all democratic processed developed inside the member states, even though these processes are not specifically regulated in the TEU or generally in Union law.[65]

That is why a 'European Union founded on such bases cannot show political, institutional and legal contempt for scrupulously democratic processes for the dissolution of a member state or the secession of territories.'[66] This is so, even if these processes are against the law:

> We must accept the possibility that the declaration of a democratic option linked to the constitution of a new political entity breaks the status quo, renouncing constitutional rules to be mechanically applied to thwart democratic aspirations.[67]

Although they accept that the right to self-determination as recognized in international law cannot be applied to territories within the EU (as explained in chapter 2), for them

[62] ibid 15-19.
[63] ibid 22.
[64] ibid 42.
[65] ibid.
[66] ibid.
[67] ibid.

this does not imply that secession is not legitimate if this is the will of a group of citizens in a certain territory inside a State, even though they are not subject to colonial rule or a situation of oppression. For them, there is also a need to respect this democratic will.[68] Their conclusion is the following:

> The European Union is obliged to give a positive reply to a request for internal enlargement by a state appearing through a process of secession or dissolution of the European Union's member state, and should always guarantee the continuity of effective application to the Union' legal system in the new state and particularly the effectiveness of the rights and obligations given to its citizens.[69]

Very similar reasoning has been followed more recently by other Catalan scholars.[70] For them, respecting the democratic principle means facilitating EU membership of the new entity.[71] They believe that there is a conflict between the democratic principle enshrined in Article 2 TEU and the respect for territorial integrity of Member States established in Article 4(2) TEU. They argue that the credibility of the EU would be undermined if territorial integrity prevails and the EU does not support the new entity in its attempt to become a new Member State.[72] Linde replied directly to this approach in the very same journal where their piece was published. He offered a sociological or political argument: Linde argued that according to the polls, Catalan society is a divided one, where there is no clear majority in favour of secession. For him, under these circumstances a referendum on secession would only threaten the breakup of the Catalan society.[73]

While it may be reasonable to conclude that it is politically imprudent to hold referendums on decisive and national issues when according to polls, surveys and

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[68] ibid 43.
[69] ibid 45.
[70] They also consider that the democratic principle is one of the core values of the EU and is the cornerstone principle that should guide the EU approach towards secession within Member States: 'EU's response should respect the democratic principle, that has to characterize both its behaviour and that of its Member States.' Joan Ridao and Alfonso González, 'La Unión Europea ante la eventual creación de nuevos Estados surgidos de la secesión de Estados Miembros' (2015) 28 Revista de Derecho de la Unión Europea 363, 381.
[71] ibid 382.
[72] ibid 381.
[73] Linde (n 46) 403.

electoral results there is no clear majority, the main legal concern is as to the meaning of constitutional democracy. These scholars, Matas, Jaria, González, Román and Ridao, detach the Rule of Law from democracy, as if democracy could stand alone, by itself, or even prevail, forgetting that Article 2 TEU refers to different but interrelated principles:

> The Union is founded on the values or respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

In effect, the EU is founded on a set of common principles of democracy, Rule of Law and fundamental rights. It does not make any sense to describe democracy as opposed to the Rule of Law. In a constitutional State, democracy is not only about voting, but doing so according to rules that can only be changed following the amendment procedure foreseen in the very same rules. In 2014, in the Communication about the new EU Framework to Strengthen the Rule of Law, the European Commission described the Rule of Law as the 'backbone of any modern constitutional democracy.'[74] The Rule of Law 'makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.'[75] Based on the Court of Justice and the European Court of Human rights case law,[76] as well as documents drawn up by the Council of Europe, notably the Venice Commission[77] and national constitutional traditions of EU Member States,[78] the Commission provided a non-exhaustive list of important elements of the

[74] European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158, 2.
[75] ibid 4.
[76] The following cases are particularly relevant: Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-06677, para 38 and 39; Joined Cases C-402/05 P and C-415/05 P *Kadi v. Council* [2008] ECR I-06351, para 316; *Stafford v United Kingdom* App no 46295/99 (ECtHR, 28 May 2001), para 63.
[77] See Venice Commission, 'Report on the Rule of Law', CDL-AD (2011)003rev-e. See also Venice Commission, 'Rule of Law Checklist', CDL-AD (2016)007. The Venice Commission has built up a solid reputation on the issues of the rule of law both in EU countries and elsewhere in Europe. See Joakim Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart 2015) 291, 300.
[78] 'When one examines what the rule of law entails in what are arguably the most influential national legal traditions in Europe – the British, German and French traditions – it is possible to outline some divergences

notion of Rule of Law in the EU legal system: the principle of legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for human rights; and equality before the law.[79] These principles are 'the vehicle for ensuring compliance with and respect for democracy and human rights.'[80] The Commission concludes categorically:

> This means that respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.[81]

In effect, in a constitutional democracy, like the type of democracy in EU Member States, there is no such thing as democracy outside the law, or democracy without respecting the Rule of Law. As the Canadian Supreme Court established in 1998:

> Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.[82]

In similar terms, Carlos Closa argues that this approach to democracy by certain scholars 'advances a shallow conception of democracy, whereby democracy becomes simply a majoritarian principle prevailing over any other consideration.'[83] He reminds us that democracy 'amounts to much more than mere aggregation of the preferences of the majority' and that 'respect for the rule of law is part of EU policy towards outside

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between these national understandings. Yet, the importance of these divergences should not be overstated. Firstly, some degree of disagreement in reality persists within any legal system as regards the precise meaning, scope of application and normative impact of the rule of law. Secondly, these disagreements are for the most part theoretical in nature and quite remarkably, national scholarly debates are actually conducted on largely identical terms. Last but not least, national understandings have now largely converged.' Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) 04 Jean Monnet Working Paper 22. Therefore, one could affirm that in EU countries there is 'an identifiable consensus with regard to the core meaning, scope and impact of the rule of law as a constitutional principle.' ibid.

[79] European Commission, Communication, A New EU Framework to Strengthen the Rule of Law (n 74) 4.

[80] ibid.

[81] ibid.

[82] *Reference re Secession of Quebec* [1998] 2 SCC 217, 78.

[83] Closa (n 30) 249-250.

secessionism, since the EU made the question of constitutional validity the key factor in the EU's response to newly-gained statehood'[84], as will be shown in the last chapter of this thesis.

Another main important legal problem of the so-called 'internal enlargement' theory is that, like the restrictive approach, it prevents Member States deciding who joins the EU. The rule of unanimity (Article 49 TEU) is clear in this regard.[85] EU Treaty provisions express legitimate Member States aspirations, including the decision about who they want to share the EU political community with.[86] That is why this decision, necessarily, requires a unanimous agreement.[87] Indeed, this decision is so relevant for EU Member States that, for example, France has included a constitutional provision to ensure that a new enlargement will have to be accepted by the national constituency. Thus, Article 88.5 the French Constitution, amended in 2005, establishes that '[a]ny Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.'[88] Besides, the new aspirant State is expected to fulfil the so-called Copenhagen criteria. It cannot be denied that a new independent State, which emerges from an existing EU Member State, will be in an advantageous position in relation to EU law compliance. But a presumption of compliance is not enough. The new State will have to pass an exam on its economic viability, Rule of Law, protection of minorities and capable

[84] ibid.
[85] Mangas (n 55) 62. See also, Linde (n 46) 407 and Galán (n 12) 114.
[86] De Miguel (n 11) 238.
[87] That is why I disagree with Kochenov's approach: 'Should the people of the newly emerged state express the will to remain part of the EU, moreover, the EU should aspire to employ all the available political and legal tools to ensure the continuation of EU membership and protect those citizens and companies that benefit from the internal market and important EU rights in other spheres from a temporary disapplication of the acquis.' Kochenov and Van den Brink (n 33) 11.
[88] To be found at <http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly#Title15> accessed 11 August 2017.

Administration.[89] Furthermore, the exam is also about the political will to share a common destiny. This is a discretionary prerogative of current EU Member States. This same logic is applied in Article 50.5 TEU, when it is established that '[i]f a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49'.

4.3 Distinction between different types of secession

Recently it is becoming widely accepted among scholars that the key issue is to distinguish between different types of secession. 'The compatibility of secessions with EU law depends decisively on whether they are unilateral (i.e. non-consensual) or consensual/agreed processes, since different EU legal provisions may be invoked in either case, and with different effects.'[90] Scholars tend to identify or relate lawfulness with consensus and unlawfulness with unilaterality.[91] This might be the paradigm, and the only cases witnessed thus far, [92] but there are other possible instances, such as unlawful but subsequently consensual secession. For the present, we will assume the common distinction that tends to relate lawfulness with consensus. The criteria of lawfulness depend on the internal legal order concerned, as shown in the previous chapter.

In this section, I will distinguish between legal arguments raised to justify a certain EU law position towards i) lawful and consensual scenarios; ii) unlawful and non-consensual scenarios and iii) both scenarios.

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[89] Christophe Hillion, 'Scotland and the EU: Comment by Christophe Hillion' (*Verfassungsblog*, 15 September 2014) <http://verfassungsblog.de/scotland-eu-comment-christophe-hillion-2/> accessed 30 August 2017: 'the fact that its devolved administrative and judicial institutions have been involved in the application of EU law for more than 40 years would not in itself guarantee that its structures, as a state, would be in a position to implement the whole *acquis* from the day of independence.'

[90] Closa (n 30) 247.

[91] For instance, Jean-Claude Piris, when reminding the differences between the Scottish and the Catalan case, notes that there is a difference between Scotland, where everything was settled as between the central government and the Scottish Government and Catalonia, where the Spanish Constitutional Court and the Spanish Parliament set themselves against secession. Piris (n 39) 72-73.

[92] The Scottish case would have been an example of lawful and consensual secession, while the Catalan scenario has been an example of unlawful and unilateral/non-consensual attempt to secede.

4.3.1 Lawful and consensual scenarios: obligation to enter into good faith negotiations

Former ECJ judge David Edward has claimed that in the event of consensual secession within an EU Member State, EU institutions and Member States have an obligation to negotiate in good faith with the segregated territory before separation takes effect to determine the future relationship with the EU.[93] It should not be surprising that he uses the term 'consensual', since, in British constitutional terms, when referring to Scotland, there is an identification between consensus and lawfulness, given that the legality of a referendum on independence and, therefore, the subsequent process, depends mainly on the political will of Westminster. His view is that looking at the wording of Article 50 TEU, that foresees negotiations in case of withdrawal,[94] it is unreasonable to expect secession without negotiation, taking into account that such scenario would put at risk budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations.[95]

> Looking to the presumed intention of the Treaty-makers, they cannot reasonably be supposed to have intended that there must be prior negotiation in the case of withdrawal but none in the case of separation. […] In order to avoid the disruption that would otherwise ensue, negotiation would be necessary before separation took place – precisely as the Treaty requires in the case of withdrawal.[96]

Beyond the analogy with Article 50 TEU and the need to avoid 'absurd and unacceptable results', Edwards also bases the obligation to negotiate in Article 2 TEU, that refers to democracy and the protection of minorities, non-discrimination and solidarity as foundational values of the EU. He also invokes Article 4 TEU when referring to the principle of sincere cooperation, the obligation of Member State to ensure fulfilment of

[93] Edward (n 31) 1167.
[94] Although 'secession' is not the same as 'withdrawal', it is admitted that both are 'germane' concepts. Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Accession from Within? An Introduction' (2014) 33 (1) Yearbook of European Law 335, 336.
[95] Edward (n 31) 1164 onwards.
[96] ibid 1167.

EU obligations and the duty to facilitate the achievement of EU tasks. Furthermore, Edward contends that the outcome of such negotiations cannot be predicted, which precludes an automatic right to remain within the EU for seceding entities, leaving their future relationship in the hands of an uncertain negotiation process. Uncertain especially since the new entity will have to come to terms with powerful players like EU institutions and large States. Edward also acknowledges that, disregarding the legal form of the agreement, ratification by all Member States would be required.[97] He also admits that '[t]he results of such negotiation are hardly, if at all, a matter of law.'[98]

This idea of an obligation to negotiate without a predicted outcome is also shared by other authors. It represents a major departure from the thesis of 'automatic internal enlargement'. For instance, Kenealy and MacLennan note that although it is not possible to become automatically a Member State after a secession process,[99] on the basis of the principle of sincere cooperation (Article 4 (3) TEU), a new independent entity could claim a right to negotiate with the EU. According to both scholars, failure to enter into such negotiations would not only be against sincere cooperation, but it would also cause dislocation to the single market.[100] By refusing to address the situation, by denying entering into negotiations, EU institutions and Member States would contravene the concluding sentence of Article 4: 'Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' Edward, Kenealy and MacLennan also base the obligation to negotiate on analogy with Article 50: '[i]t is inherent in the nature of the integration

[97] ibid.
[98] David Edward, 'Scotland and the European Union' (*Scottish Constitutional Futures Forum*, 17 December 2012) <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx> accessed 11 August 2017.
[99] By 'automatic' they mean a process whereby no negotiation or Treaty amendment is required. Kenealy and MacLennan (n 33) 599.
[100] ibid.

project that rights acquired through EU membership are complex and reciprocal, and that sudden dislocations threaten to damage the fabric of the project.'[101] The reference to Article 50 is particularly welcomed by Chamon and Van der Loo:

> Article 50 does not simply regulate the exit of a Member State from the EU but provides a general framework catering for a shrinkage in the scope of application *ratione loci* of the Union *acquis*. In the absence of such a framework, the scope of application of EU law might change from one day to the next, disrupting existing relations within the integrated internal market, without anything to follow up on this rupture.[102]

According to these authors, Article 50 should be read as having larger implications beyond the withdrawal of an EU Member State. The logic of Article 50 should be applied to any scenario of contraction. For them, the reason why it does not explicitly refer to secessions within EU Member States is twofold: first, only Member States are constituent entities of the EU. Second, acknowledging such possibility would have undermined the territorial integrity of EU Member States.[103] In effect, in symbolic and political terms, admitting the feasibility of such an option could be read as undermining national cohesion. Unlike Edward, Kenealy and MacLennan also base their position on the right to self-determination,[104] yet do not offer any further explanation. This is however problematic for the reasons given in chapter 2, which is that outside the colonial context and the emergent theory of remedial secession,[105] 'there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division

[101] ibid. 600.
[102] Merijn Chamon and Guillaume Van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?' (2014) 20 (5) European Law Journal 613, 621.
[103] ibid.
[104] Kenealy and MacLennan (n 33) 600.
[105] 'For a people that has not been colonised, secession is then only possible when that group is being collectively denied civil and political rights and when it is subject to egregious abuses by the mother state, i.e. when internal self-determination has proven to be an unviable option. In such cases the group has a "remedial" right to secession. Given the political and human rights requirements which states have to meet to be eligible for EU membership, it is not likely for a subnational group in an EU Member State to be in such a position.' Chamon and Van der Loo (n 102) 616.

or territory.'[106] Therefore, invoking a right to external self-determination within an EU Member States is not legally sound. What is also common to Edward[107] is that Kenealy and MacLennan apply their reasoning only to consensual secession. They admit that in the absence of an agreement with the parent State, in case of unilateral secession, 'the continuance, or otherwise, of the territory's EU membership would be subject to altogether different considerations which fall outside the scope of this article.'[108]

The argument in favour of an obligation to negotiate, which echoes the 1998 Canadian Supreme Court approach to Quebec attempt to secede, based on the principle of sincere cooperation seems politically reasonable and legally founded. The principle of sincere cooperation in EU law (Article 4(3) TEU) or 'EU loyalty', 'good faith', 'loyal cooperation' or 'fidelity', as has been referred to in the past, obliges EU Member States to take all appropriate measures to ensure fulfilment of their obligations under the treaties. Such obligations arise mutually between Member States and the Union (vertical loyalty and reverse vertical loyalty) and between Member States (horizontal loyalty).[109] Thus, Member States and the EU are obliged to ensure the effectiveness of EU law. However, the scope of the loyalty obligations within the EU are 'commensurate to its complexity and level of integration as an international organization.'[110] In effect, loyalty at EU level

[106] James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 417.
[107] '[The negotiation obligation] does not resolve the case of Catalonia, since, as noted above, it is to be assumed that Spain would regard the separation of Catalonia as constitutionally impossible.' Edward (n 76) 1167.
[108] Kenealy and MacLennan (n 33) 593.
[109] The terminology is owed to Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 22-25.
[110] Geert de Baere and Timothy Roes, 'EU loyalty as Good Faith' (2015) 64 International and Comparative Law Quarterly 829, 838. In the same vein, Klamert: 'Thus, loyalty indeed could be seen as an enhanced principle of *pacta sunt servanda*, as it has been put by AG Mazák. Loyalty thus is stronger even where it is similar, such as in the obligation not to frustrate binding commitments entered into by states (a treaty before ratification in the case of international law, a directive before the expiry of the deadline for transposition in the case of EU law). Moreover, in the Union, loyalty not only ties the Member States to each other but also creates obligations towards the EU institutions, more than would be apposite in the intergovernmental setting that is the WTO.' Klamert (n 109) 46. De Baere and Roes explain that probably, the difference between pacta sunt servada and EU loyalty lies in the will of the drafters to emphasize that Member States

would be more far-reaching than at any international organisation, but with lesser strictures than at a truly federal level.[111] In the event of a lawful and consensual secession, the rump Member State affected has an obligation to inform the rest of the Member States and EU institutions, and to refrain from any measure that could imperil the rights and expectations of the other Member States. Thus, 'once Union interests are affected, loyalty applies irrespective of whether the matter belongs to the reserved powers of the Member States.'[112] Accordingly, it will have to negotiate the future status of the seceding entity towards the EU in good faith, avoiding legal vacuum and major disruptions. But this does not imply the acceptance of the seceding entity membership. The EU loyalty principle obliges the rump State to take into account the interests of both the EU and the other Member States, to act in good faith by informing, consulting, and negotiating. However, this does not preclude the rump State from exercising their discretionary decisional power at the Council of accepting or refusing a future enlargement. The same could be said about the other EU Member States. The cooperation duties cannot be so far-reaching that they deny the discretionary margin EU Member States have when it comes to enlargement. As Edward rightly pointed out, the outcome of the negotiations cannot be predicted. Or as Klamert says, '[w]hile loyalty is legally enforceable in contrast to solidarity, and may even apply to areas of reserved competence of the Member States, it does not apply to the political decision-making in the Council.'[113]

In sum, as shown both the analogy of Article 50 TEU and the reference to the sincere cooperation principle (Article 4(3) TEU) are strong arguments to legally justify

'were to make the newly established Community work in practice and, to that effect, they would have to do more than the new Treaty could mention explicitly.' de Baere and Roes (n 110) 833.

[111] 'It also evidenced that the structures imposed on the German *Lander* by *Bundestreue* are more far-reaching than those imposed on the EU Member States by loyalty, which in turn are habitually more detailed and far-reaching than the duties imposed by good faith in international law more generally.' ibid. 874.

[112] Klamert (n 109) 29.

[113] ibid 84.

the position of EU law towards legal and consensual secessionist attempts. The only concern with these arguments is that they are only useful for lawful and consensual secession. They are not useful to ground an EU response to other type of secession.

4.3.2 Unlawful and non-consensual scenarios

Whenever there is a legal consensus between the seceding entity and the Member State affected, the EU should not oppose *per se* the membership application of the new independent sovereign state. This leaves for consideration a secessionist bid that is unlawful and unilateral.

Territorial integrity argument

Some scholars have pointed out that a unilateral declaration of independence, which is unlawful in all EU national constitutional legal orders, is against EU law, for the territorial integrity of EU Member States is particularly protected by Article 4(2) TEU.[114] The problem with the argument about the territorial integrity of the State is the following: unless it can be proved that EU law has developed a distinct meaning of this principle,

[114] Diego López Garrido (coord), 'Cataluña ante la Unión Europea. Las consecuencias jurídicas de la independencia' (*Fundación Alternativas*, September 2015) 6 <http://www.fundacionalternativas.org/public/storage/fundacion_documentos_archivos/c4bf6ae25f99cbb0f6209c3ed715d972.pdf> accessed 30 August 2017. See also Tajadura, 'Los Procesos Secesionistas y el Derecho Europeo' (n 46) 367. Tierney and Boyle admit explicitly the reasoning when they argue that 'in a case of contested secession this would indeed be a very strong objection. However, […] if the UK accepts Scottish Independence, and it is willing to cooperate with Scotland's application to join the EU, the duty on the EU to respect the territorial integrity of the UK is no longer at issue.' Stephen Tierney and Katie Boyle, 'An Independent Scotland: The Road to Membership of the European Union' (2014) ESCR Scottish Centre on Constitutional Change Briefing Paper 15-16<http://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/Tierney%20and%20Boyle%20Scotland%20and%20EU%20paper%2020%20Aug%202014_0.pdf> accessed 30 August 2017. In similar although not exact terms, Pérez de Nanclares explains that on the basis of the respect of the essential functions of the State like ensuring the territorial integrity, the EU shall accept those legal decisions aimed at precisely guaranteeing the territorial integrity of EU Member States. José Martín y Pérez de Nanclares, 'Reflexiones jurídicas a propósito de una eventual declaración unilateral de independencia de Cataluña: un escenario político jurídicamente inviable' (*Real Instituto Elcano*, 24 September 2015) 28 <http://www.realinstitutoelcano.org/wps/wcm/connect/bb469e0049f77f9298de9e207baccc4c/MartinPerezDeNanclares_reflexiones_juridicas_independencia_Catalunya.pdf?MOD=AJPERES&CACHEID=bb469e0049f77f9298de9e207baccc4c> accessed 30 August 2017.

the territorial integrity principle is inherited from public international law. As explained in the previous chapter, since the end of World War II it has been a cornerstone of the international legal regime, particularly in Europe. However, it does not prohibit unilateral secessions without foreign intervention. In 2010, the International Court of Justice had the opportunity to address this issue when deciding the Kosovo Advisory Opinion:

> Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations. […] [But] the scope of the principle of territorial integrity is confined to the sphere of relations between States.[115]

Thus, this principle does not operate *ad intra*, against pro-secessionist movements, but *ad extra*, and therefore the provision established in Article 4(2) TEU would refer to the obligation of the EU to respect the autonomy of Member States when protecting themselves against external threats.[116] Having said that, however, it has to be remembered that the reference to 'territorial integrity' was introduced by the European Convention in 2003 out of a petition of the Spanish government, interested in having 'an EU-level response to the challenge posed by the so-called Ibarretxe Plan, which envisaged a new status for the Basque Country close to full statehood.'[117] Moreover, European leaders like Angela Merkel have referred to this principle[118] implying that 'all parties must respect and guarantee the national sovereignty and territorial integrity of member states.'[119] However, the legal value of such declaration is at most dubious. And even if EU Member States accept now that in Europe the respect for territorial integrity included in Article

[115] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, I.C.J. Reports 2010 403, para 80.
[116] Bossacoma (n 32) 70.
[117] Closa (n 30) 248.
[118] Miguel González and Luis Doncel, 'Merkel reclama a Cataluña respeto al principio de integridad' territorial' *El País* (Madrid, 1 September 2015) <https://politica.elpais.com/politica/2015/09/01/actualidad/1441095737_896484.html> accessed 30 August 2017.
[119] Closa (n 30) 249.

4(2) TEU has to be understood as a prohibition of unilateral secession (something that has still to be proven), that would be a very novel usage of the principle and given the lack of explicit and clear provisions, there would be a risk of legal uncertainty.[120]

Breach of Rule of Law principles

Some authors have also emphasized that a unilateral secessionist process which does not respect the existing framework of the Rule of Law in a given Member State can be perceived as violating Article 2 of the TEU.[121] The truth is that if one takes into account the precedents in neighbouring countries, 'respect for the rule of law is part of EU policy towards outside secessionism, since the EU made the question of constitutional validity the key factor in the EU's response to newly-gained statehood.'[122] In the same vein, Graham Avery argues that 'the implicit policy of the EU in relation to independentism in Europe consists of initial reluctance followed by pragmatic acceptance, provided that the process can be considered as constitutional.'[123] This ground is legally sound, it has an explicit, clear and legal basis and is therefore useful for building an EU legal response to unilateral and unlawful secessionism.[124] However, the reference to the breach of

[120] Case C-325/91 *France v Commission* [1993] ECR I-03283, para 26: 'Community legislation must be clear and its application foreseeable for all interested parties. As a result of that requirement for legal certainty, the binding nature of any act intended to have legal effects must be derived from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis.'

[121] Jean-Claude Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (II)' in Carlos Closa (ed), *Secession From a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 90-91.

[122] Closa (n 30) 250.

[123] Graham Avery, 'Independentism and European Union' (*European Policy Centre*, 7 May 2014) <http://www.epc.eu/documents/uploads/pub_4393_independentism_and_the_eu.pdf> accessed 30 August 2017.

[124] Other authors have also supported this view. See, among others, Closa (n 30) 250. Also, Kochenov accepts this argument, although with some nuances: 'With respect to secession, adherence to the rule of law requires that secessions happen in accordance with national constitutional requirements (presuming the latter are reasonable, of course, as opposed to the arrangements that ban any secession talk outright without giving the constitutional rearrangement any possibility whatsoever)' (emphasis added). Kochenov and Van den Brink (n 32) 14. The reference to 'reasonable' is a tricky one. What does 'reasonable' mean? As has been explained in the previous chapter, it is not uncommon for Western constitutional tradition to require a constitutional amendment in order to admit secession. And constitutional amendments tend to be quite rigid. Is such rigidity reasonable? In our view, yes, indeed. As the Venice Commission admits (Venice

principles contained in Article 2 TEU is unhelpful to justify the EU legal approach to consensual and lawful secession.

4.3.3 Unlawful (non-consensual) and lawful (consensual) secession: respect for Member States national identity

Article 4(2) TEU establishes that the EU shall respect the national identity of the Member States, contained[125] in their fundamental structures, political and constitutional. This provision has been also understood as respect of the 'constitutional identity' of Member States.[126] This provision is the most appropriate legal ground to sustain the EU response to secession, and can address any type of secessionist challenge within EU Member States. It is however important at the outset to consider whether Article 4(2) TEU connotes only Member State or also 'national units', such as certain regions within Member States.

> The Union shall respect the equality of Member States before the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

Commission, 'Report on Constitutional Amendment', CDL-AD(2010)001), the question of constitutional amendment lies at the heart of constitutionalism and implies that 'the fundamental rules for the effective exercise of state power and the protection of individual human rights should be stable and predictable, and not subject to easy change.' (para 5) That is why the general requirements for amending the constitution are in most countries quite strict (para 51). What's the purpose of such rigidity? Or as the Venice Commission puts it, 'Why should a democratic society precommit itself in the sense that it lays down constitutional rules that cannot be changed by the majority when need arises, even following perfectly democratic procedures?' (para 72) The issue here is that 'constitutions are "devices for precommitment or self-binding, created by the body politic in order to protect itself against its own predictable tendency to make unwise decisions" (Elster).' (para 73) 'A quite widely used metaphor is that of Ulysses, ordering in advance his crew to tie him to the mast in order not to be tempted by the song of sirens. In the same way, society by adopting a rigid constitution "ties itself to the mast", in order not to be tempted or distorted by short-term political gains and passions.' (para 74)

[125] The term 'inherent in' may be used interchangeably with 'expressed in' or 'contained in'. Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 136.

[126] Leonard FM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 Utrecht Law Review 36, 37 and 43-4. As for the link between national and constitutional identity, see Parekh: 'National identity finds its partial but clearest expression in the Constitution of the country, a self-consciously formulated and authoritative public statement in which it tells itself and the world what kind of a community it is and what it stands for.' Bhikhu Parekh, *A New Politics of Identity: Political Principles for an Independent World* (Palgrave Macmillan 2008) 60. Also, Vicky C Jackson: 'Constitutions […] express national values and self-understandings; and they embody historically specific compromises and agreements. They also establish the identity and status of the nation in a community of nations.' Vicky C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 Harvard Law Review 109, 124. Mark Tushnet agrees with the approach, but warns that national and constitutional identities tend to coincide in well-functioning democracies, but not in dictatorships. Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 Yale Law Journal 1225, 1270-1273.

First, '*their* national identities' (emphasis added) refers directly and solely to Member States. Second, it makes a clear distinction between 'Member States' and 'regional and local self-government', where these other 'national units' could be encapsulated. Third, in EU law terminology it is common to equate 'national' to the nation-state or the central government.[127]

Although the reference to the national identities of the Member States was already included in the Maastricht Treaty, it is not until the Lisbon Treaty that the TEU makes an explicit reference to the constitution of the States. Whereas in the Maastricht Treaty Article 6(3) TEU established that '[t]he Union shall respect the national identities of its Member States', the current Article 4(2) TEU affirms that 'the Union shall respect [Member States'] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' Thus, 'the political and constitutional aspect is much enhanced in the Lisbon version. To the extent that the Lisbon Treaty here focuses on state structures, there is a shift in emphasis from national identity as such to constitutional identity.'[128] Some authors have argued that such a move could be a response to the case law of national constitutional courts sending repeated signals to the EU that they were ready to protect their national constitutional identity from

[127] It is noteworthy here to invoke the 2001 Opinion of the Committee of the Regions concerning a European Charter of Regional Self-Government, where it is established that '[t]he definition of regional self-government recognises the existence of an intermediate tier between central government and local authorities. The task of determining the division of decision-making powers between national, regional and local authorities is a matter for national authorities.' Thus, the Committee of the Regions, probably the EU body mostly interested in reinforcing the position of sub-national entities within the EU, assumes naturally that 'national' refers to central government. Committee of the Regions, 'Recommendation of the Congress of Local and Regional Authorities of Europe on a European Charter of Regional Self-Government' 2001/C 144/02.

[128] Besselink (n 126) 44.

EU law intrusions.[129] Needless to say, those signals were putting EU primacy at risk.[130] In such case law the highest Courts[131] began to use the concept of 'constitutional identity' to denote the hard core of their constitution that could not be touched by EU law.[132]

This controversy between the highest national courts and EU law is a good example of the legal tension between the different legal orders in the EU. It has been argued that the relationship between EU law and national legal orders is best conceived as a pluralistic legal system, or a multilevel constitutional system, where hierarchical relationships of validity do not accord properly to the current legal reality. As said in chapter 1, MacCormick introduced the concept of 'constitutional pluralism' in 1995 affirming that,

> [T]he most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical. The legal system of Member States and their common legal system of EC law are distinct but interacting systems of law and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.[133]

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[129] 'Its continuous insistence that EU law takes precedence even over national constitution has been put into an entirely new light with the adoption of the Treaty of Lisbon, which explicitly shields the national constitutional identity. The latter is a response to the Member States (judicial) determination that certain formal and substantive dimensions of their constitutional structure, the so-called irreductible epistemic core, are ring fenced and are to remain untouchable shall the State retain its constitutional autonomy and political independence.' Matej Avbelj, 'Theory of European Union' (2011) 36 European Law Review 818, 833. See also Leczykiewicz, 'Article 4(2) TEU could be seen as codification of the case law of national constitutional courts, who often claim that EU law supremacy is only conditional. Whether it is the protection of human rights or the preservation of the essential structures of national constitutionalism, they cannot, the argument goes, be overridden by EU law.' Dorota Leczykiewicz, 'The 'national identity clause' in the EU Treaty: a blow to supremacy of Union law?' (*UK Constitutional Law Association Blog*, 21 June 2012) <https://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/> accessed 1 September 2017.

[130] For an in-depth review of the tension between Article 4(2) TEU and primacy, see Mary Dobbs, 'Sovereingty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 (1) Yearbook of European Law 298.

[131] Particularly: the German Bundesverfassungsgericht (decision of 30 June 2009), the French Conseil Constitutionnel (decision of 27 July 2006), the Spanish Constitutional Court (Declaracion 1/2004), the Italian Corte Costituzionale (decision 8 June 1984). These decisions reflect the tension between a commitment to European integration and the caution against the dilution of national's core statehood by European integration. Jo Eric Khushal Murkens, 'Bundesverfassungsgericht (2BvE 2/08): "We want our identity back" – the revival of national sovereignty in the German Federal Constitutional Court's decision on the Lisbon Treaty' (2010) 3 Public Law 530, 536-537.

[132] Cloots (n 125) 5.

[133] Neil MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 European Law Journal 259, 265.

EU law and domestic legal orders have been defined 'as two interdependent, interwoven and reciprocally influential parts of one unit.'[134] Maduro has argued that one aim of Europe's constitutional pluralism is to prevent constitutional conflicts, by ensuring that the two legal systems adjust to each other.[135] Thus, Member States and EU both claim sovereignty, but try to avoid direct conflicts through making concessions to each other. In a related vein of argument, Barber has pointed out that the European pluralist legal system arms national and EU law with weapons that may help ensure mutual respect and restraint.[136]

Article 4(2) TEU and the concept of national identity can be seen as an expression of this pluralistic approach:[137] protecting aspects fundamental to the Member States, but on the basis of EU law.[138] In effect, the clause is 'a form of public recognition of the multinational composition of the EU and, thus, a way of showing respect for the Member States' national identities.'[139] The EU shows its sensitive approach to the various national identities, probably aware that 'the success of any institutional structure and, indeed, of any model of government at large, depends on its capacity to reflect and give expression to the social pedigree of its constituent entities.'[140] Thus, as Besselink explains,

> Article 4(2) of the EU Treaty speaks not just of respect for the principles which are common to the Member States, but of respect for the national identity of the Member States by the Union. National identity […] refers to that which differentiates the Member States from one another. And this national identity is legally determined by the identity of the national constitution.[141]

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[134] Ingolf Pernice, 'The Treaty of Lisbon: Multi-level constitutionalism in Action' (2009) 2 WHI 26. See also Neil Walker, 'Multi-level constitutionalism: looking beyond the German debate' (2009) 8 LEQS Paper <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper8Walker.pdf> accessed 1 September 2017.
[135] Miguel Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed) *Sovereignty in transition* (Hart 2003) 531.
[136] Nick Barber, *The Constitutional State* (Oxford University Press 2010) 171.
[137] Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1452.
[138] Oreste Pollicino, 'The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?' (2010) 29 (1) Yearbook of European Law 65, 96.
[139] Cloots (n 125) 179.
[140] Avbelj (n 129) 824.
[141] Besselink (n 126) 47.

In sum, according to Article 4(2) TEU, Union institutions, including the ECJ, are under a legal obligation to respect the national constitutional identities of each Member State. This balanced and respectful constitutional legal approach is probably the only way a polity like the EU can survive in the long term. It must ensure a satisfactory accommodation of its main constituencies.

This still leaves open the issue as to how national and constitutional identity can be defined. It also requires analysis of how the ECJ has interpreted the meaning and scope of the national identity clause, and whether the secession clause could be considered part of the constitutional identity of a State. National identity is difficult to capture. But the Lisbon Treaty drafters provided some clarification. As Cloots explained, they circumscribed the concept of 'national identity' or 'constitutional identity' in two ways: 'by designating the Member States as the only legally relevant national groups, and by restricting the pertinent individuating features of a given national group (i.e., of a given Member State) to those that find expression in the State's fundamental structures.'[142] It should also be stressed that the focus of Article 4(2) TEU is on Member States rather than national groups. In fact, 'the clause excludes from its scope certain national groups which have a moral claim to respect, most notably stateless nations.'[143] Since the Lisbon Treaty the ECJ has overcome its hesitancy about deciding whether a certain law or policy qualifies as an aspect of national identity.[144] While there are not many cases dealing with the topic, the existing case law does provide guidance in this respect.

[142] Cloots (n 125) 145.
[143] ibid 152.
[144] The 2004 *Omega* case was a good opportunity to introduce the discourse about the protection of national identity, but the Court decided to resolve it through the reference of human rights as a general principle of law. One wonders if, after the Lisbon Treaty, and the clear expression of constitutional national identity the Court would have referred explicitly to constitutional identity. It might have done so, albeit implicitly. Case C-36/02 *Omega* [2004] ECR I-09609, paras 32-34.

In *Sayn-Wittgenstein* (2010) Austria argued that the provisions at issue, which were implementing measures of the Law on the abolition of nobility, were intended to protect the constitutional identity of the Republic of Austria and that they constituted a fundamental decision for the country. Other Member States (Czech Republic, Italy, Slovakia and Lithuania) supported Austrian view and the Commission also considered that the case related to national identity. The Court admitted that 'in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under EU law.'[145]

In *Runevic-Vardyn* (2011) Lithuania argued that its national language 'constitutes a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities.'[146] Other Member States also accepted that the protection of the official national language was legitimate in order to safeguard national unity and preserve social cohesion. The Court admitted the link between ensuring protection of the national language and Article 4(2) TEU.[147] In these cases, issues such as the republican character of the country and the

[145] Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, para 83.
[146] Case C-391/09 *Runevic-Vardyn* [2011] ECR I-03787, para 84.
[147] Case C-391/09 *Runevic-Vardyn* [2011], para 86-87: '86. According to the fourth subparagraph of Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) EU provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language. 87. It follows that the objective pursued by national rules such as those at issue in the main proceedings, designed to protect the official national language by imposing the rules which govern the spelling of that language, constitutes, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law.' Note the different approach to the Court in the *Groener* case: 'The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the

national language were accepted as forming part of the national identity of a Member State and, therefore, meriting protection according to Article 4(2) TEU.

Cloots has drafted a set of norms that are especially regarded as mirroring the national constitutional identity of a country:[148] fundamental rights; the State's official language (s); the State's structure (unitary, federal, or something in between); the relationship among the distinct branches of government or the relationship between the State and religion tends to be bound up with the nation's particular character and self-understanding.

In this regard, it is highly difficult to justify that a constitutional provision like the secession clause, either explicit in the constitutional text or implicit following the interpretation made by the national Constitutional Court, does not constitute a basic element of the national identity of a country. Note, for instance, that the Venice Commission has considered that secession is possibly the most important decision that a political community may take.[149] Therefore, a certain constitutional approach to secession is properly regarded as forming part of the national identity of a Member State and, therefore, merits protection according to Article 4(2) TEU.

In light of the above, it can be concluded that, in the event of a secessionist challenge, the EU should, on grounds of Article 4(2) TEU, defer to national constitutional legal orders and respect their position, whatsoever it might be, in an exercise of constitutional tolerance, 'one of Europe's most important constitutional innovations', as Weiler has explained: '[n]o matter how close the Union, it is to remain a union among

aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.' Case C-379/87 *Groener* [1989] ECR 03967 para 19.

[148] Cloots (n 125) 161.

[149] Venice Commission, 'Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with applicable International Standards' CDL-AD(2005)041, para 24.

distinct peoples, distinct political identities, and distinct political communities.'[150] In effect, when referring to the rationale behind Article 4(2) TEU and the legal pluralism within this multi-level system, 'European integration is necessarily based on a minimum level of tolerance, acceptance and trust of the Member States. […] Historically and originally, European integration is a response to intolerance between states.'[151]

The national constitutional identity clause resolves the different scenarios of a secessionist challenge: (i) in the event of lawful and consensual secession, it provides a legal reason as to why the EU has to respect and therefore take into consideration the membership application, although this only entails negotiations whose outcome is unknown and subject to unanimity. Here the analogy to Article 50 and the reference to the principle of sincere cooperation become relevant again. Thus, in the case of a 'Yes' vote in Scotland in 2014, the appropriate EU reaction would have been to enter into good faith negotiations with the Scottish authorities; (ii) in the event of non-consensual and unlawful secession, it offers a legal ground why the EU cannot accept such process. The EU institutions cannot recognize such an independence process. Therefore, a hypothetical unilateral declaration of independence within an EU Member State would not trigger the expulsion of such territory from the EU, but it would be seen as the refusal to admit a new legal reality, as happened with the secessionist attempt of Catalonia in October 2017. Thus, the reactions of the EU institutions outlined at the beginning of this chapter were in accordance with EU law, since they did respect the constitutional legal order of Spain by not recognizing the Catalan unilateral declaration of independence.

[150] Joseph H. H. Weiler, 'On the power of the Word: Europe's constitutional iconography' (2005) 3 (2-3) International Journal of Constitutional Law 173, 186-187.
[151] Besselink (n 126) 47.

4.3.4 Other scenarios: unlawful but consensual secession; non-consensual but lawful secession; remedial secession

The following scenarios have not been reviewed by scholars. This may be because Scotland and Catalonia are, respectively, cases of i) consensual and lawful attempt of secession and ii) unilateral and unlawful attempt of secession. Furthermore, the recent secessionist examples in neighbourhood territories such as Montenegro[152] and Crimea,[153] which will be analysed in the last chapter, also followed the same pattern. Montenegro was an example of consensual (or agreed) and lawful secession, while Crimea was a case of unilateral (or non-consensual) and unlawful secession. Thus, the recent experience of these real cases where there is a strong relationship between, on the one hand, consensus and lawfulness, and, on the other hand, lack of consensus and unlawfulness, might explain why scholars have not paid attention to those imagined scenarios where there is no alignment between consensus and lawfulness. In any event, the analysis of these imagined scenarios deserves some attention, because it will reinforce our argument of the need to invoke Article 4(2) TEU when exploring the legal basis of the EU reaction towards any type of secession.

[152] In the 2737th General Affairs and External Relations Council meeting, dated 12 June 2006, EU Member States representatives acknowledged that Serbia had recognized the new territorial reality and that Montenegro had acted in accordance with constitutional provisions and that 'therefore' the EU and its Member States had decided to develop further relations with the Republic of Montenegro as a sovereign, independent State. Available at <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/90014.pdf> accessed 5 March 2018.

[153] On 16 March 2014, the European Union released a Joint statement on the unilateral referendum on Crimea by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Durao Barroso declaring that 'The European Union considers the holding of the referendum on the future status of the territory of Ukraine as contrary to the Ukrainian Constitution and international law. The referendum is illegal and illegitimate and its outcome will not be recognised.' Available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141566.pdf> accessed 5 March 2018.

Consensual but unlawful secession

The paradigm of a consensual but unlawful secession is one where, for example, there is a legal framework that requires a certain procedure or plainly outlaws secession, but the central government nonetheless reaches a political deal with the secessionist entity. In such a scenario there would be a constitutional transformation in that Member State, where, by definition, the constitutional identity of the country was in the making, since there would be a profound mismatch between the legal order and the political legitimacy that underpins it. There would therefore be a transitional constitutional moment. As explained in chapter 1, once the deal (i.e. new constitutional pact) is consolidated (either ultimately through a formal amendment or without it), the constitutional identity of the country has changed, has evolved. In such a scenario, a transitional constitutional moment, EU institutions should remain neutral, but vigilant that the values and principles included in Article 2 TEU are not violated. Once the political situation and the new evolved national constitutional legal order is consolidated and the constitutional crisis is over, the EU should, according to Article 4(2) TEU recognize the new and evolved national constitutional identity and, therefore recognize the new territorial polity.

Non-consensual but lawful secession

This scenario is exemplified by the situation where the central government refuses to accept the result of a lawful secessionist attempt. There would therefore be violation of the constitutional order by the Member State. We should distinguish the type and extent of the unlawfulness. If the violation affects values and principles enshrined in Article 2 TEU, EU institutions will have to resort to Article 7 TEU.[154] The debate about the

[154] We are not implying that this is a quick or satisfactory mechanism, since we are aware of the Union's vulnerabilities and deficiencies in the domain of upholding the Rule of Law, both in the EU's design and its day-to-day functioning. A recent account to be found in Dimitry Kochenov, 'The EU and the Rule of

violation of Article 2 TEU and the recourse to Article 7 TEU, however interesting, falls outside the scope of this thesis. But if the unlawfulness is not systematic and grave and does not require recourse to Article 7 TEU, it might also entail evolution of the political consensus that is the basis of the constitutional pact. In such a case, there would be a constitutional crisis. EU institutions should, once again, remain neutral and vigilant, making sure that Article 2 TEU is respected and reacting only when the constitutional order is consolidated.

Non-consensual, unlawful secession but widely supported secession move

In the event of a non-consensual, unlawful secession, but widely supported secession move, the EU obligation enshrined in Article 4(2) TEU and the deferential approach still holds valid, provided that the values of Article 2 TEU are not violated. In this regard, we share the view of Campins Eritja, who believes that if a EU Member State does not facilitate a political solution, and engages in obstruction through silence and persistent refusal that might be considered a grave political error, but 'it falls short of being a systematic threat to democracy, the rule of law and human rights that are required for the application of Article 7 of the TEU'.[155]

Undoubtedly, if the constitutional crisis provokes political instability or jeopardizes the functioning of the internal market, political interests might convince EU institutions of the need to mediate with the Member State concerned in order to find a solution for the crisis. This consideration holds also for any of the situations described above and goes beyond any legal analysis of the situation. If the internal constitutional

Law – Naiveté or a Grand Design?' in Maurice Adams et altri (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press 2017) 420.

[155] Mar Campins Eritja, 'The European Union and the Secession of a Territory from a EU Member State' (2015) 2 (XVII) Diritto Pubblico Comparato ed Europeo 479, 480.

disorder triggers instability across the EU, EU institutions might be tempted to intervene and engage in diplomatic negotiations.

Conclusion

There is no clear and explicit EU law provision regarding secession within EU Member States. No precedent either. But given current political events in certain Member States, EU institutions have been forced to deliver statements dealing with such a scenario.[156] After having reviewed the relevant scholarly literature, it has been argued that the principal criterion is the distinction between lawful and consensual secession, and unlawful and unilateral secession. Since the legality criteria are, as seen in the previous chapter, established by the national constitutional legal orders, and given that the EU is obliged to respect the constitutional identity of the Member States (Article 4(2) TEU), EU law should show a deferential attitude, as long as Article 2 TEU is respected. Accordingly, if domestic law considers that secession is 'unlawful', EU law should respect that position by not recognizing the statehood of the secessionist entity. In this regard, it can be concluded that the EU reaction to the Catalan crisis has been in accordance with EU law. If, on the contrary, the domestic legal order has enabled the secessionist attempt, EU law should respect that outcome by recognizing the new entity as a sovereign State and enter into good faith negotiations. There might be, however, other scenarios where lawfulness and consensus do not coincide. Even in these cases of constitutional identity in transition, the rule of Article 4(2) TEU together with Article 2 still holds valid, because while the new constitutional order is in the making, the EU should remain vigilant that Article 2 TEU is not violated. When the new legal order is

[156] As explained at the beginning of the chapter, EU institutions were particularly active during the Catalan crisis in October 2017, when they sided with the Spanish central government asking for the respect of the Spanish constitutional legal order.

consolidated, and provided it does not oppose Article 2 TEU, the EU, again, will have to show a tolerant attitude towards the national constitutional identity.

Chapter 5: EU law towards new States emerging out of secession

Introduction

This chapter will explore the legal situation that arises when a new State has emerged and has been recognized by the EU and EU Member States following the recognition policy explained in previous chapters. In the event of the creation of a new, sovereign and independent European State out of secession from a current EU Member State, what would happen in relation to its EU membership? Will it retain it? Will it have to ask for it? In that event, what is the most appropriate legal path? And what will happen as regards EU citizenship rights of the new State's nationals?

The chapter will initially address the debate about State continuity and succession. We will define the terms and then explore the different alternatives: will the rump Member State be the continuing State maintaining its EU membership, while the seceding territory would become a new, successor State that would have to ask for membership? Or following an internal enlargement theory will both States maintain EU membership? Alternatively, and given the profound change of circumstances, another option would be to consider that both States should have to ask for EU membership. As will be shown, it will be argued that the rump State will continue with its EU membership, while the new State that seceded will have to ask for EU membership, notwithstanding the quick access that could be designed if a political agreement between the candidate and the rest of EU Member States is reached.

A further important issue, in the event that the new State is interested in EU accession, concerns the route towards EU membership, thereby requiring discussion of Article 49 TEU and Article 48 TEU. Thus, should the new independent State follow the ordinary path of Article 49 TEU, or is there any possibility to treat this accession as an

amendment to the treaties and, therefore, invoke Article 48 TEU? And, is this difference relevant at all? In our view, the discussion about the accession routes is relevant only to certain extent, since regardless of the chosen legal route, both require a high degree of political consensus, unanimity and a ratification process throughout all EU Member States. Therefore, the practical consequences are minor. In any event, it will be argued that from a legal point the most suitable approach is recourse to Article 49 TEU.

Finally, the chapter will also consider the debate about EU citizenship, nationality and secession. The discussion here is highly speculative, since this regime will depend on the negotiations between the rump State and the new seceded territory. However, what deserves analysis it to what extent nationality law (that in principle is mainly governed by internal law) is constrained by international and, above all, EU law. In other words, and specifically, would the withdrawal of national citizenship rights and consequently EU citizenship rights as a possible result of the negotiations violate EU law? Could EU citizenship have any effect at all in the EU approach towards secession? It is our assumption that, despite some ECJ case law (i.e. *Rottmann* and *Ruiz Zambrano*), EU Member States still hold an important degree of autonomy when it comes to defining nationality and, therefore, the impact of EU citizenship can only be limited.

1. State continuity and succession of States

1.1 State continuity and succession of States under Public International Law

State continuity refers to cases where the same State continues to exist despite changes in the territory and population, whereas State succession makes reference to the legal issues when there is a change of sovereignty over a territory. Undoubtedly, secession, as defined in chapter 1, (i) implies State succession, the seceded entity, and (ii) it might also refer to State continuity provided that the parent State continues to exist, i.e. the rump State. As

Piris recalls, 'were a secession to be conducted in conformity with the law (national, European and international), the new entity would become a legal entity distinct from its State of origin, as from the date of its independence.'[1] Each EU Member State, as any other State around the world, would be free to decide unilaterally to recognise the seceded entity as an independent and sovereign State. Before exploring the issues that the new entity will have to deal with after recognition, such as legal routes to EU accession, and the position of its own nationals vis a vis EU law, let us focus on the international legal status of the territorial entities concerned, the rump State and the seceded entity. This has, as will be seen, been the object of a heated discussion among scholars examining secession and EU law, for international law is far from offering a straightforward answer to this issue. As Athanassiou and Shaelou note, 'state continuity' and 'state succession' are areas of great uncertainty and controversy and 'the relevant state practice is far from uniform or unambiguous'.[2]

In the previous chapter, we reviewed some of the answers provided by the European Commission to questions posed by Members of the European Parliament focused on future membership of seceding entities, such as State succession. In some answers the European Commission referred to negotiations within public international law.[3] In effect, the truth is that although internally the relations of the Member States and their peoples in matters covered by the European treaties are governed by European law, the question of the territorial extent of a State has been treated by the EU as a matter of

[1] Jean Claude Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (II)' in Carlos Closa (ed), *Secession From a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 91.
[2] Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Accession from Within? An Introduction' (2014) 33 (1) Yearbook of European Law 335, 359-360.
[3] For instance, Question for written answer by Mara Bizzotto (EFD) to the Commission, 25 Juy 2012, E-007453/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN> accessed 9 August 2017.

international law.[4] Indeed, this legal corpus has been part of the scholarly discussion when examining secession within the EU, as made clear in chapter 1 and chapter 2.[5] It is noteworthy here to address the international law approach, although, as we will see, it does not provide conclusive answers and is only of limited help. Thus, we will only refer to the main lines of argument summarizing the key conclusions.

The Vienna Convention on Succession of States in Respect of Treaties of 1978 is the legal document usually referred to when addressing secession, the formation of new States and the status of legal relationships between the parent State, the new entity and the rest of the international community. Succession of States is defined in its Article 2 (1) (b) as the 'replacement of one State by another in the responsibility for the international relations of territory.' Article 34 of such treaty provides for a general rule of continuation (or automatic accession) in cases of separation of parts of a State:

> 1. When a part or parts of a territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> Any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

However, Article 4 of the same document expressly states that 'the effect of state succession on membership of an international organisation depends on the relevant rules

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[4] Case 148/77 *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787, para 10: 'It follows from Article 227 (1) that the status of the French overseas departments within the Community is primarily defined by reference to the French constitution under which, as the French Government has stated, the overseas departments are an integral part of the Republic.' As Boyle and Crawford established, the ECJ made clear that 'a Member State's territory depends on that Member State's own constitution, not on the EU treaties. No treaty amendment is therefore required simply as a result of a change to the borders of a state's territory.' Alan Boyle and James Crawford, *Annex A Opinion: Referendum on the Independence of Scotland - International Law Aspects* (UK Government, 2013) para 159 <https://www-test.pure.ed.ac.uk/portal/files/14540285/Boyle_A_Annex_A_Opinion.pdf.> accessed 15 May 2018.
That is why even if a Member State suffers loss of its territory, EU treaties would continue to apply to its reduced territory, provided that the country is not on the verge of dissolution. See the discussion in chapter 6 related to the independence of Algeria.

[5] Some authors have challenged the resort to public international law: 'given the complex relationship between EU law and international law, the question of successor and continuator status is perhaps not as relevant to the issue at hand as the Commission seems to think.' Daniel Kenealy and Stuart MacLennan, 'Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?' (2014) 20 (5) European Law Journal 591, 597.

of that organisation.' This means that the very same treaty admits that despite the existence of a general automatic succession rule, what matters ultimately is the opinion of the international organization concerned, which, at the end, means the opinion of the States that belong to that organization, in the case at hand, the EU Member States. In its commentary on Article 4, the International Law Commission confirmed this view:

> In many [international] organizations membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and a member of the organization as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization.[6]

Thus, the wording of the treaty (Articles 4 and 34 read together) and the interpretation offered by the International Law Commission both reject the theory of automatic succession. In fact, what public international law is signalling is that what matters in the events at hand, secession and membership of an international organization, is the position of the international organization affected. In any event, although the Vienna Convention is in force, it has only been ratified by a few EU Member States, Croatia, the Czech Republic, Estonia, Slovakia, Slovenia, Cyprus,[7] and its status as customary international law is doubtful.[8] Thus, the applicability of the treaty remains unclear, which would leave us with no international law applicable. However, many authors accept as a well-

[6] International Law Commission, 'Draft Articles on Succession of States in respect of Treaties with commentaries' text adopted by the International Law Commission at its twenty-sixth session in 1974. Available at <http://legal.un.org/ilc/texts/instruments/english/commentaries/3_2_1974.pdf> accessed 4 August 2018.

[7] Check ratification status at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en#EndDec> accessed 15 May 2018.

[8] Boyle and Crawford (n 4) para 124; In the same line, Jo E. Murkens, 'Scotland's place in Europe' (2001) The Constitution Unit UCL 10 <http://cadmus.eui.eu/bitstream/handle/1814/46232/Murkens_2001.pdf?sequence=1&isAllowed=y> accessed 15 August 2017. Also, the Catalan Council for National Transitional, a consultative body set up by the Catalan government to advise on the path towards independence, has shown its doubts as to the effectiveness of this Treaty. Consell Assessor per la Transició Nacional, *La integració a la comunitat internacional* (Catalan Government 2014) 17.

established customary rule the norm that in the event of succession of States, the rules for international organization membership status for new independent entities have to be found within the organization at stake.[9] In the event the organization at stake, such as the EU, does not have specific provisions governing succession of States, what becomes particularly relevant is to what extent there is some consistency in the practice of international organizations, and to what extent such practice has been understood by the international community as legally binding, that might have led to the emergence of some sort of substantive customary law, beyond the procedural norm that what matters is the law of the organization affected.

In this sense, Scharf has argued that, despite some controversy among scholars, it is possible to map with some precision the contours of a customary law of succession to membership for rump States. He maintains that automatic succession is possible only if the successor can establish sufficient legal identity with the former member, then becoming the continuing State.[10] He suggests that in determining whether a potential successor is the continuation of a member or whether the member's international personality has been extinguished, the State has to retain (a) a substantial majority of the former member's territory, (b) a majority of its population, (c) a majority of its resources,

[9] 'The 1978 Vienna Convention on succession of states in respect of Treaties defines the international law position. Article 4 establishes that the effects of state succession on membership of an international organisation depend on the relevant rules of that organisation. *Even though only seven EU states are party to the Convention, it provides a solid reference point in this regard*.' (emphasis added) Carlos Closa, 'Secession from a Member State and EU Membership: the View from the Union' (2016) 12 (2) European Constitutional Law Review 240, 251; see also Alfredo Galán, 'Secesión de Estados y Pertenencia a la Unión Europea' (2013) 1 Istituzione del Federalismo 95, 106; and Miquel Palomares, 'Las decisiones de los Jefes de Estado y de Gobierno, en el seno del Consejo Europeo, como categoría jurídica para regular, transitoriamente, la participación en la Unión Europea de nuevos Estados surgidos de la separación de Estados Miembros' (2013) 17 Revista d'Estudis Autonòmics i Federals 146, 151.

[10] Michael P. Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations' (1995) 29 [1] Cornell International Law Journal 29, 67. In the same line, Athanassiou and Shaelou: 'It nevertheless stands to reason that there should be at least a presumption of state continuity where the rump state involves what may be regarded as fundamentally the same territorial and governmental unit'. Athanassiou and Shaelou (n 2) 360; see also Boyle and Crawford (n 4) para 77-8.

(d) a majority of its armed forces, (e) the seat of government and control of most central government institutions. Boyle and Crawford sustain the same thesis:

> In general, state practice shows that continuity depends on the criteria for statehood: a state is the same if it involves what may be regarded as the same independent territorial and governmental unit at the relevant times, despite changes in its population, territory or system of government.[11]

For instance, when referring to past international practice, when it came to the partition of India and Pakistan, India was considered the continuing State of pre-split India, since it retained most of British India's territory and population. It maintained its founding UN membership, whereas Pakistan, had to apply in its own right, as it was considered a new State, not a continuing one.[12] A similar scenario is to be found in the separation of Singapore from Malaysia in 1965. While Malaysia retained its international identity and UN membership because it was considered the continuing State, Singapore was treated as a new State and had to ask for UN membership.[13] After the separation from Pakistan, Bangladesh was considered a new State and had to ask for international recognition,[14] while Pakistan (former West Pakistan) was considered the continuing State. The dissolution of the USSR posed a major challenge for international practice. After initial uncertainty, the Russian Federation was considered the continuing State of the USSR, retaining its legal personality, UN membership and, particularly relevant, the permanent seat and veto power at the UN Security Council.[15] The former Soviet Socialist Republics had to ask for UN membership, since they were treated as new States. In 1993 Ethiopia

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[11] ibid para 52.

[12] UN doc. S/RES/29 (1947) 22 May. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/29(1947)> accessed 4 August 2018.

[13] UN doc. S/RES/ 213 (1965) 20 September. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/213(1965)> accessed 4 August 2018.

[14] UN doc. S/RES/351 (1974) 10 June. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/351(1974)> accessed 4 August 2018.

[15] Yehuda Z. Blum, 'Russia takes over the Soviet Union's seat at the United Nations' (1992) 3 European Journal of International Law 354, 360. Blum considers that legally speaking the arguments of the Russian Federation were flawed, but major political interests prevailed and thus the international community accepted the Russian claim to consider it the continuing State of the USSR and, therefore, maintain the former privileged status of the USSR within the UN Security Council.

was considered the continuing State of Ethiopia after the secession of Eritrea and continued its UN membership, while Eritrea had to be admitted in its own right.[16]A more recent example can be found in the case of Sudan. The new State of South Sudan, which had seceded from the North, was admitted to the UN in 2011, while Sudan (the Northern part) continued with its membership as the continuing State.[17] In sum, the successor continuing State remains bound by treaties concluded by the preceding State, and remains a member of the same international organizations with the same rights and duties.[18]

If, on the contrary, there is no State retaining the majority of the population, the resources and territory, then what has occurred can be better described as dissolution or dismemberment of the State rather than secession of one of its territories. In this latter case, the former legal international identity is extinct. As a result, no entity can be considered a continuing State. Thus, the new born States established by secession, successors but not continuing States, have to apply for new membership of international organizations. Thus, after the dissolution of Czechoslovakia, both the Czech Republic and Slovakia had to apply for UN membership. Both were considered successor States, not continuing States. This implicit rule, to the effect that if a State is a continuing State then its international organizations memberships will continue, whereas a new State must be formally admitted,[19] has been the practice of the UN[20] and also of European regional organisations.[21] This practice has been traditionally linked to the so-called 'clean slate'

[16] UN doc. S/RES/828 (1993) 26 May. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/309/72/IMG/N9330972.pdf?OpenElement> accessed 4 August 2018.
[17] UN doc. S/RES/1996 (2011) 8 July. Available at <https://www.un.org/press/en/2011/sc10322.doc.htm> accessed 4 August 2018.
[18] Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (II)' (n 1) 92.
[19] Boyle and Crawford (n 4) para 128. See also Athanassiou and Shaelou (n 2) 359-361.
[20] Boyle and Crawford (n 4) para 129.
[21] Matthew Happold, 'Independence: in or out of Europe? An independent Scotland and the European Union' (2000) 49 [1] International and Comparative Law Quarterly 15, 22-25, 27. See also Murkens, 'Scotland's place in Europe' (n 8) 11.

rule: 'a new state that was not party to a treaty cannot be bound by it, nor can other parties to a treaty be bound to accept a new party in their midst.'[22] In the past this approach had very obvious justifications. When a new State emerges, it should commence international life free from the treaty rights and obligations applicable to its former sovereign, it should not be bound by the treaties of the predecessor. However, although this justification of the 'clean slate' rule made sense in a decolonization context, it is unclear whether it is suitable in the current scenario of the EU.

1.2 State continuity and succession of States under European Union Law

In the case of the EU: (i) there is no EU law provision governing the issue and, therefore, we have to have recourse to public international law; (ii) there is no international treaty on the issue ratified by EU Member States; (iii) scholars tend to admit as a customary rule a treaty provision that establishes that in the event of succession of States, the rules for international organization membership status have to be found within the organization itself, which is of little help in the case at hand; (iv) scholars have also identified as a customary rule out of State and international organizations practice in recent decades that automatic succession, maintenance of membership, is possible only if the successor can establish sufficient legal identity with the former member State. Otherwise, the 'clean slate' rule applies.

This leads us to the fundamental question: in a scenario of secession within the EU, which State will be considered a successor and continuing State, and therefore entitled to remain automatically an EU Member State? And which State will be considered a successor but not a continuing State and, consequently, will have to apply for new EU membership?

[22] Athanassiou and Shaelou (n 2) 361.

In the first event, in the case of a continuing State, we would be referring to a situation where the 'new' State retains the majority of the population, territory and resources. Customary international law states that only under these circumstances can a 'new' State be considered a continuing State. Accordingly, we would be referring to a rump State like Spain after the secession of Catalonia, Italy after the secession of Veneto, France after the secession of Corsica, Germany after the secession of Bayern or the United Kingdom after the secession of Scotland. It is difficult to deny that only the rump Spain, Italy, France, Germany or the UK would be considered continuing States, since they would retain the majority of the former population, resources, territory, seat of government and control of most central government institutions.[23] For Boyle and Crawford (referring to the UK after the loss of Scotland) this 'will be evident, without further elucidation.'[24] Take into account, for instance, the case of the United Kingdom after the independence of Ireland:

> There is no indication in the Articles of Agreement for a Treaty between the Great Britain and Ireland of 6 December 1921 that either party questioned the UK's continuity; on the contrary, it appears to have been premised on the personality of the UK continuing uninterrupted.[25]

Thus, the rump State's rights and obligations remain unaffected, since 'the coming into being of one or more seceding state entities does not normally affect the existence of the rump state in the international stage, nor does it raise issues of state continuity and succession.'[26] Then, under these circumstances, according to customary international law, the rump State would not need to ask for EU membership:

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[23] Only a few scholars or pro-independence politicians claimed that after Scottish independence there would be two States (e.g. the remaining United Kingdom and Scotland) that could be considered continuing States and maintain their status within the EU, although subject to negotiations. Paul S. Henderson, 'Review: Scottish Independence' (2003) 45 Scottish Affairs 97, 100: 'Certainly, the two new states would have to negotiate with the European Union over such matters as the number of votes in the Council of Ministers and number of seats in the European Parliament, but neither would be expelled.'

[24] Boyle and Crawford (n 4) para 50.

[25] ibid para 65.

[26] Athanassiou and Shaelou (n 2) 360.

> It seems unlikely that anyone would suggest that its EU membership could somehow lapse as a consequence of the loss of population and territory occasioned by Scottish independence.[27]

Athanassiou and Shaelou share the same view:

> In light of the above, the EU law position of the rump Member State in a genuine secession scenario is, in the authors' opinion, clear: the rump Member State would carry forward its legal personality and continue to enjoy its EU membership rights and obligations notwithstanding secession[28].

In effect, since the EU treaties do not define the territory of EU Member States, they can continue to apply to the reduced or to the extended territory of an EU Member State. Indeed, 'the territorial scope of application of EU law can be changed unilaterally by a member state giving independence (decolonisation) to a territory or incorporating a territory.'[29] Needless to say, retaining EU membership will not prevent the rump State from minor adjustments related to its terms of membership, such as, for example, the number of members of the European Parliament elected on its territory, or the weight of its vote in the Council.[30] However, 'there is nothing in the Treaties to suggest the existence of any obligation for the rump Member State to withdraw from the EU, or to otherwise re-negotiate its relationship with its partners merely because of incidents of secession affecting its territory and population'[31] beyond the referred adjustments.

In the second event, in the case of a successor but not a continuing State, we would be referring to a situation where the 'new' State does not retain the majority of the

[27] Boyle and Crawford (n 4) para 145.
[28] Athanassiou and Shaelou (n 2) 342.
[29] Ziller explains that the size of EU 'territory' relies on member states' unilateral decisions, which shows that the EU lacks at least one of the major components of a state: territory. Jacques Ziller, 'The European Union and the Territorial Scope of European Territories' (2007) 38 (1) Victoria University of Wellington Law Review 51, 52-53.
[30] Piris also refers to other adjustments like 'the modalities of participation in the budget of the EU (Article 310 TFEU), the number of members of the Committee of the Regions (Article 301 TFEU) and of the Economic and Social Committee (Article 305 TFEU), subscription to the capital of the European Investment Bank (Article 5 of Protocol 5 to the EU Treaties), participation in various European funds, etc.,' Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (II)' (n 1) 93.
[31] Athanassiou and Shaelou (n 2) 340.

population, territory and resources of a current EU Member State: for example, an independent Catalonia, Veneto, Corsica, Scotland or Bayern.[32] Since there are, as seen above, no legal rules within the EU that specifically govern the situation, we must have recourse to public international law. In this scenario, provided the new States were interested in EU membership, and in accord with customary international law, they would have to ask for EU membership. The reason is, as Happold explains, that membership of an international organization gives rise to rights and obligations, it offers their members the possibility to share and decide a common destiny, at least in certain areas. It is, therefore, necessary to give States the possibility to negotiate and decide with whom they want to work and collaborate.[33] In the same vein, Jenkt states that:

> The membership of an international organization has a personal quality and it is both reasonable and psychologically sound and wise that a new member of the international community should be required to apply for membership.[34]

As Chamon and Van der Loo state, '[t]his is very relevant to the EU, which probably has the most stringent procedure for admission of all international organizations.'[35] Thus, when translating and applying public international law to the EU situation, one could infer that following International Law any new independent State like Catalonia, Veneto,

[32] The case of Belgium, where Flanders could be pushing for independence in the future, is much more difficult, since it could lead to the dissolution of Belgium, as in the case of Czechoslovakia or the former Yugoslavia. Unlike in the abovementioned scenarios of the UK, Spain, Italy or France, where the identification of the rump States (successor and continuing States) on the one hand, and the new born States on the other, seems evident, the case of Belgium is much more complex. Previous practice does not provide much guidance and the decision whether the new born States should be considered successor and continuing States of Belgium or not will be adopted following international negotiations. Thus, any opinion would be purely conjectural. Besides, although this is highly speculative, one should not discard the possibility that the borders of the two new States would be an important source of dispute. Negotiations would be required, even if the Badinter Borders Principle is invoked, which states that the former internal borders become international borders following a dissolution. Since it is not clear whether this principle applies only in cases of dissolution, or also in cases of secession, negotiations would be needed to determine the new borders. Peter Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission' (2000) 24 (1) Melbourne University Law Review 50, 54-57.

[33] Happold (n 21) 27.

[34] C. Wilfred Jenk, 'State Succession in Respect of Law-Making Treaties' (1952) 29 BYBIL 105, 134.

[35] Merijn Chamon and Guillaume Van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?' 2014 (20) 5 European Law Journal 613, 618.

Corsica or any other such territory 'would not automatically join on independence unless the EU's rules had that result.'[36] Boyle and Crawford add that 'on the face of the EU treaties and other indications, it seems likely that Scotland would be required to join the EU as a new Member State.'[37] This view is shared by Araceli Mangas:

> The region that starts a *de iure* process (Scotland) or a *de facto* process (Catalonia) towards independence will be separated from the parent State and will become a third State vis a vis the EU. This is the consequences of its deeds. It decides on a voluntary basis its withdrawal from the EU[38] (own translation).

From an EU perspective, although there are no express EU provisions that cover this issue, the argument invoked in the previous chapter concerning the rights of current Member States to decide who can join the EU should also be taken into account. We should bear in mind that EU Treaty provisions express legitimate Member States aspirations, one of which is the decision about with whom they wish to share the EU political community, the EU common destiny. That is why this decision, necessarily, requires a unanimous agreement, as stated in Article 49 TEU. That is also why the entrance of a new State, regardless of its origins, should respect the right conferred by the Treaties on current Member States to exercise the veto, or possibility to deny the accession of any new State. Furthermore, as explained in chapter 4, the new aspirant State is expected to fulfil the so-called Copenhagen criteria. It cannot be denied that a new independent State that emerges from an already EU Member State will be in an advantageous position in relation with EU law compliance. But a presumption of compliance is not enough. As will be seen below, the new State will be tested on its economic viability, rule of law, protection of minorities and capable administration. Finally, the conclusion that any new State emerging by way of secession would have to

[36] Boyle and Crawford (n 4) para 142.
[37] ibid para 153.
[38] Araceli Mangas, 'La secesión de territorios en un Estado Miembro: efectos en el derecho de la Unión Europea' (2013) 25 Revista de Derecho de la Unión Europea 47, 64.

accede to the EU as a new Member State is fully consistent with statements on the subject by EU officials, as has been seen in the previous chapter.[39] Having said that, as Boyle and Crawford state:

> All this is not to suggest that it is inconceivable for Scotland automatically to be an EU member. The relevant EU organs or Member States might be willing to adjust the usual requirements for membership in the circumstances of Scotland's case. But that would be a decision for them, probably made on the basis of negotiations; it is not required as a matter of international law, nor, at least on its face, by the EU legal order.[40]

In effect, in the event of a successful secession, at some point negotiations among Member States would start and political interests rather than legal provisions would determine the outcome of the challenge. This prompts the following question: what does the European Commission mean when it says that the debate about membership after secession will have to be resolved in accordance with public international law, if it is only of limited help? It would seem that the European Commission is not only underlining the lack of EU rules in the area, but it is also stressing the intergovernmental logic of the issue and the relevant position of EU Member States in addressing the situation. It would seem that the European Commission was advancing the idea that in the event of secession, recognition of independence and subsequently expressed will of EU membership, negotiation and the national interest of the Member States will be key. This is also why Boyle and Crawford assumed that 'the consequences of Scottish independence within the EU will depend on the attitude of other EU Member States and organs, and on negotiations.'[41]

[39] In 2014, during an interview with the BBC, the then President of the European Commission explained that an independent Scotland would have to apply for EU membership in the usual way. '"Extremely difficult" for Scotland to join EU – Barroso' (*BBC*, 16 February 2014) <http://www.bbc.com/news/av/uk-politics-26215579/extremely-difficult-for-scotland-to-join-eu-barroso> accessed 14 February 2017.
[40] Boyle and Crawford (n 4) para 164.
[41] ibid para 144.

2. Route towards accession: Article 48 TEU or Article 49 TEU

Let us turn our attention to the specific legal path that the new state born out of secession must follow in order to acquire EU membership. In the previous section, we indicated that, according to public international law and EU law, new born States will have to ask for EU membership. There are, however, no EU law provisions specifically governing how a new state born out of secession that used to be subjected to EU law should apply for accession. Scholars have taken different approaches to this issue. Some believe that the classic legal path for ordinary accession, Article 49 TEU, is the appropriate route in the case at hand. Others contend that given the special circumstances, Article 48 TEU is the most suitable path. Article 48 TEU deals with amendments to the treaties by existing members, while Article 49 TEU deals with the applications of third non-EU countries. Together with the conditions known as the Copenhagen criteria, it defines the political, legal, economic and procedural requirements. Clearly, neither Article specifically governs the situation of a territory of an existing Member State becoming independent and wishing to become a new EU Member State.

Throughout the years prior to the 2014 Scottish referendum, there was in Scotland and the rest of the UK significant debate about this particular issue. In its 2013 Scotland's Future report, the Scottish Government affirmed that:

> The alternative to an Article 49 procedure, and a legal basis that the Scottish Government considers is appropriate to the prospective circumstances, is that Scotland's transition to full membership is secured under the general provisions of Article 48. Article 48 provides for a Treaty amendment to be agreed by common accord on the part of the representatives of the governments of the member states.
>
> Article 48 is therefore a suitable legal route to facilitate the transition process, by allowing the EU Treaties to be amended through the ordinary revision procedure

> before Scotland becomes independent, to enable it to become a member state at the point of independence.[42]

To the contrary, the UK House of Commons Scottish Affairs Committee explained that (i) '[e]xperts are divided on whether Article 48 can be used to increase the membership of the European Union as the Scottish Government suggests';[43] (ii) EU senior officials have rejected this route and have shown their preferences for Article 49;[44] (iii) the UK government has described it as 'utterly implausible'[45] and (iv) even in the unlikely event that this route was the chosen approach, Scotland would be dependent on the UK team during the negotiations, and it could not reasonably expect it 'to raise issues that would be to the detriment of the citizens of England, Wales and Northern Ireland. Key objectives identified made by the Scottish Government in its White Paper would not, therefore, be realised.'[46]

2.1 Opinions in favour of the Article 48 TEU procedure

As indicated, during the debate concerning EU membership for an independent Scotland, the UK Government took the view that the preferred route is Article 49 TEU, while the Scottish government voiced his preference for Article 48 TEU. Legal experts are, as seen above, divided. Douglas-Scott explains that the view adopted by the UK Government, Barroso and Van Rompuy 'is not inevitable, and may not even be well-reasoned.'[47] She bases her reasoning in the *sui generis* nature of the EU, its distinctive new legal order and

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[42] 'Scotland's Future' (Scottish Government 2013) 220. Available at <https://www.gov.scot/resource/0043/00439021.pdf> accessed 3 August 2018.
[43] House of Commons Scottish Affairs Committee, 'The Referendum on Separation for Scotland: Scotland's Membership of the EU' Twelfth Report of Session 2013-14, para 18. Available at <https://publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/1241/1241.pdf> accessed 3 August 2018.
[44] ibid.
[45] ibid para 26.
[46] ibid.
[47] Sionaidh Douglas-Scott, 'How easily Could an Independent Scotland Join the EU?' (2014) 46 University of Oxford Legal Research Papers 1, 7.

its pragmatism.[48] She argues that the use of Article 49 TEU would entail 'the risk that a newly independent Scotland would be cast into the wilderness, its ties with the EU cut on the date of independence.'[49] In her opinion, Article 48 TEU 'would be a form of internal enlargement for the EU, and in this way, Scotland's uninterrupted membership of the EU could be preserved.'[50] Avery also suggests that 'it would be in the interest of the EU to follow an "internal" procedure under Article 48 of the Treaty'.[51] Kenealy and MacLenan share a similar viewpoint, but admit that Article 48 TEU entails difficulties, since it also requires the unanimous agreement of all existing EU Member States. They do not view Article 48 TEU as a smooth and straightforward 'internal enlargement', unlike Douglas-Scott. However, they still prefer Article 48 TEU route for the following reasons:

> We suggest that the process of treaty amendment would better reflect the general principles of the EU and the acquired rights of EU citizens. The Article 49 route would place Scotland, only because of the result of its democratic referendum, on the same footing as all other states outside of the EU. Whilst there would be no guarantees involved in the Article 48 route, it would (1) recognise that the situation of Scottish independence was qualitatively different from accession conventionally understood, and (2) offer a greater chance of successively transitioning Scotland to Member State status in time for its date of independence.[52]

[48] ibid 8.
[49] ibid 24.
[50] ibid.
[51] Graham Avery, 'Could an independent Scotland join the EU?' (*European Policy Centre Policy Brief*, 28 May 2014) <http://www.epc.eu/documents/uploads/pub_4487_scotland_and_the_eu.pdf> accessed 3 August 2018. What is also interesting to note about Avery and Douglas-Scott is that both admit the risk that the Article 48 TEU route could encounter political mistrust among certain EU Member States with pro-independence movement tensions. Thus, Douglas-Scott distinguishes the Scottish case with unilateral declarations of independence and affirms that '[i]n such cases of unilateral independence, good faith negotiations with EU institutions and other member states, and use of Article 48 procedure, is unlikely to be possible.' Douglas-Scott (n 47) 24. Avery, in turn, considers that in this respect 'the case of Scotland is different from Kosovo or Catalonia, since the Scottish referendum is not unilateral but part of a constitutional process agreed by London […] To satisfy the concerns of Spain and others, the EU would reaffirm its respect for the constitutional arrangements of member states.' Avery (n 51). Thus, both authors underline the important difference we have outlined in chapter 4 between unilateral (and unlawful) and consensual (and lawful) independence processes.
[52] Kenealy and MacLennan (n 5) 601.

The main assumption behind this approach is that European leaders tend to decide first what they want to do and only then they look for the legal path to proceed.[53] This view, as we will be seen below, has some legal flaws.

2.2 Opinions in favour of the Article 49 TEU procedure

Tierney and Boyle consider that, although Article 48 TEU 'provides a feasible route', it is 'more likely that Scotland will be required to make an application to join the European Union by way of the Article 49 of the Treaty on the European Union'.[54] This is the opinion of many other scholars. For these scholars, there are various reasons to oppose the Article 48 TEU procedure. For instance, the choice of legal instruments is not to be decided by only taking into account the political convenience of those concerned. In this regard, the *lex specialis*, among other reasons, suggests that the Article 49 TEU procedure is the most appropriate route. Furthermore, the Article 49 TEU route ensures application of the Copenhagen criteria, while Article 48 TEU does not.

Legal choice and lex specialis

Closa underlines the fact that '[t]he choice of legal basis is not the free prerogative of EU agents.'[55] In effect, as the ECJ has held, 'the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include, in particular, the aim and content of the measure.'[56] According to the Court, it follows from

[53] Michael Keating, 'Would an independent Scotland be in the European Union?' in C. Jeffery and R. Perman (eds) Scotland's Decision: 16 Questions to think about for the referendum on 18 September (Birlinn Limited 2014) 46-49. The idea that EU pragmatism and flexibility will prevail should Catalonia become independent (assuming that some sort of internal accommodation will be finally adopted) has also been stressed by the Catalan Council for National Transitional. Consell Assessor per la Transició Nacional, *Les vies d'integració de Catalunya a la Unió Europea* (Catalan Government 2014) 13.

[54] Stephen Tierney and Katie Boyle, 'An Independent Scotland: The Road to Membership of the European Union' (*ESRC Scottish Centre on Constitutional Change Briefing Paper*, 20 August 2014) <https://www.centreonconstitutionalchange.ac.uk/sites/default/files/papers/Tierney%20and%20Boyle%20Scotland%20and%20EU%20paper%2020%20Aug%202014_0.pdf> accessed 3 August 2018.

[55] Closa (n 9) 261.

[56] Case C-338/01 *Commission v Council* [2004] ECR I-4852, para. 54.

this approach, that if the Treaty contains different provisions that could be capable of constituting the legal basis for the measure in question, one should invoke the more specific provision.[57] Basically, the ECJ is opting for the *lex specialis* criterion, a general principle of law: a provision governing a specific question like accession, Article 49 TEU, should trump provisions dealing with more general issues like treaties amendments, Article 48 TEU.

Piris explains that Article 49, 'the only correct, necessary and sufficient basis',[58] has a threefold meaning: (i) to check if all the criteria for admission are met; (ii) to negotiate the specific terms of accession and (iii) to adopt the necessary EU adjustments ad intra.[59] Likewise, Hillion points out that Article 49 TEU is a *lex specialis*, since it sets forth the specific EU procedure for admitting a new State into the EU: 'irrespective of whether the aspirant comes from within or outside, its exclusive function in the system of the treaties is to alter the *state* composition of the EU by admitting a new member.'[60] By way of contrast, Article 48 TEU has a distinct purpose, which is to allow existing Member States to modify the treaties: 'it is not purported to include new parties to the existing treaties, or to introduce the necessary legal changes to EU primary and secondary law, or transitional arrangements for making that inclusion possible.'[61] Murkens also admits that Article 48, unlike Article 49, 'was not designed to bring about the institutional changes needed to accommodate a new Member State.'[62] That is why relying on Article

[57] ibid para 60.
[58] Jean Claude Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (I)' in Carlos Closa (ed), *Secession From a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 86. Campins Eritja shares the same view. Mar Campins Eritja, 'The European Union and the Secession of a Territory from a EU Member State' (2015) 2 (XVII) Diritto Pubblico Comparato ed Europeo 479, 492-498.
[59] Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (I)' (n 58) 83.
[60] Christophe Hillion, 'Scotland and the EU' (*Verfassungsblog*, 15 September 2014) <https://verfassungsblog.de/scotland-eu-comment-christophe-hillion-2/> accessed 3 August 2018.
[61] ibid.
[62] Jo E. Murkens, 'Scotland and the EU: A Comment' (*UK Constitutional Law Association Blog*, 10 September 2014) <https://ukconstitutionallaw.org/2014/09/10/debate-jo-murkens-scotland-and-the-eu-a-comment/> accessed 3 August 2018.

48 TEU is 'far from persuasive on technical legal grounds.'[63] As Closa affirms, '[p]lainly stated, Article 49 is the *lex specialis* regulating accession'.[64]

Copenhagen criteria

Another reason to support the Article 49 TEU procedure is through examination of the Copenhagen criteria. The presumption of fulfilment,[65] as explained in chapter 4, should be ruled out. Therefore, the idea of an 'internal enlargement', or negotiations following Article 48 TEU without the need to test whether the new State fulfils the accession criteria, seems unfounded and legally incorrect. Needless to say, the situation of a territory that has been applying EU law for decades cannot be completely compared with the situation of the Western Balkans countries, to name some of the current candidate countries. However, this does not mean that such territories, once in the way of acquiring statehood, will be exempted from the accession criteria.[66] For instance, the issues of the protection of minorities, or the good neighbourhood relations criterion, might be thorny issues for some new countries like Catalonia or Flanders.[67] As Piris states, '[a] new State is a new State. Nothing can establish that "by definition" a new State would be founded with the same values, have the same capabilities and be able to fulfil the necessary conditions to become a Member State of the EU in its own right.'[68]

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[63] ibid.
[64] Closa (n 9) 262.
[65] Given the current EU membership, the Catalan government assumes that the fulfilment of the Copenhagen criteria by the new Catalan Republic would be 'evident'. Consell Assessor per la Transició Nacional, *Les vies d'integració de Catalunya a la Unió Europea* (n 53) 51. We have both explained in chapter 4 and in this chapter the inaccuracy of this approach.
[66] Chamon and Van der Loo (n 35) 623.
[67] ibid. Although these requirements should not be overemphasized either, since if there is enough political will, the EU institutions will find the way to tone down the conditions, as the flexible approach to Cyprus illustrates. See chapter 6 of this thesis.
[68] Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (I)' (n 58) 84.

Notwithstanding the above, it might transpire that even following Article 49 TEU, the new State application could be fast-tracked, in the sense that accession negotiations could be facilitated or accelerated. In the words of Piris: '[l]egally, the fact that Catalonia and Scotland might both be able rapidly to fulfil the necessary conditions to become EU Member State could help accelerate the procedure, but could not dispense with following it.'[69] Since there is no exhaustive list of strictly defined Copenhagen criteria, 'the pragmatic approach of the European Council as regards accession conditions may result in new criteria, tailor-made for the applying newly independent states.'[70] In effect, as the ECJ recalled in *Mattheus v Doego* when referring to the accession provisions, the conditions of accession are to be drawn up by the applicant country and the EU Member States following negotiations: '[t]hus the legal conditions for such accession remain to be defined in the context of that procedure without its being possible to determine the content judicially in advance.'[71] Negotiations could start following a potential pro-independence vote within the territory and during the process of formally acquiring statehood, so that formal independence and EU membership are achieved consecutively.[72] Furthermore, the possibility of the establishment of ad hoc and transitional measures to accommodate the secessionist entity cannot be ruled out. In this regard, a reverse Cyprus approach during the negotiations has been suggested,[73] by virtue of which EU law would still be applicable

[69] ibid.
[70] Chamon and Van der Loo (n 35) 622.
[71] Case C-93/78 *Mattheus v Doego* [1978] ECR I- 2203, para 7.
[72] There are some precedents of the EU negotiating with entities on their way to statehood like Kosovo (e.g. 2015 Stabilisation and Association agreement between the EU and the European Atomic Energy Community and Kosovo), or the Palestine Liberation Organization (e.g. 1997 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip).
[73] Kai-Olaf Lang, 'Katalonien auf dem Weg in die Unabhängigkeit?' (2013) SWP-Deutsches Institut für Internationale Politik und Sicherheit Aktuell 8 <https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2013A50_lng.pdf> accessed 7 August 2018.

in the territory of the seceded entity, despite the fact that the new sovereign has not yet attained full membership.[74]

In sum, '[a]ccession via EU reform procedure (i.e. Article 48 TEU) seems unfounded and legally incorrect, while the traditional procedure (i.e. Article 49 TEU), emerges as the proper route.'[75] In any case, the key challenge of the accession process, which affects both procedures, is the fact that all Member States have to agree on the application. Needless to say, other EU Member States could have reasons to slow down the accession process, or create difficulties. Furthermore, some countries may require a nation-wide referendum prior to ratification. Given the increased Euroscepticism in some EU countries, the ratification process might encounter difficulties, thus resulting in a No vote in the ratification referendum, even if the rejection of the enlargement is not so much directed against the candidate country, but against the EU project as a whole.[76]

3. EU citizenship after independence following secession

A detailed legal analysis of the issues that emerge after successful secession (like State continuity and succession of States or the appropriate route towards accession) would not be completed without examining nationality issues that will have to be negotiated

[74] In fact, the applicability of EU law depends entirely on the political will of the seceded entity. For instance, Article 10.2 of the Law 20/2017, of 8 September, on Juridical Transition, passed by the Catalan Parliament weeks before the unsuccessful Catalan unilateral declaration of independence, sets forth that EU law shall also continue to be applied in Catalonia after independence. This law was the legal framework that had to prevail over the current Spanish one should a majority of Catalans vote in favour of independence in the 1st October referendum. A completely different discussion is to what extent the institutions of the new entity and its inhabitants will benefit from the rights derived from EU law and from those EU provisions that require EU intervention or EU Member States reciprocity. English version of the Catalan law available at <http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-20_2017-on-Juridical-Transition.pdf> accessed 4 August 2018.

[75] Closa (n 9) 263.

[76] Something similar to what occurred during the 2004 Constitutional Treaty ratification process: 'as the number of referenda grows, so do the chances of rejection in one or more member states. And the reason for rejection would not, it is respectfully submitted, be linked to any specific provision of the new constitution, nor even to its overall material content. I am arguing, rather, that such rejection may be linked to extraneous issues rooted in national politics, to a general "anti-Europe" sentiment, and, most intriguingly, to something other than the content of the new Treaty of Rome but rather to the very idea of a European constitution.' Joseph H.H. Weiler, 'On the power of the Word: Europe's constitutional iconography' 2005 (3) International Journal of Constitutional Law 173, 178.

between the rump State and the new independent sovereign State. The discussion about nationality issues after independence fits necessarily in the current chapter because it is the one dealing with successful secession attempts (the appropriate temporal momentum for nationality discussions). However, some of the findings of the next pages (see section 3.2.3 and, in particular, footnote 111) in fact, sustain the overall argument of the thesis thoroughly explained in chapter 4. In effect, it will be shown that the doctrine of EU citizenship cannot by itself engender automatic membership of the EU for an independent country borne out of a region within a EU Member State. This supports the thesis of the thesis. Namely, that EU law does not possess an autonomous approach to secession (in the case of the alleged doctrine, a generous or accommodating perspective), but a deferential one towards the constitutional legal orders of EU Member States, provided that certain conditions posed by EU law itself (respect for values enshrined in Article 2 TEU) are fulfilled.

Nationality law is not just another area of the legal order. It has traditionally been considered a domain reserved for States, for it is a highly politically sensitive matter. As D'Oliveira explains, '[t]he power to determine who belongs to a particular state, to define a state's body of citizens, is essential to the existence and the identity of the state'.[77] Indeed, '[a] member state's citizens are an integrating and essential component of the sovereign statehood of the member state.'[78] Needless to say, nationals of the rump State will maintain their nationality and, therefore, their EU citizenship. But what would occur with the nationals of the new born State?

In the event of a quick negotiated EU access and a short interim/transitional period the situation does not give rise to many questions. However, in the event of a long non-

[77] Ulli Jessurun d'Oliveira, 'Decoupling Nationality and Union Citizenship?' (2011) 7 European Coinstitutional Law Review 138, 148.
[78] ibid.

EU membership period, different scenarios arise: (i) the States concerned might negotiate a dual nationality regime, which would guarantee the maintenance of EU citizenship to nationals residing in a third country; but (ii) the States concerned might also reach an agreement to grant a right of option, and, therefore, in the event of choosing the nationality of the new born State that could lead to the dispossession of the nationality, and therefore EU citizenship, of the continuing State inhabitants. As said, the outcome of the negotiations is purely political and conjectural. But the key legal question in the case at hand is to what extent is nationality law, usually governed by internal law, constrained by international and EU Law? Specifically, would the withdrawal of national citizenship rights, and as a result the withdrawal of EU citizenship, violate international Law and EU law? It is our assumption that, despite some ECJ case law (e.g. mainly *Rottmann* and *Ruiz Zambrano*)[79], EU Member States still hold an important degree of autonomy when it comes to define citizenship and nationality law. In any event, and although nationality law is essentially governed by internal law, States are also constrained by public international law and by European Union law. These constraints and, particularly, the impact of EU citizenship when it comes to secession will be considered below.

3.1 Public International Law constraints

In relation to public international law, four international instruments merit attention, the relevance of which has been accepted by the ECJ.[80] First, the Universal Declaration of Human Rights (1948). Article 15 recognises that '[e]veryone has the right to a nationality' and '[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' Thus, the dispossession of nationality should not be arbitrary and should not lead to statelessness. Second, the International Law Commission's Articles on the

[79] Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-01449 and Case C-34/09, Gerardo Ruiz *Zambrano v Office national de l'emploi (ONEM)* [2009] ECR I-01177.
[80] Case C-135/08 *Janko Rottmann v Freistaat Bayern* (n 79) para. 14.

Nationality of Natural Persons in Relation to the Succession of States.[81] Article 4 of the text encourages States to prevent persons from becoming stateless as a result of succession of States. Article 24 covers the situation that would result in the event of secession, since it deals with separation of part or parts of the territory. It sets forth that in general terms

> [w]hen part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State [rump State] continues to exist, a successor State [seceded entity] shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to (a) persons concerned having their habitual residence in its territory.

Thus, in principle, those residing in the seceded territory, unless there is a negotiated right of option (foreseen in Article 26) or an agreement over a dual nationality regime, will acquire the nationality of the new born State. Article 25 contends that rump States shall withdraw its nationality from persons qualified to acquire the nationality of the seceded State. However, rump States will have to make sure before dispossession that those persons have previously acquired a new nationality. Third, the Convention on the Reduction of Statelessness (1961),[82] which attempts to reduce statelessness. Article 8 sets forth that States 'shall not deprive people of their nationality so as to render them stateless'. However, withdrawal of nationality is accepted where nationality has been acquired by misrepresentation or fraud. Fourth, the European Convention on Nationality (1997).[83] It upholds the same principle that 'statelessness shall be avoided' and it only

[81] The Articles on Nationality of Natural Persons in Relation to the Succession of States were adopted by the International Law Commission at its fifty-first session, in 1999. By resolution 55/153 of 12 December 2000, the General Assembly took note of the Articles, the text of which was annexed to the resolution, inviting Governments to take into account, as appropriate, the provision contained therein in dealing with the relevant issues. Details to be found at <http://legal.un.org/avl/ha/annprss/annprss.html> accessed 30 July 2018.

[82] The Convention on the Reduction of Statelessness is a United Nations multilateral treaty signed in 1961 and entering into force in 1975. It has been ratified by 11 EU Member States. However, Spain, Portugal, Italy, Belgium, Poland or France have not ratified it. Details to be found at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en> accessed 30 July 2018.

[83] The European Convention on Nationality is a comprehensive convention of the Council of Europe dealing with the law of nationality. It was signed in 1997 and it entered into force in 2000. It has been

allows for one exception: in the case of acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant.'

Although, as explained in the footnotes, the legal binding force of all these international instruments is contested and dubious (except for the Universal Declaration of Human Rights), it would seem that in general terms and as regards to our main issue (i) withdrawing nationality is not prohibited by international law, provided that it does not lead to statelessness;[84] which in the context at hand would mean that a rump State will not violate international law if it decides to dispossess those citizens residing in the seceded entity from their nationality as long as the persons concerned have opted for acquiring the nationality of the new entity; (ii) there might be an agreement between the rump State and the seceded entity to grant a right of option to the citizens concerned; however, there is no international duty to do so; and (iii) there is no international obligation to grant dual nationality. This is as far as public international law can take us. The constraints imposed are very limited and offer a wide variety of options for the negotiations between the States concerned.

3.2 European Union Law constraints

We have seen that public international law sets some constraints on States when it comes to nationality law. Such constraints, however, are not deemed to be stifling. EU law might, however, impose more far-reaching constraints. This is the interpretation of some

ratified by 20 European States. Spain, the UK, France, Italy, Greece or Poland are among those countries which have not ratified the Convention. In fact, Spain and the UK have not even signed the treaty. Details to be found at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166> accessed 30 July 2018.

[84] In effect, as has been explained, '[i]n international law, the most important principle concerns protection against statelessness occurring as a result of the creation of a new state.' Jo Shaw, 'Unions and Citizens: Membership Status and Political Rights in Scotland, the UK and the EU' in Carlos Closa (ed), *Secession From a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 164-165.

scholars in the light of ECJ decisions. It will be shown, though, that this interpretation needs to be nuanced. In the next pages, we will be dealing with the question of the extent of the discretion available to the Member States to determine who their nationals are. Or as Advocate General Maduro puts it:

> In so far as citizenship of the European Union, which depends, admittedly, on enjoyment of the status of national of a Member State, is established by the Treaty, can the powers of the Member States to lay down the conditions for the acquisition and loss of nationality still be exercised without any right of supervision for Community law? [85]

3.2.1 EU treaty provisions

In effect, the point at issue here is to what extent the EU citizenship regime, created in the 1992 Maastricht Treaty, constrains EU Member States autonomy to govern nationality law as regards secession. Article 20(1) of the TFEU sets forth that 'every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' Union citizenship is presented 'as being a dependent variable of the possession of the nationality of a member state.'[86] One cannot become an EU citizen without first being a national of one of its Member States. Declaration no.2 attached to the Maastricht Treaty established:

> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of the Member State shall be settled *solely* by reference to the national law of the Member State concerned[87] (emphasis added).

With this declaration, EU Member States underlined their prominence in designing nationality law. Furthermore, the Commission has systematically adopted the view that nationality law is a matter exclusively to be governed by the Member States and,

[85] Opinion of Advocate General Poiares Maduro – Case C-135/08 *Janko Rottmann v Freistaat Bayern* (n 79).
[86] D'Oliveira (n 77) 147.
[87] OJ 1992 C 191, p. 98.

therefore, it has refused to make substantial statements on EU Member States' nationality law, because it has claimed to lack competence to do so.[88] In 1992 the European Council also recalled that

> [T]he citizenship of the Union gives nationals of the Member States *additional* rights and protection […] *They do not in any way take the place of national citizenship.* The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned[89] (emphasis added).

EU Member States were thereby trying to underline the additional character of EU citizenship: EU citizenship is dependent on the nationality of the Member States. Thus, in principle, if secession means dispossession of national citizenship, which should not be necessarily be the case, since the rump State and the new sovereign might accept a dual nationality regime, then it would also mean dispossession of EU citizenship. Or as Medina points out, assuming there is no dual nationality regime in place: '[i]f a part of a Member State secedes, their citizens would lose their EU citizenship', for 'EU citizenship is vicarious to national citizenship.'[90] EU officials have also been clear in this regard. As explained in chapter 4, in July 2012, the Commission was asked whether in case of secession, citizens would immediately lose their status as EU citizens and the resultant rights and obligations. The Commission stated that 'in accordance with Article 20 of the Treaty on the Functioning of the European Union (TFEU), EU citizenship is additional to and does not replace national citizenship (that is, the citizenship of an EU Member State).'[91] However, some authors have contended that ECJ decisions might have altered this approach. The ECJ has constantly repeated that 'Union citizenship is destined to be

[88] D'Oliveira (n 77) 145.
[89] OJ 1992 C 348, p. 1.
[90] Manuel Medina Ortega, 'The Political Rights of EU citizens' in Carlos Closa (ed), *Secession From a Member State and Withdrawal from the European Union* (Cambridge University Press 2017) 147.
[91] Question for written answer by Mara Bizzotto (EFD) to the Commission, 25 Juy 2012, E-007453/2012 <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN> accessed 9 August 2017.

the fundamental status of nationals of the Member States'.[92] What does it exactly mean in the context of the effect of EU citizenship on secession?

3.2.2 ECJ case law

In *Micheletti*, a case involving a dual national Argentine-Italian dentist who wanted to practice in Spain, the Court considered the degree of latitude of the Member States to organize their laws concerning nationality. The ECJ explained that '[u]nder international law, it is for each Member State, *having due regard to Community law*, to lay down the conditions for the acquisition and loss of nationality'[93] (emphasis added). The Court wanted to emphasize that prominence over a domain, in the form of Member States' internal legislation governing nationality law, does not preclude influence of EU law. Although *Micheletti* was a landmark case, the decisions that are particularly relevant in our context are *Rottmann* and *Ruiz Zambrano*.

In *Rottmann*, a case involving an Austrian national who had been dispossessed of Austrian nationality after acquiring German citizenship, which was later withdrawn, it was 'clear that the ECJ [wa]s willing to challenge member states' autonomy in nationality matters.'[94] The ECJ decided to discuss openly the indirect influence of EU law on the nationality laws of the EU Member States. Although the ECJ had already sent signals about the limits placed by EU citizenship on the EU Member States' autonomy in previous decisions,[95] in *Rottmann* the Court expressly explicated the following:

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[92] Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2002] ECR I-6193, para 31.
[93] Case C-369/90 *Mario Vicente Micheletti and others/Delegación del Gobierno en Cantabria* [1992] ECR I-4258, para 10.
[94] Gerard René de Groot and Anja Seling, 'The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7 European Constitutional Law Review 150, 150.
[95] Although the decision was labelled as a 'milestone' in the sphere of nationality law, René de Groot also argues that 'the judgement cannot be considered as very surprising, or as coming "out of the blue" and based solely on the ECJ's creativity […] the active stance of the Court with regard to shaping the concept of Union citizenship was already clear in cases such as Baumbast (C-413/99), Martínez-Sala (C-85/96), Grzelczyk (C-184/99), Garcia Avello (C-148/02)'. De Groot and Seling (n 94) 151.

> [T]he situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.[96]

In other words, the 'loss of the newly acquired member state nationality consequently means loss of Union citizenship.'[97] And the Court found that such a situation involving loss of Union citizenship falls within the scope of EU law. It has, therefore, become clear that revocation of EU citizenship, as opposed to its initial granting, are matters of interest to EU law.[98] The ECJ concluded that while EU Member States have power to lay down the conditions for the acquisition and loss of nationality, they must take into account the following:

> [I]n respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law.[99]

In exercising this judicial review, the Court found that a decision withdrawing naturalisation because of deception[100] is a legitimate reason of public interest:

> In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.[101]

The Court noted that this was in line with public international law. However, it also held that it is 'for the national court to ascertain whether the withdrawal decision at issue in

[96] Case C-135/08 *Janko Rottmann v Freistaat Bayern* (n 79) para 42.
[97] De Groot and Seling (n 94) 153.
[98] Athanassiou and Shaelou remind us that in *Rottmann* the ECJ 'distinguised the situation of the applicant to that of the applicant in *Kaur* […] where a third country national did not meet the definition of a national of a given Member State and could not therefore as such be deprived of the rights deriving from the status of Union citizen, which he had never enjoyed in the first place.' Athanassiou and Shaelou (n 2) 355.
[99] Case C-135/08 *Janko Rottmann v Freistaat Bayern* (n 79) para 48.
[100] Janko Rottmann had obtained German nationality without revealing that he was wanted in Austria as a suspect for a professional offence. When the German authorities heard of it, his naturalisation was revoked.
[101] Case C-135/08 *Janko Rottmann v Freistaat Bayern* (n 79) para 51.

the main proceedings observes the principle of proportionality.'[102] Thus, the question that EU law asks is to what extent the withdrawing or dispossession of nationality can be considered proportionate. This is one of the relevant questions that we should be asking ourselves when considering secession, EU law and dispossession of nationality: is it proportionate to dispossess nationality from millions of current citizens who have opted for a new nationality in the event of secession?

However, before answering the question about the proportionality of nationality dispossession in case of secession, it is important to consider *Ruiz Zambrano,* since it further limited the autonomy of Member States by prohibiting the application of national immigration laws to a significant group of third country nationals. In effect, the ECJ claimed that the Treaty 'precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.'[103] In the case at hand, the Court held that Article 20 TFEU

> precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.[104]

It could be argued that, as in *Rottmann*, the Court considered that 'European citizenship provisions by their very nature fall outwith the "purely internal" situation.'[105] And, as previously done in *Rottmann*, 'the Court [took] the determinative step of recognising the unique "nature" of European citizenship rights as giving rise to the requisite link with

[102] ibid para 55.
[103] Case C-34/09 Gerardo Ruiz *Zambrano v Office national de l'emploi* (n 79), para 42-44.
[104] ibid para 45.
[105] Anja Lansbergen and Nina Miller, 'Court of Justice of the European Union. European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)' (2011) 7 (2) European Constitutional Law Review 287, 292.

Union law.'[106] *Ruiz Zambrano* has been read as a decision that 'constitutes a highly significant encroachment into an area previously outwith the scope of Union regulation.'[107] Clearly, 'national citizenship law is not entirely independent of EU law, and should respect its principles to the extent that it can have an impact on the enjoyment by individuals of their EU law-derived rights.'[108] More importantly, the ECJ has moved beyond its classic cross-border thinking. There is no need to establish a cross-border situation for EU citizenship to protect the substance of the rights of the Member States' nationals.[109]

3.2.3 EU law scholars

The salient issue for this thesis is the extent to which these cases impact the discussion on EU law and secession.[110] For some, the effect is profound. Given the position of the ECJ in *Rottmann* and *Ruiz Zambrano* and bearing in mind the importance placed by the EU Charter of Fundamental Rights to individuals, who lie at the hearts of the EU activities, O'Neill argues the following:

> rather than analyse the matter from the classic viewpoint of public international law – which recognizes only States and international organisations are the subject and object of international rights and obligations - EU law requires to look at the issue [secession within the EU] from the viewpoint of the individual citizen.[111]

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[106] ibid 293.
[107] ibid 301.
[108] Athanassiou and Shaelou (n 2) 354.
[109] Dimitry Kochenov, 'The Right to Have What Rights? EU citizenship in Need of Clarification' (2013) 19 (4) European Law Journal 502, 508.
[110] The discussion about the concrete influence of these rulings goes beyond the scope of this chapter and thesis. Suffice it to say that the Court has also been criticized for being engaged in a cherry -picking exercise and lack of predictability, for in further decisions, like *McCarthy*, and despite a similar set of circumstances, the Court denied the applicant the benefits granted to Ruiz Zambrano. Kenealy and MacLennan (n 5) 609. See also, Kochenov (n 109).
[111] Aidan O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU' (*Eutopialaw*, 14 November 2011) <https://eutopialaw.com/2011/11/14/685/> accessed 26 July 2018. O'Neill's argumentation, without further elucidation, continues by affirming that if faced with the question of secession within the EU, based on the previous arguments about EU citizenship being the fundamental status of nationals of EU Member States, the ECJ's most likely position would be to accept the automatic accession of the seceded entity. This is however very unlikely. Douglas Scott also rejects the argument: 'To be sure, the doctrine of EU citizenship cannot by itself engender automatic membership of the EU for an independent Scotland. It would be necessary for the treaties to be amended, at the least according to the procedures in Art 48.' See Douglas-Scott (n 47) 19. So do Kenealy and McLennan: '[w]e conclude that no matter how it is examined, the notion that EU citizenship could be in some way generative of EU

Douglas Scott shares this very same view:

> [T]he critical question here is whether the Court of Justice would consider that Scottish independence deprived Scottish citizens of their acquired rights as EU citizens. Given the importance accorded by the Court to the primacy of EU law, and EU citizenship as being 'the fundamental status of nationals of the Member States', it is unlikely that the Court would hold this to be the case.[112]

In sum, these authors regard that a national measure from the rump State that rejected a dual nationality regime, or directly dispossessed those residing in the new born State of their previous nationality, (provided they acquired the nationality of the new seceded entity), would violate EU law, for such a measure would lead to the dispossession of EU citizenship.

This reasoning can, however, be questioned. We should refrain from providing EU citizenship with a constitutional significance far beyond that which has been admitted by the ECJ. In *Rottmann* the Court dealt specifically with the lawfulness of the withdrawal of citizenship, and the ECJ admitted its lawfulness provided that the dispossession satisfies a proportionality test. Is it reasonable to assume as proportionate a national measure that consists of the dispossession of nationality to those who have opted for the nationality of the new born State out of secession? I contend that such a measure should be considered proportionate and, therefore, lawful under EU law. One must recall that

membership for Scotland is far-fetched.' See Kenealy and MacLennan (n 5) 602. Closa is also critical of the argument: 'Most perspicuous scholars have rightly indicated that EU citizenship is not sufficient to guarantee or generate EU membership for a particular territory.' Closa (n 9) 257. Also, Athanassiou and Shaelou, when referring to the extent of the legitimate expectations of the nationals of a newly created state entity, admit 'the absence of any right of automatic accession of the seceding entity to the EU.' See Athanassiou and Shaelou (n 2) 357. The reasoning is also dismissed by Crawford and Boyle, (n 4) paras 178-180. Lastly, it should be pointed out that 'a breakaway from the mother state also means a breakaway from the EU, since any subnational entity that forms part of the EU does so by virtue of being an integral part of the national Member State. From the perspective of EU law, it is only this national Member State that exists. The fact that the regional entities making up this state, no matter how autonomous they may be under national public law, do not have special status under EU law is a recurring feature in the case-law of the Court of Justice.' Chamon and Van der Loo (n 35) 619. The ECJ has, moreover, held that '[i]t is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.' Case C-95/97 *Région wallonne v Commission of the European Communities* [1997] ECR I-1787, para 6.

[112] Douglas-Scott (n 47) 19.

citizenship laws 'generally set the prima facie boundaries of political demos, in the sense of providing – in most cases – the preliminary determination of who can vote and who can stand for election, especially in national elections.'[113] As Kenealy and MacLennan stress, we should not forget the following:

> The objective of citizenship is to create a determinate class of persons who owe a duty of loyalty to the state. […] It is submitted that, where a class of individuals vote to secede from a state, withdrawing citizenship from that class is a proportionate course of action on the part of that state. It is therefore submitted that, notwithstanding the question as to whether or not the Scottish case constitutes a purely internal situation, the withdrawal of citizenship from Scots nationals would nonetheless satisfy the proportionality standard required by the Court in *Rottmann*.[114]

This view is echoed by Closa, who states that 'any proposed obligation to grant citizenship to several million people now facing life as citizens of an independent state could well be considered disproportionate.'[115] Moreover, as Piris notes, consistent practice in international relations has been that where citizens of the new born state have new nationality, this leads to removal of nationality by the rump state.[116] Nothing precludes rump EU Member States from offering dual nationality regime to those residing in the seceded entity. However, no law can force them to do so. In fact, Article 9 of the Law 20/2017, of 8 September, on Juridical Transition, passed by the Catalan Parliament weeks before the unsuccessful Catalan unilateral declaration of independence, admits the need to negotiate with Spain the dual nationality of the new Catalan Republic:

> 1. The attribution of Catalan nationality does not require the renunciation of Spanish or any other nationality.
>
> 2. In the briefest time frame possible, the Catalan Government will seek negotiations with the Spanish government in order to draw up a treaty on nationality.[117]

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[113] Shaw (n 84) 160.
[114] Kenealy and MacLennan (n 5) 610.
[115] Closa (n 9) 257.
[116] Piris, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (II)' (n 1) 94.
[117] English version of the Catalan law available at <http://exteriors.gencat.cat/web/.content/00_ACTUALITAT/notes_context/Law-20_2017-on-Juridical-Transition.pdf> accessed 4 August 2018.

Another line of reasoning that has been echoed by some Catalan scholars is to invoke current Spanish legislation (mainly Section 11.2 of the Spanish Constitution[118]), which provides that '[n]o person of Spanish birth may be deprived of his or her nationality'. Based on this constitutional provision, some authors have argued that in the event of secession, Catalans (who are Spanish citizens by birth), even if they opt for Catalan nationality, cannot be deprived of Spanish nationality.[119] Therefore, they will continue to enjoy all the rights attached to EU citizenship. However, this argument seems to ignore an important point. It is difficult to imagine that in the event of Catalan secession, a major constitutional disruption, Spain would not amend its Constitution to accommodate the new situation. In this scenario, nothing prevents Spanish constitutional lawmakers from amending that specific provision. Therefore, relying on the current legal state of affairs seems a risky enterprise.

Needless to say, the absence of an automatic right to EU citizenship does not preclude the establishment of a transitional period that mitigates the effects of the dispossession:

> The absence of an automatic right to EU citizenship (the existence of which would imply the continuing enjoyment of the rights deriving therefrom), does not necessarily mean that, in the interim period between secession and accession to the EU, the nationals of a newly created state entity would not have a legitimate expectation to the survival of certain aspects of their former EU Citizenship rights. What it does, however, mean is that these expectations can only be given effect through negotiations, involving the rump Member State and other EU Member States, on the one hand, and the seceding state entity, on the other, informed by the need to avert some of the adverse consequences, for individuals, of the act of secession.[120]

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[118] English version of the Spanish Constitution available at <http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf> accessed 4 August 2018.

[119] Mariona Illamola, 'Nacionalitat catalana i/o nacionalitat espanyola. I l'europea?' 2017 (25) Revista d'Estudis Autonòmics i Federals 93, 104. See also Eduard Segarra, 'Nacionalidad catalana' in Eduard Segarra (coord), *¿Existe el Derecho a Decidir?* (Tibidabo Ediciones 2014) 37.

[120] Athanassiou and Shaelou (n 2) 359.

In effect, any agreement as regards the interim period will depend on the good will of the different parties involved, since we would, otherwise be faced with 'secession a la carte'.[121]

In conclusion, it appears that in a secession scenario the inhabitants of the new state born out of secession cannot oppose the possible withdrawal of the rump State nationality and, consequently, the dispossession of EU citizenship. Or to put it differently: 'the enjoyment by the inhabitants of the newly created state entity of EU citizenship cannot be automatic.'[122] It will depend on the negotiations between the States concerned. It is for this reason that the constraints on EU Member States imposed by public international law and EU law are only of limited effect.

Conclusions

There is no clear EU law guidance when it comes to govern the life of a new State born out of secession within the EU. Because of the absence of a clear EU legal regime, we have considered public international law, the few EU law provisions that could provide some help, ECJ case law and theories developed by EU law scholars to address the main questions that might arise in the event the new entity is interested in EU membership. These questions include the following. Will the new entity be considered a successor but not a continuing State of the rump State? Should it ask for EU membership, or could we assume an internal enlargement procedure? Will it have to follow Article 49 TEU, or is there any way to avoid the procedural difficulties? Can the EU citizenship regime

[121] Medina also shares this approach when he admits that a transitional status for residents of the seceding territory could be considered: 'This could have been the case for the citizens of Scotland, as the referendum for secession was negotiated in a friendly manner between the governments of Scotland and the UK. In the spirit of friendly relations between a rump UK State and a seceding Scotland, the UK could have been expected to facilitate the entry of an independent Scotland in the EU. If the citizens of Scotland had been left outside the EU for a short period pending the formal admission of Scotland as a new Member, it would have made sense to establish transitional arrangements to maintain their rights as EU citizens in the interim.' Medina (n 90) 151.

[122] Athanassiou and Shaelou (n 2) 358-359.

influence the negotiations between the rump State and the seceded entity by limiting the autonomy of the former and forcing it to offer dual nationality?

Given the hypothetical character of these questions, (there is no precedent of successful secession within the EU), we have not been able to offer unqualified conclusions. We cannot either rule out completely ad hoc solutions, should the EU face a successful independence process in the future. However, this chapter has shed light on the legal debate around these issues. It has been shown that seceded territories cannot be considered continuing States of the rump State. Therefore, such entities will have to ask for EU membership. EU law can be very pragmatic and history has proven that law is not a hurdle when there is enough political will. However, as has been also pointed out throughout this thesis, the EU is a community based on the Rule of Law, and cannot avoid the legal discipline of certain procedures. Thus, given the *lex specialis* argument, an accession procedure requires compliance with Article 49 TEU, which demands, inter alia, unanimous agreement of all EU Member States. Having said that, and given the political pragmatism of the EU, even this procedure and the negotiations itself can be accelerated in order to avoid any major disruption to the internal market. If as a result of secession, the rump State dispossesses from its nationality all those residents who opt for the nationality of the new State, there is no right to maintain EU citizenship. Nor does EU law force the rump State to offer a dual nationality regime to the inhabitants of the seceded entity. Many of the final results will, perforce, depend on negotiations. Thus, the attitude of those involved in the negotiations, the rump State, seceded entity and the other EU Member States, will be key to determine the solutions adopted

Chapter 6: European Union policy towards secession in neighbouring countries. The practical argument

Introduction

The aim of this chapter is to contribute to the research question with empirical data, namely to identify the policies of the EU and EU Member States towards secession. While the rest of the chapters are mainly theoretical, the approach of the following pages is empirical judged in terms of political experience. Needless to say, there is a risk of examining and treating State practice (i.e. what it is in reality) as the normative standard and, therefore, as an additional argument to sustain the legal proposition of this thesis. To avoid such temptation, such empirical review is included at the very end of the thesis, once the main argument has been already firmly established. Thus, this chapter is not aimed at providing reasons to justify the overall argument, but to show that the legal analysis advanced in this thesis is politically feasible. In effect, it will be shown that, despite the sometimes-speculative approach of the thesis (mainly in chapter 5), the normative hypothesis tested in this work is in accordance with the EU's closest precedents, and, therefore, it is a workable and feasible approach. The chapter reveals that in the last decades the EU has developed a distinctive approach to secession in its external policies (i.e. recognition policy provided that the secession process respects the Rule of Law), which coincides with that which it should have (normatively speaking) in internal cases, as explicated in chapter 4. In sum, this chapter is relevant, since it demonstrates the political feasibility of the normative standard explained throughout this work.

Since there has been no secession within a Member State, we should focus on (i) episodes of territorial changes within the EU and (ii) the EU approach to secession in neighbouring countries. First, we will refer to the cases of the independence of Algeria,

the withdrawal of Greenland and the reunification of Germany. Although they are not accurate precedents for possible secession of territories within Member States, we will identify the lessons that can be learned from those experiences in light of the current secessionist challenges. Second, we will review the case of the Turkish Republic of Northern Cyprus and the EU attitude towards it since its declaration of independence. This is an extraordinary example of how pivotal a role a Member State can play in EC policy formation if its national interest is at stake. Next, we will examine the experiences of the countries borne right after or immediately before the crumbling of the Soviet Union (Baltic States, dissolution of Czechoslovakia and Yugoslavia). They are examples of national fragmentation in the post-communist world and cannot be considered genuine secessionist challenges comparable to the ones posed in constitutional and liberal democracies. However, some of the lessons drawn from these experiences might tell us something relevant about EU and secession. This will be followed by analysis of EU policies towards more recent secessionist attempts in neighbouring countries such as Serbia with the two key cases of Montenegro and Kosovo. Finally, the cases of Transnitria (Moldova), South Ossetia and Abkhazia (Georgia), Nagorno-Karabaj (Azerbaijan) and Crimea (Ukraine) will be analyzed. What has been the position of the EU regarding the proclaimed entities? Has the EU recognized them? Is there any *rationale*, any constant and coherent trend?

In the analysis of all the conflicts mentioned above, we will take into account the following features: was there an agreement with the mother State or was the secessionist attempt unilateral? Did it follow a legal procedure? What was the position of the international community? These are some of the arguments to be borne in mind by European Member States when considering secession. This chapter therefore seeks to be the empirical support for the doctrinal and theoretical work developed in this thesis.

There have, of course, been other secessionist challenges (such as East Timor, and South Sudan) where the EU did not play any significant role since these territories are not located within the European neighbourhood. That is why such cases will not be addressed in the following pages. As for the cases/conflicts that are reviewed, each of them deserves not only a chapter but a thesis itself. The aim of the following section is just to shed light on the EU position in all those cases, not to review in detail any of them.

It should, moreover, be noted that recognition of states, as Hans Kelsen acknowledged, is a highly controversial issue that has not been resolved satisfactorily either in theory or in practice.[1] This chapter does not aim to present any comprehensive theory about EU and recognition of states, but simply to show EU practice when dealing with relevant territorial changes within the EU and secession in neighbouring countries. It will be shown how the EC used recognition policy as an instrument of foreign policy rather than a formal declaration of an ascertainable fact.[2]

1. Territorial changes within the European Union

Algeria (France)

While Algeria (technically not a French colony)[3] was under French jurisdiction, it was subject to the EC treaty provisions under Article 227 (2) EEC (*inter alia* on free movement of goods, agriculture, liberalization of services, competition and institutions). The incorporation of French African territories (particularly Algeria) into the European

[1] Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35(4) American Journal of International Law 605. In this article Kelsen explains the two distinct acts comprised in the term 'recognition': a political act (i.e. the discretionary decision to enter into political relations with a recognized state or government) and a legal act (i.e. the establishment of the fact that a given community has satisfied the required conditions to be considered a state according to general international law). In this chapter when we refer to 'recognition', we are implying both acts.

[2] Lauterpach began his book on recognition of states admitting that the predominant view in the literature of international law is that recognition or 'the very commencement of the international personality of States and the question of their legal right to existence as such' is a political rather than a legal question. Hersch Lauterpach, *Recognition in International Law* (Cambridge University Press 1947) 1.

[3] Algeria represented three French *départements* and from 1957 onward only two. See Dorothy Pickles, *Algeria and France* (Methuen 1963).

enterprise was a central French objective during the Treaty of Rome negotiations that faced initial Dutch and German opposition.[4] It could be argued that Algeria enjoyed *de facto* membership in the Community, benefiting from all economic provisions of the Treaty except those applying to the Common Agricultural Policy.[5] During the long and bloody independence war (from 1954 to 1962), the then EC institutions continued to approach Algeria as part of the French territory.[6]

The 'mystery', as Kalypso Nikolaidis has described the process by which Algeria came out of the EC[7], began with Algeria's independence in 1962. In effect, Algeria's independence resulted in the continued (although limited) application of EC law in Algerian territory.[8] In December 1962 Algeria requested the provisional maintenance of the relevant Articles of the EEC Treaty, pending future definition of EEC-Algeria relations.[9] Six months later the EEC agreed to the request of maintaining the *quasi* Member State status for Algeria.[10] The following year, the Algerian Minister of Foreign Affairs asked the President of the EEC Council to start exploratory conversations to clarify future relations between Algeria and the EEC, since the current situation was interim.[11] At first the French delegation was hesitant to articulate a vision that would anchor the provisional situation in a legal framework. There was some reluctance to

[4] Peo Hansen and Stefan Jonsson, 'Building Eurafrica: Reviving Colonialism through European Integration, 1920-60' in Gabrielle Maas, Kalypso Nicolaïdis and Berny Sèbe (eds), *Echoes of empire : memory, identity and colonial legacies* (IBTauris 2015) 217.
[5] William Zartman, 'North Africa and the EEC Negotiations' (1986) 22 (1) Middle East Journal 1, 1.
[6] See, for instance, the type of discussions within the Council of Ministers in the 1960s as for Algeria and the application of Article 227(2) EEC Treaty at <http://archives.eui.eu/en/files/inventories/15312?d=inline> accessed 3 June 2015.
[7] Kalypso Nicolaïdis, 'Southern Barbarians? A Post-Colonial Critique of EUniversalism' in Kalypso Nicolaïdis, Gabrielle Maas and Berny Sèbe (eds), *Echoes of empire: memory, identity and colonial legacies* (IB Tauris 2015) 287.
[8] Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Accession from Within?—An Introduction' (2014) 33 (1) Yearbook of European Law 335, 350.
[9] Allan F Tatham, 'Don't Mention Divorce at the Wedding, Darling!': EU Accession and Withdrawal after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012) 144.
[10] Zartman (n 5) 1.
[11] Bull. EC 2-1964, point V.7.

specify a binding vision of their relationship with Algeria.[12] The French were interested in protecting the comfortable interim and beneficial Algerian status and tried to postpone dealing seriously with the issue. However, they could not prevent the *de facto* erosion of some benefits given the impatience of Germany, Italy and particularly the Netherlands.[13]

Rounds of exploratory conversations and negotiations,[14] an interim trade regime,[15] and a partial agreement on wine[16] followed until an association agreement was finally signed in 1976, which entered into force in 1978.[17] The delay in reaching an agreement was not only due to Algerian and French interests, but also to the position of some Member States, like Italy, that opposed Mediterranean associations without prior protection for its own production.[18]

From a European integration process perspective, it seems striking that Algeria remained for such a long period (from 1962 to 1978) in an interim and uncertain position. The reason is that the French vision trumped the interests of other EC Member States.

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[12] Muriam Haleh Davis, *Producing Eurafrica: Development, Agriculture and Race in Algeria, 1958-1965* (NYU PhD dissertation 2015) 245.

[13] Algeria's customs regime was slightly modified by the establishment of a triple-column tariff on November 1, 1964. In 1966, the Council decided to exclude it from further intra-community tariff cuts and various members granted it an intermediate customs position between intracommunity and Common External Tariff (CET) levels. Zartman (n 5) 2.

[14] In February 1964, a delegation of the Algerian government engaged in those exploratory conversations with a Commission delegation in order to shed light over the issue. Bull. EC 4- 1964, point III.3. Such exploratory conversations ended in December 1964, when both sides agreed that proper conversations could be launched. Bull. EC 2-1965, point IV.63. In May 1965, the European Commission submitted the Council its definitive report on future relations with Algeria. Bull. EC 5-1965, point III.56. On 8 January 1968, the Algerian petition to engage in negotiations with the EEC was confirmed. Bull. EC 3-1968, point VI.71.

[15] In February 1968, the Council asked the Commission to submit proposals to establish an interim regime of trade relations between the EEC and Algeria pending further negotiations. Bull. EC 4-1968, point IV.50. Such proposal was submitted on May 2, 1968. Bull. EC, 7-1968, point III.58.

[16] On 30 July 1968, the Council reached an agreement concerning Algerian wine, in force since January 1, 1971. Bull. EC 9/10-1968, point III.79; Bull. EC, 12-1971, point III.91. In March 1972, the Council decide to ask Algeria to start negotiations for a global agreement. Bull. EC, 5-1972, point III.76. A visit from Mr. Bouteflika, then Minister of Foreign Affairs, in June 1972 launched the start of the negotiations, scheduled for July 10, 1972. Bull. EC 8-1972, point III.99. The global agreement should contain, apart from a trade preferential regime, economic cooperation measures. Bull. EC 9-1972, point III.100. Negotiations continued during the following years. Bull. EC 9-1973, point 2304; Bull. EC 12-1974, point 2323.

[17] 'Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria', signed on 26th April 1976. Available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=228> accessed 5 August 2015.

[18] Zartman (n 5) 9.

For our purposes, the Algerian case underlines that when an issue (in this case Algeria) is part of the national interest of a Member State (namely France) and the rest of Member States have no strong preferences, EU reaction is highly vulnerable to such interest. It has to be noted, though, that such early practice predates any formal constitutionalisation of the EU. Therefore, given the highly intergovernmental era, it is unsurprising that those decisions were left entirely to the national Member State level to define.

Greenland (Denmark)

When Denmark negotiated its EC membership, it decided to include Greenland as Danish territory in the EC,[19] despite Greenland's reluctance. Greenland's opposition to the EC grew considerably when European fishermen began to harvest in Greenland waters. In 1982, the Greenland Parliament organized a referendum on EC membership, where 53% of the voters were in favour of leaving the EC.[20] The Danish government (on behalf of Greenland) negotiated with the European institutions the required amendments to the treaties. All the amendments were included in an international treaty approved and ratified unanimously by all EC Member States. In essence, the amendments provided for non-application of the treaties to Greenland and its inclusion as one of the so-called Overseas Countries and Territories ('OCT') enjoying association arrangements with the EC. Besides, Greenland also obtained special fisheries arrangements.[21] In sum, Greenland followed the appropriate Danish legal procedures to express their opinion and Denmark, agreeing to respect that will, behaved accordingly.

[19] Unlike Greenland, Denmark had expressly left Faroe Islands out of the EC. Faroe Islands enjoy Home Rule since 1948 and before the Danish accession to the EC had already made clear their will to be regarded as a third country in the context of the EC. Available at <http://www.government.fo/foreign-relations/missions-of-the-faroe-islands-abroad/the-mission-of-the-faroes-to-the-european-union/the-faroe-islands-and-the-european-union/> accessed 26 May 2015.

[20] Details to be found at <http://english.eu.dk/en/faq/faq/Greenland> accessed 24 August 2015.

[21] See the text of the treaty at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1985:029:FULL&from=ES> accessed 26 May 2015.

It is also interesting to note the fact of acceptance by the European institutions after the Danish petition of treaties amendment. In this sense, it could be mentioned, as an example, the 7 June 1983 European Parliament 'Resolution on the memorandum concerning the proposal by the Danish Government amending the Community Treaties with a view to Greenland's withdrawal from the Community and with a view at the same time to making the special association rules in Part Four of the EEC Treaty applicable to Greenland.'[22] In that document the European Parliament took into account not only the results of the referendum, but also the fact that two of the three political parties in Greenland were in favour of EC withdrawal (i.e. wide consensus) and that accordingly the Danish government (on behalf of the Greenland inhabitants) had asked for such withdrawal. Therefore, the European Parliament:

> 1. Regrets yet respects the result of the referendum of 23 February 1982;
>
> 2. Recommends that the request by the Danish Government that negotiations on Greenland's withdrawal from the Community commence be granted;
>
> 3. Recommends that the request by the Danish Government that Greenland be allowed to withdraw be granted;
>
> 4. Recommends negotiation of a new status for Greenland as a non-European territory, providing for Greenland's special relations with the Community in a mutually harmonious form.

The European Parliament also endorsed the view of the European Commission, namely, the proposal of granting Greenland OCT status supplemented by a concurrent agreement between Greenland and Denmark on the one hand and the Community on the other to establish mutual rights and obligations on a lasting basis.

With regard to our concerns, we should point out that a clear position of a Member State (i.e. Denmark on behalf of Greenland) following a procedure in accordance with the internal constitutional framework resulted in a quick adaptation of EC treaties.

[22] [1983] OJ C184/26. The resolution was overwhelmingly adopted with 122 votes for, 9 against and 7 abstentions.

Despite the lack of enthusiasm, and given the consensus within the EU Member State affected, EU institutions rapidly adapted to the situation.

German reunification

While the preceding cases became footnotes in the European integration process, German reunification has been considered the catalyst for a new order in Europe.[23] After the fall of the Berlin Wall, in Germany there was an overwhelming desire for reunification.[24] But would German reunification be acceptable to the international community and, particularly, to its European neighbours? Despite initial hesitations, on 10 February 1990, President Gorbachev assured Chancellor Kohl 'that the Soviet Government would not oppose German unification'.[25] Meanwhile, the Bush administration had been an ally of German reunification since the very beginning.[26]

The British government had some initial doubts about the role of an enlarged Germany, but accepted the fact that with US and Soviet support, Germany would enlarge.[27] What became also key in Europe was the French position. At first, many French citizens were not easy with the idea of German reunification, but were finally prepared to

[23] It allowed for the Maastricht Treaty, with its ambitious plans for a monetary union, EU citizenship, common foreign and security policy… Renata Fritsch-Bournazel, *Europe and German Unification* (Berg 1992) 5.

[24] The victory of an alliance of conservative forces 'was interpreted as a plebiscite in favour of Chancellor Kohl and his offer of a "quick fix"'. Anne-Marie Le Gloannec, 'Two Germanies in one' in Wolfgang *Heisenberg* (ed), *German Unification in European Perspective* (Centre for European Policy Studies 1991) 58. Also, Fritsch-Bournazel (n 23) 161.

[25] Peter Ludlov, 'The German-German negotiations and the "Two-Plus-Four" talks' in Wolfgang Heisenberg (ed), *German Unification in European Perspective* (Centre for European Policy Studies 1991) 24.

[26] ibid 22-23. The position of the US foreign policy was brilliantly captured by the Washington Post columnist Richard Cohen: 'Of course, no one can ignore what happened the last time Germany was unified. […] But if a unified Germany is ever to take its place among nations it has to be allowed to act much like any other nation. To treat it differently, to feed a German sense of victimization, would only repeat the mistakes of the past.' Richard Cohen, 'No double standard for Germany' *Washington Post* (Washington DC, 6 December 1989). <https://www.washingtonpost.com/archive/opinions/1989/12/06/no-double-standard-for-germany/a9954579-6a82-435a-b8fa-f02bdb50c9a9/?utm_term=.e64571c9c904> accessed 8 March 2017.

[27] Prime Minister Thatcher was particularly concerned about the lack of German firm commitment on the inviolability of the Polish border. Interview with Mrs Thatcher published by *Der Spiegel* in March 1990. Available at <http://www.spiegel.de/spiegel/print/d-13507157.html> accessed 14 March 2017.

accept it.[28] French approval was, of course, key. As former Federal Chancellor Helmut Schmidt admitted in 1990, 'Die französische Nation ist die einzige, die in den Augen all unserer anderen Nachbarn die deutsche Einheit legitimieren kann.'[29] (The French nation is the only one which in the eyes of all our neighbours can legitimize German unity.) Mitterrand took advantage of the German reunification to strengthen European integration, his old ambition. He negotiated hard 'to ensure linkage between agreement to German unification and acceleration of the European integration process.'[30] This approach was also shared by the European Commission:

> If an enlarged Germany posed challenges for the Community and for the balance of economic power between its members, here was an opportunity for the Commission to use member states' worries to speed up progress on economic, monetary and political union. EMU and Political Union would bind Germany even more tightly into the Community system.[31]

Once the internal and external political will to ensure reunification was clear (i.e. wide national and international consensus), Germans themselves and Germans along with their European partners had to decide the legal routes. As for the constitutional legal perspective, the Germans decided to follow the easy route established in Article 23 of the *Grundgesetz*, whereby new *Länder* may opt for membership of the Federal Republic (i.e., simple enlargement of the territory, a short way to political unity).[32]

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[28] See, for instance, the political statements of President Mitterrand on 3 November 1989 at a joint press conference with Federal Chancellor Helmut Kohl ('I am not afraid of reunification') and Mitterrand's political rival, Paris Mayor Jacques Chirac, on 8 November, admitting being in favour of German reunification 'if this is demanded by the German themselves'. Fritsch-Bournazel (n 23) 172.

[29] Helmut Schmidt, 'Nicht die Chancen verpatzen' *Die Zeit* (Hamburg, 9 March 1990) <http://www.zeit.de/1990/11/nicht-die-chance-verpatzen> accessed 8 March 2017.

[30] David Spence, 'The European Community and German Unification' (1992) 1 (3) German Politics 136, 140. In the same line, see Roger Morgan, 'Political and institutional implications for the European Community' in Wolfgang Heisenberg (ed), *German Unification in European Perspective* (Centre for European Policy Studies 1991) 88.

[31] Spence, 'The European Community and German Unification' (n 30) 141.

[32] The other path was to be found in Article 146, whereby a new constitution resulting from negotiations between the two States would be necessary. This latter route would have meant the creation of a new State, which was highly problematic: uncertainty as to the international commitments of the new Germany, long negotiations to draft a new Constitution and the risk to hamper the European architecture. Le Gloannec (n 24) 58. See also Josu de Miguel, 'La cuestión de la secesión en la Unión Europea: una visión constitucional' (2014) 165 Revista de Estudios Políticos 211, 227.

The internal solution adopted by Germany allowed EC institutions to adopt the moving treaty boundaries' rule,[33] which meant that the Federal Republic of Germany had no fixed territorial definition in the European treaties and that it was free to redefine its territory without profound European treaty implications. According to the European Parliament, however, a longer process similar to an accession treaty (including the involvement of the Parliament itself) was required.[34] But the Council and the Commission could not accept that view, since it implied a much longer negotiation process and German political reality was not going to allow it.[35] German unification was then not viewed as a new accession, which would have implied the risky required formal ratification of all Member States, but as an internal enlargement of a current Member State.[36] The interests of both the Federal Republic of Germany and the Member States coincided and despite the huge impact of the German unification on the European Community (a less developed new population of 16.5 million was submitted to EC law), it was accepted without any treaty amendment:

> For the Federal Republic, the path of amendment would have made the extension of the area of application of the Treaties subject to completion by all Member States of national ratification procedures. This operation, naturally long in any case, could be lengthened still further by an adverse stance by a State or a national parliament. […] For other Member States, non-amendment implies acceptance by Germany of all the Treaty rules, particularly those regarding the institutions, avoiding renewed questioning of weighting at the Council of Ministers and the distribution of European Parliament. It is no doubt because of agreement reached on this point that no through legal analysis was done.[37]

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[33] Jochen Frowein, 'The Reunification of Germany' (1992) 86 (1) American Journal of International Law 152, 159.

[34] European Parliament, 'Interim report drawn up on behalf of the Temporary Committee to consider the impact of the process of German unification on the European Community' (1990) 24-25. Available at <http://www.epgencms.europarl.europa.eu/cmsdata/upload/15180e60-1970-4721-b39f-1859ac79fe2e/23369_CARDOC_Reunification_EN_WEB.pdf> accessed 14 September 2017.

[35] Spence, 'The European Community and German Unification' (n 30) 142.

[36] David Spence, 'The European Community's negotiations on German unification' in Wolfgang Heisenberg (ed), *German Unification in European Perspective* (Centre for European Policy Studies 1991) 29.

[37] Jean-Paul Jacqué, 'German Unification and the European Community' (1991) 2 (1) European Journal of International Law 1, 3.

The Commission submitted some preliminary work to the Dublin European Council of April 1990, where political consensus was reached:

> We are pleased that German unification is taking place under a European roof. The Community will ensure that the integration of the territory of the German Democratic Republic into the Community is accomplished in a smooth and harmonious way. […] It will be carried out without revision of the Treaties[38] (emphasis added).

The Commission suggested (and the European Council accepted) a gradual incorporation of the German Democratic Republic into the European Community. The European Council also required the Federal Republic to keep the Community informed of developments between the two Germanies through the involvement of the Commission. In fact, the Commission was able to influence the drafting of the *Einigungsvertrag* (Unification Treaty) negotiated between the two German States.[39] On 3 October 1990 such international treaty permitted the disappearance of the German Democratic Republic as a State and the decision to merge it into the Federal Republic of Germany. Thus, the Federal Republic of Germany persisted and united Germany did not constitute a new legal subject.

In short, the European Community had welcomed (out of political interests) a major internal enlargement without the revision of any treaty, despite legal concerns. In effect, German unification was an informal form of enlargement. German unification illustrates 'the speed and effectiveness with which Community institutions can act under pressure,'[40] and as long as there is a wide consensus, we would add. It also shows EC flexibility: '[e]verybody, from Community officials to senior politicians in the member states, was prepared to make exceptions in order to facilitate the process.'[41] Needless to

[38] Bull. EC 4-1990, point I.4. Emphasis added.
[39] Christian Willem Anton Timmermans, 'German Unification and Community Law' (1990) 27 Common Market Law Review 437, 446.
[40] Spence, 'The European Community and German Unification' (n 30) 157.
[41] ibid 160.

say, neither Algeria nor Greenland nor Germany, as has been explained, can be used as precedents in the case of secession within Member States since neither are technically 'secession'. German reunification is widely used as the closest precedent, but this is misleading. First, the reunification did not lead to a fragmentation of the EU, but to its widening, whereas secession within an EU Member State would lead to EU fragmentation. Second, secession within an EU Member State would require immediate changes to Treaty provisions:

> In contrast with the German case, where the other Member States were glad to accept the Germany's underrepresentation following its reunification, it is clear other Member States would not be willing to accept a possible overrepresentation of the remaining entity of a Member State following its breakup.[42]

However, despite no case provides a clear and decisive guidance, all situations underline a key issue: the important and decisive role of the affected Member State in the relationship between the EU and a territory under (or previously under) its jurisdiction and the prevalence of political consensus over legal objections. In effect, in all these cases pragmatism prevailed over legal obstacles as long as there was a common political will to solve the situation.[43]

2. The Turkish Republic of Northern Cyprus: the importance of national interests in EU policy formation

As is well known, Cyprus, a former British colony, is now a divided island. In the South, there is a Greek-speaking Orthodox community, while a Turkish-speaking Muslim community lives in the North. After an armed struggle against the British and following international agreements between the UK, Greece and Turkey, in 1960 the Republic of

[42] Merijn Chamon and Guillaume Van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?' (2014) 20 (5) European Law Journal, 613, 620.
[43] Miquel Palomares Amat, 'Las decisiones de los Jefes de Estado y de Gobierno, en el seno del Consejo Europeo, como categoría jurídica para regular, transitoriamente, la participación en la Unión Europea de nuevos Estados surgidos de la separación de Estados Miembros' (2013) 17 Revista d'Estudis Autonòmics i Federals 146, 164.

Cyprus ('RoC') achieved its independence. The 1960 Constitution established a bi-communal partnership state. In 1963, the Greek Cypriots proposed to reduce the concessions granted to the Turkish community three years later. Disagreement over the proposal triggered inter-community violence. In 1974, the Greek Military government organized a *coup d'etat* in RoC and extended the Greek dictatorship to the island, which provoked the Turkish invasion through the North. The European Commission reacted on July 17, 1974 stating that 'the association between the European Economic Community and the Republic of Cyprus is founded in the independence and territorial integrity of this country…'.[44] After the 1975 Vienna Agreement the island remained divided (as it is still today).

Greece joined the EC in 1981. In November 1983, the Turkish-Cypriots declared unilaterally the Turkish Republic of Northern Cyprus ('TRNC'). Immediately after that the European Commission issued a statement declaring that it 'profoundly regrets and rejects the unilateral declaration of independence (…) The government of the Republic of Cyprus is the solely legal representative and the only one recognized by the European Community.'[45] The same day the then 10 Member States adopted a declaration whereby they rejected the unilateral declaration of independence since it was against the UN Resolutions. In addition, they reiterated their support for the independence, sovereignty, territorial integrity and unity of the Republic of Cyprus. The ten also committed themselves to convince third States not to recognize the new proclaimed entity.[46] The international community as a whole also condemned the act of secession.[47] The EU's

[44] Bull. EC 7/8-1974, point 2327.
[45] Bull. EC 11-1983, point 2.2.34.
[46] Bull. EC 11-1983, points 2.4.1 - 2.4.2.
[47] Nathalie Tocci, *The EU and Conflict Resolution. Promoting peace in the backyard* (Routledge 2007) 33. The Security Council issued a Resolution (followed by many others similar in terms) whereby it 'deplores the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus; considers the declaration referred to above as legally invalid and calls for its withdrawal.' UN doc. S/RES/ 541 (1983) 18 November.

capacity to influence the conflict grew considerably with the accession process. In 2002 Cyprus was invited to join the EU.[48] The process was launched by the Greek Cypriot RoC and the Turkish Cypriots were excluded from the process.[49] When the EU launched the negotiations, the understanding within EU institutions was that a settlement was a precondition of accession, which was in accordance with all previous statements. Thus, the 1993 Commission's Opinion on Cyprus stated the following:

> [T]he Community considers Cyprus as eligible for membership and (…) as soon as the prospect of a settlement is surer, the Community is ready to start the process with Cyprus that should eventually lead to its accession. (para 48)[50]

Such conditionality gave the EU strong bargaining power in the conflict. EU accession could make both communities reconsider its opposition to reunification, which was the preferred solution for European States. There were optimistic expectations that the accession process could be a catalyst for a solution to the conflict.[51] Surprisingly this conditionality position was abandoned shortly after. In effect, the last paragraph dedicated to Cyprus in the 1997 Commission's Agenda 2000 read as follows:

> If progress towards a settlement is not made before the negotiations are due to begin, they should be opened with the government of the Republic of Cyprus, as the only authority recognised by international law.

Two years later, the European Council in Helsinki confirmed that a settlement would not be a condition for Cyprus's accession.[52] The carrot-and-stick approach had been altered.[53]

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[48] The 2002 European Council in Copenhagen agreed to admit Cyprus as a new Member State to the EU. Available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/73842.pdf> accessed 22 July 2015. Negotiations had begun much earlier. In July 1993, the Commission delivered a favourable opinion on Cyprus's application for membership.

[49] Tocci (47) 41.

[50] Commission, 'Opinion on the Application by the Republics of Cyprus for Membership' doc/93/5 June 30, 1993.

[51] George Christou, 'Cyprus and the EU: Two years later: The European Union: What role in the Cyprus conflict?' (2006) 41 (2) The International Spectator 19, 19.

[52] 'If no settlement has been reached by the completion of accession negotiations, the Council's decision on accession will be made without the above being a precondition.' The European Council met in Helsinki on 10 and 11 December 1999. Available at <http://www.europarl.europa.eu/summits/hel1_en.htm> accessed 22 July 2015.

[53] Etain Tannam, 'The European Union and Conflict Resolution: Northern Ireland, Cyprus and Bilateral Cooperation' (2012) 47 (1) Government and Opposition 49, 64.

In 2004, shortly before Cyprus's accession, a referendum on the Annan Plan (the fifth revision of the UN proposal for reuniting Cyprus) was held in the whole island. The plan was rejected by the Greek Cypriots:[54] one of their main reasons was their strong bargaining position once EU accession was assured regardless of the final settlement .[55] As Tocci puts it, 'if there was no condition of solving the conflict for EU accession, why should the Greek Cypriots do away with their internationally recognized state exactly at the very moment it strengthens its political weight, with its accession to the EU?'[56] When in 2004 a divided Cyprus joined the EU, Turkish-Cypriots were left outside the EU environment and its benefits. EU law has not been applied in north Cyprus, which, according to Protocol 10 of the Accession Treaty, is considered a territory to fall outside the effective control of the RoC.[57]

Why (despite the strong preference of the European Council for the accession of a united Cyprus) did the EU miss the great opportunity to play a key policy-maker role in the solution of the conflict?[58] The main reason is Greece, the only Member State with

[54] The plan provided for sharing of sovereignty between the two communities. Referendum turnout was very high in both communities. While it was approved by 65% of Turkish Cypriots, it was rejected by 76% of Greek Cypriots.

[55] The EU accession prospects was what gave them enough power to sustain their position, which is, fundamentally, that although they are willing to share their economic prosperity with the less advance Turkish Cypriot community, they are not willing to share its 'sovereign status'. For them, the Turkish Cypriots should be treated as a minority within Cyprus, not as a co-founder community. Christou (n 51) 25.

[56] Tocci (47) 43.

[57] George Kyris, 'Europeanization and the Turkish-Cypriot Political Parties: How Europe Matters' (2012) 13 (3) Turkish Studies 471, 478. Does it mean that the EU has no contact at all with TRNC? The Union has been very cautious in dealing with Turkish Cypriots authorities for fear that this could constitute or be interpreted as an act of recognition. Tocci (n 47) 49. Despite the absence of diplomatic recognition, the EU is trying to help the Turkish Cypriots out of their isolation. Christou (n 51) 23. Partially this EU approach was triggered by the results of the Annan Plan referendum, which altered the Commission's perceptions of 'fault' and 'blame' for the situation in Cyprus, giving Turkey and the Turkish Cypriots the 'moral' high ground in efforts to find a solution. ibid 24. The European Commission has two main instruments to interact with the TRNC: (i) the aid programme 'to help the Turkish Cypriots prepare for reunification' (in place since 2006) and (ii) the Green Line Regulation (in place since 2004), aimed at regulate and facilitate trade between the divided island. ibid. In order to avoid direct contact with the TRNC authorities, the European Commission works closely with the TRNC Chamber of Commerce. Kyris (n 57) 479.

[58] Christou (n 51) 23.

strong and clear interests in Cyprus.[59] It made its consent to strengthen ties with Turkey conditional on the progressive lifting of conditionality on the Greek Cypriots.[60] At other times it threatened to veto enlargement to the north in 1994 and to the east in 1997-2004 should Cyprus be excluded from the Union.[61] As one expert points out, '[t]he Cyprus conflict was the clearest case in which the strong national interest of one Member State played a pivotal role in determining the conduct of contractual relations with Cyprus and Turkey.'[62]

As has been shown, the case of Cyprus is an extraordinary example of the key role a Member State can play in changing what had been EC policy.

3. New European States after the dissolution of the Soviet Union

The Baltic States

At the end of the 1980s, a popular nationalist and non-violent movement spread throughout the Baltic nations Latvia, Estonia and Lithuania demanding independence, democracy and the Rule of Law. Unlike after the WWI, the case for their independence was then clear.[63] According to many Western States their forced incorporation in the Soviet Union in 1940 (out of a secret deal between Hitler and Stalin) was a violation of

[59] As for the UK, the other EU Member State with interests in the conflict, it accepted Cyprus unconditional entry in the EU (allegedly) because of the RoC government's agreement that this would not jeopardize the status of the British bases on the island. In fact, when in 2004 Cyprus entered the EU, the two military bases remained extra-EU territory. Tocci (n 47) 52.

[60] In effect, 'Cyprus has been closely intertwined with Greece and Turkey and has had a strong impact on the Greek-Turkish relationship.' Tannam (n 53) 52. It is worth mentioning that the Greek position towards Turkey met the tacit consent (if not encouragement) of other EU Member States also reluctant to strengthen ties with Turkey. Thus, Greek interests were not at odds with the position of other EU Member States.

[61] Tocci (n 47) 52.

[62] ibid 171.

[63] Jan Arveds Trapans, 'The West and the recognition of the Baltic states: 1919 and 1991. A study of the politics of the major powers' (1994) 25 (2) Journal of Baltic Studies 153, 163.

international law. At least *de jure*, it could be argued that the Baltic States continued to exist even after WWII.[64]

In the spring of 1990[65] after elections won by Baltic popular movements (elections considered to be valid and fair by international observers)[66] Lithuania declared its independence on March 11, while Estonia and Latvia did the same on March 30. Moscow tried to suppress the democratic revolts, since the Baltics nations figured in Gorbachev's plans for reform.[67] However, although the rhetoric often took an aggressive tone, the Soviet Union refrained from a large scale armed intervention. The first response to the declarations of independence of the major Western states was hesitant and stuttering.[68] Germany was particularly reluctant to accept any movement that could endanger the cordial German-Soviet relations.[69] Even Great Britain, despite Thatcher's sympathies for the Baltic nations (vanguard of the liberation movement in the Soviet Union), was not

[64] Russian political elites maintain the narrative of the Baltic states' voluntary joining with the Soviet Union. Maria Malksoo, 'The Memory Politics of Becoming European: The East European Subalterns and the Collective Memory of Europe' (2009) 15 (4) European Journal of International Relations 653, 669.

[65] Elections held in Lithuania on 24 February 1990; in Latvia and Estonia on 18 March 1990.

[66] International reaction to Lithuanian elections: Vincent J. Schodolski, 'Elections to take Lithuania a step farther from Moscow' *Chicago Tribune* (Chicago, 24 February 1990) <http://articles.chicagotribune.com/1990-02-24/news/9001160394_1_sajudis-lithuanian-communist-party-non-communist-parties> accessed 4 August 2015.

[67] Francis X. Clines, 'Lesson in the Baltics: Gorbachev's Tolerance Only Goes So Far' *New York Times* (New York, 3 September 1989) <http://www.nytimes.com/1989/09/03/weekinreview/the-world-lesson-in-the-baltics-gorbachev-s-tolerance-only-goes-so-far.html> accessed 4 August 2015. From a legal point of view, it should be noted that according to Article 72 Soviet Constitution (dated 1977) secession was a right conferred to Soviet Republics. The right to secede was developed in a law passed in April 1990. The foreseen procedure was extremely complex and it required not only a referendum in the Republic wishing to secede but in the rest of the Soviet Union. In any event, following Karl Loewenstein famous distinction, it should be noted that the Constitution of a socialist-communist country cannot be considered a 'normative Constitution', but a 'semantic Constitution' and, therefore, it seems pointless to frame the discussion in legal terms. Karl Loewenstein, *Political Power and the governmental Process* (University of Chicago Press 1957).

[68] Even despite some feelings of guilt among many Western Europeans. In 2005, the European Parliament recalled the 'tyranny inflicted by the Stalinist Soviet Union' and acknowledged 'the magnitude of the suffering, injustice and long-term social, political and economic degradation endured by the captive nations'. European Parliament resolution on the sixtieth anniversary of the end of the Second World War in Europe on 8 May 1945 (12 May 2005) Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2005-0180&language=EN&ring=B6-2005-0290> accessed 1 September 2015.

[69] Andreas M. Klein and Gesine Herrmann, 'Die Beziehungen Deutschlands zu den Baltischen Ländern seit der Wiedervereinigung' (2010) 9 KAS Auslandsinformationen 67-69 <http://www.kas.de/wf/doc/kas_20394-544-1-30.pdf?100831115715> accessed 2 September 2015.

willing to offer direct support.[70] According to Trapans, both Germany and France asked Lithuania's President to postpone its plans for independence and urged him to negotiate with Moscow.[71] In fact, the first official EC responses to the declarations of independence was a series of calls for dialogue and negotiation between Vilnius and Moscow due to violent clashes in Lithuania: '[T]he Twelve […] hope for a respectful, open and fair dialogue between Moscow and Vilnius avoiding the use of force or the threat of the use of force on the basis of the principles of the Helsinki Final Act.'[72] On April 4 1990, the twelve insisted calling 'for maximum restraint on all sides and therefore strongly urge all concerned not to permit actions which could further aggravate an already delicate situation and to begin discussions without delay.'[73]

Europe encouraged dialogue to solve the crisis even after the Soviet Union had sent some military troops to the Baltic republics to supress the revolt. In January 11, 1991, after a small-scale armed intervention in Lithuania, the Community and its Member States issued a Declaration concerning the situation in the Baltic Republics:

> The Community and its Member States hope that the Soviet Union will enter as soon as possible into negotiations with the elected representatives of the Baltic republics in order to meet, through a peaceful solution, the legitimate aspirations of the Baltic peoples.[74]

[70] Trapans (n 63) 167.
[71] ibid 164.
[72] Bull. EC 3-1990, point 1.3.5.
[73] Bull. EC 4-1990, point 1.3.1. On April 21 1990, the European Community expressed their concerns at the coercive economic measures introduced by Moscow in relation to Lithuania and promised to keep the situation under continuous review. Joint Statement 21 April 1990, Bull. EC 4-1990, point 1.3.7.
[74] Bull. EC 1/2-1991, point 1.4.9. Three days after, another joint statement declared that 'the use of force, as has happened in Lithuania, is unacceptable. (…) A solution can only be found through a dialogue between the Soviet authorities and the elected representatives of the Baltic peoples, with a view to satisfying the legitimate aspirations of these peoples.' Bull. EC 1/2-1991, point 1.4.12.

After the referenda organized in the Baltic States regarding the independence of the countries (with overwhelming support for independence in the three republics),[75] the EEC and its Member States showed its support for the democratic process:

> They note with satisfaction that the consultations have taken place in peace and without interference or violence. These results cannot be ignored. They urge an early opening of a serious and constructive dialogue between the central government of the USSR and the elected Baltic authorities.[76]

Along with the Baltic resurgence, the Soviet Empire was disintegrating. In 20 August 1991, after the attempted *coup d'etat* in the Soviet Union, the European Community and its Member States condemned the removal of President Gorbachev and expressed their concerns at the reports of military action in the Baltic States and appealed 'to the Soviet authorities to refrain from all threat or use of force against the democratically elected governments and representatives of the Baltic peoples.'[77] Two days after, the European Community and its Member States published a joint statement to express relief and satisfaction at the collapse of the coup. The failed attempt meant that the path to democratic reform was still on the agenda: 'The European Community and its Member States congratulate President Gorbachev who is the architect of these reforms and President Yeltsin without whose courage the fruits of these reforms would not have survived.'[78] And then, only after the Soviet fall seemed irreversible (with the removal of the subsequent realpolitik constraints) in 28 August 1991, the EC and its Member States issued the following statement:

> The EC and its Member States welcome the restoration of the sovereignty and independence of the Baltic States which they lost in 1940. They have consistently regarded the democratically elected parliaments and governments of these States as the legitimate representatives of the Baltic peoples. (…) Therefore, the

[75] 9 February in Lithuania (93,2% in favour and turnout 84,7%); 3 March both in Estonia (78,4% in favour and 82,9% turnout) and Latvia (74,9% in favour and turnout 87,6%). Dieter Nohlen and Philip Stöver (eds), *Elections in Europe: A data handbook* (Nomos 2010) 1210, 567 and 1136.
[76] Bull. EC 3-1991, point 1.4.2.
[77] Bull. EC 7/8-1991, point 1.4.19.
[78] Bull. EC 7/8-1991, point 1.4.21.

> Community and its Member States confirm their decision to establish diplomatic relations with the Baltic States without delay.[79]

It is interesting to note that the term 'recognition' does not appear in the announcement. '[I]t was important to distinguish the Baltic states from other republics of both the USSR and the SFRY which were also claiming independence.'[80] In fact, 'it took seventeen months for Washington, Paris, London and Bonn to act and then they did so after an unexpected turn of events, the collapse of the Soviet Union.'[81] Gorbachev's successor, Yeltsin, did not oppose Baltic secessions. That allowed a rapid international recognition of independence, culminating on September 17, 1991, when the UN General Assembly voted to admit the Baltic States.[82]

Despite Gorbachev's initial insistence that the Baltic demands for independence were an internal issue of the Soviet Union that had to be resolved through its law on secession, it is difficult to accept that this was a typical case of secession. It should rather be seen as 'restoration of independence.'[83] But even on this scenario, where from a legal point of view their case was solid, European states were hesitant to recognize their independence because of Moscow's opposition. A typical case of 'realpolitik'. Only after it was evident that Russia would not impede Baltic independence (in fact, Soviet recognition followed on September 4), did European states agree to welcome the 'restoration' of their sovereignty. Democratic legitimacy and historical reasons were not enough to support Baltic independences given the threats that the Soviet Union represented.

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[79] Bull. EC 7/8-1991, point 1.4.23. In the same sense, 6th September Declaration. EC 9-1991, point 1.4.3.
[80] Roland Rich, 'Recognition of states: the collapse of Yugoslavia and the Soviet Union' (1993) 4 (1) European Journal of International law 36, 38.
[81] Trapans (n 63) 164.
[82] ibid 169.
[83] Malksoo, 'The Memory Politics of Becoming European' (n 64) 665.

Disintegration of Yugoslavia

Yugoslavia was the site of a European foreign policy failure, namely the inability to prevent and stop wars in its immediate backyard. There is an extensive literature on the collapse of Yugoslavia and the role of the EC. We will shed light solely on those events that are relevant to EC recognition policy. This section will only deal with the dissolution of Yugoslavia.

Until its disintegration in 1991 Yugoslavia[84] was a federation of six republics[85] and two autonomous provinces[86] with six major ethnic populations[87] (and significant minorities) living in areas that did not correspond exactly to the political divisions. There were four official languages, two different alphabets and three major religions. After Milosevic's ascension to power in 1987, minorities became the scapegoats blamed for economic decline in almost all Yugoslav republics.[88] Ethnic tensions turned Yugoslavia into a minefield. Croats and Slovenes feared that the Serbs wanted to dominate the country.[89] At first the EC and its Member States reacted asking for a democratic and united Yugoslavia: 'The Community and its Member States (…) recall that only dialogue between all the parties concerned will provide a lasting solution to the present grave crisis and ensure a future for a democratic and united Yugoslavia.'[90] Given the risk of instability, at first the main EC objective was to keep Yugoslavia united.[91]

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[84] Yugoslavia was firstly formed in 1918 out of the ashes of the Austro-Hungarian and the Ottoman Empires. Its first name was Kingdom of Serbs, Croats and Slovenes.
[85] The Socialist Federal Republic of Yugoslavia or simply Yugoslavia comprised the socialist republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Article 2 of the 1974 Yugoslav Constitution.
[86] Serbia contained two Socialist Autonomous Provinces: Vojvodina and Kosovo.
[87] However, Slovenes, Croats, Serbs, Montenegrins, Macedonians and Bosnians are all members of the broader ethnic classification of Slavs.
[88] Robert M. Hayden, 'Yugoslavia's Collapse: National Suicide with Foreign Assistance' (1992) 27 (27) Economic and Political Weekly 1377, 1380.
[89] Richard F. Iglar, 'The constitutional crisis in Yugoslavia and the international law of self-determination: Slovenia's and Croatia's right to secede' (1992) 15 Boston College International and Comparative Law Review 213, 217.
[90] EPC Joint Statement dated 8 May. Bull. EC 5-1991, point 1.4.3 (emphasis added).
[91] Sonia Lucarelli, *Europe and the breakup of Yugoslavia: a political failure in search of a scholarly explanation* (Kluwer Law International 2000) 21.

On June 25 1991 Slovenia and Croatia declared their independence after plebiscites on independence had taken place in both territories.[92] Both republics alleged their right to secede according to the 1974 Yugoslav Constitution.[93] A brief conflict followed in Slovenia, while in Croatia the war lasted longer and was dirtier and bloodier. In the first phase both the US and the UN assumed a very low profile, since it was considered a purely European problem.[94] It was going to be 'the hour of Europe'. This was the memorable phrase coined by Jacques F. Poos, the then President of the EC Council, in July 1991.[95] However, EC leaders were not able to exert as much influence as they expected.[96] Shortly after the declarations of independence, the EC attitude began to change and seemed more inclined to accept Yugoslav disintegration.[97] This was probably due to the perceived excessive use of force by Belgrade in its war against Croatia.[98] The collapse of the Soviet Union also reduced the concern about possible Soviet reaction.[99] Furthermore, Germany, since the very beginning, advocated the recognition of Slovenia and Croatia and its pressure also influenced the position of other EC Member States.[100] In early July, Germany's Foreign Minister, Hans-Dietrich Genscher, warned the Yugoslav Army saying that the EC would consider recognition if

[92] On 23 December 1990, a plebiscite on the independence of the Republic of Slovenia was held. The data released showed that 88, 5% said yes to an independent and sovereign Slovenia with a turnout of 93,2%. Available at <http://www.slovenija2001.gov.si/10years/path/chronology/> accessed 13 August 2015. On 19 May 1991 Croatia also held a plebiscite on independence. The date released showed a turnout of 83, 56 % with 93, 24 % of voters in favour of independence. Available at <http://www.izbori.hr/arhiva/pdf/1991/1991_Rezultati_Referendum.pdf> accessed 13 August 2015.
[93] In effect, the first basic principle of the preamble of the 1974 Yugoslav Constitution read as follows: 'the nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right of secession...' However, no mechanism existed in the Constitution to allow for secession.
[94] Lucarelli (n 91) 19.
[95] 'The European Community assumed the principal mediation role in the conflict and on 7 July 1991, the Yugoslav parties meeting in Brioni agreed, *inter alia*, to a three-month moratorium on the implementation of the Declarations of Independence.' Rich (n 84) 39.
[96] Richard Caplan, *Europe and the Recognition of New States in Yugoslavia* (Cambridge University Press 2005) 181. In the same sense, Lucarelli (n 95) 20.
[97] Mikulas Fabry, *Recognizing States. International Society and the Establishment of New States Since 1776* (Oxford University Press 2010) 180.
[98] Caplan (n 96) 22.
[99] ibid 23.
[100] ibid 18.

it continued to interfere in Yugoslav politics.[101] On 5 July 1991, the EC released the following joint statement:

> The EC and its Member states call for a dialogue without preconditions between all parties on the future of Yugoslavia, which should be based on the principles enshrined in the Helsinki Final Act and the Paris Charter for a New Europe, in particular respect for human rights, including rights of minorities and the right of peoples to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States (Charter of Paris). The Community and its Member States take note of the fact that in Yugoslavia all parties concerned accept the reality that a new situation has arisen[102] (emphasis added).

At first glance it might seem that the EC was only considering internal self-determination (autonomy within a state). However, the acknowledgment that a new situation had arisen, that the dialogue should be held without preconditions and, particularly, the lack of reference to the unity of Yugoslavia, made clear that the EC was opening the door to the recognition of the secessionist republics. The EC, though, was still aiming at a peaceful and negotiated change of frontiers (if necessary): 'The Community and its Member States will never accept a policy of *fait accompli*. They are determined not to recognize changes of borders by force and will encourage others not to do so either.'[103] Since violence did not stop, the European Community announced at the end of August that it was establishing both a Peace Conference on Yugoslavia and an Arbitration Commission.[104]

As for the Peace Conference,[105] it proved to be ineffective.[106] Violence in the region was operating independently of external factors.[107] After a referendum held on

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[101] Alan Riding, 'Conflict in Yugoslavia; European Community Freezes Arms Sales and Aid' *New York Times* (New York, 6 July 1991) <http://www.nytimes.com/1991/07/06/world/conflict-in-yugoslavia-european-community-freezes-arms-sales-and-aid.html> accessed 13 August 2015.
[102] EPC Joint Statement dated 5 July 1991. Bull. EC 7/8-1991, point 1.4.3 (emphasis added).
[103] EPC Joint statement dated 28 August. Bull. EC 7/8-1991, point 1.4.25.
[104] EPC Joint Statement dated 28 August. Bull. EC 7/8-1991, point 1.4.25.
[105] It begun in London on September 7 and was chaired by former NATO-Secretary-General Lord Peter Carrington.
[106] Lucarelli (n 91) 23. Although the draft Convention of 4 November 1991, the so-called Carrington Plan, managed to include minority rights provisions that were retained as key conditions for EC recognition. Caplan (n 96) 16.
[107] ibid 185.

September 8, Macedonia declared its independence on September 25. In a joint statement dated 5 October 1991 the Community and its Member States emphasized their inability to come up with an immediate solution to the Yugoslav crisis.[108] It was clear that 'the desire of independence in those regions was too strong to be countered indefinitely.'[109] The Arbitration Commission (also referred to as the Badinter Commission)[110] was called upon to give opinions that were issued between November 1991 and January 1992.[111] The opinions of the Badinter Commission[112] were important in the formulation of the EC recognition policy towards the successor Yugoslav states. On October 15 1991, Bosnia-Herzegovina declared independence. Despite German insistence[113] on the need for

[108] Bull. EC, 10-1991, point 1.4.6.
[109] Caplan (n 96) 48.
[110] The Arbitration Commission was referred as the Badinter Commission after its chairman Robert Badinter. It was made up of the presidents of five constitutional courts of EC member states (France, Germany, Italy, Spain and Belgium).
[111] These opinions set the boundaries of the successor states of Yugoslavia, and they have been considered 'as the peace treaty that ended the Cold War in Europe.' Cornelia Navari, 'Territoriality, self-determination and Crimea after Badinter' (2014) 90 (6) International Affairs 1299, 1299.
[112] The substantial Badinter principles included in the Opinions (particularly Opinions nº2 and nº3) can be summed up as follows: (i) As for the territorial principle: respect for the territorial *status quo* and for the principle *uti possidetis* meaning that the former internal boundaries within Yugoslavia became frontiers protected by international law. The *uti possidetis* was a principle derived from the colonial period; (ii) As for self-determination: the Commission acknowledged that various communities might exist within one state. Such state should grant the individuals the right to choose their own nationality, which implies that a Serb in Croatia should be able to self-identify as Serb without losing citizenship rights. It has been suggested that the distinction made between nationality and citizenship was inspired by the Maastricht Treaty. See Alain Pellet, 'The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples' (1992) 3 (1) European Journal of International Law 178, 179-180. It seems that the Commission was trying to underline was the way to underline the deep link between self-determination and human rights instead of self-determination and unilateral secession. Opinions no. 2 and 3 are reproduced in (1993) 3 (1) European Journal of International Law 183-185.
[113] Caplan has tried to explain the reasons behind the German position alleging the domestic pressure exercised both by public opinion and German elites who considered the principle of self-determination should be honoured, particularly after their own reunification and the excessive Serbian use of force. He also disregards those claims that suggest that Germany had economic motives, since, he considers that the German economic interests in the Balkans were negligible. Caplan (n 96) 43-46. Michael Libal, who was the head of the Southeast European Department of the German Foreign Ministry and the person in charge of the day-to-day conduct of German policy towards the former Yugoslavia from 1991 to 1995, wrote that strategic and pragmatic considerations were behind German behaviour: 'Germany was among the first to realize that Serbian policies made the demise of the former Yugoslavia inevitable, and that this development had to be accepted in order to direct the process of dissolution into orderly channels and to limit its destructive effects.' Michael Libal, *Limits of persuasion: Germany and the Yugoslav Crisis, 1991-1992* (Praeger 1997) 161. On the other hand, Hayden, a US scholar expert in the Balkans, considers that Germany's enthusiastic support to the Croatian government (whose new President Franjo Tudman had published a book including an apologia of the killings of Serbs committed by the *Ustacha* regime between 1941-1945, a Croatian puppet regime aided by the Nazi Germany) is due to the historic pan-German interest in ensuring no unified South Slav state. According to him, Germany's goal was the creation of German satellite states in the region. Hayden (n 88) 1378-1380. A 2011 report that appeared in the *Süddeutsche*

recognition, France and most of the EC member states continued to oppose recognition on the ground that it could worsen the conflict.[114] 'The EC was losing its cohesion precisely in a moment when it wanted to strengthen its common foreign and security policymaking capacity.'[115] So, France and Germany tried to reach an agreement, which lead to the December 16 Guidelines. France conceded,[116] but imposed certain conditions for recognition. It can be concluded that the EC institutional framework facilitated an agreement among its members despite their initial divergent positions.[117] In its Opinion nº1, dated 29 November 1991, the Badinter Commission noted 'that the Socialist Federal Republic of Yugoslavia [FRY] is in the process of dissolution'[118] (emphasis added). That legal finding (and particularly the negotiations between French and Germans) enabled the EC Foreign Affairs Ministers to adopt two texts on December 16, 1991: 'The Guidelines for the recognition of new states in Eastern Europe and in the Soviet Union'[119] and a 'Declaration on Yugoslavia.'[120] Based on the principles set out in the guidelines, in this Declaration the EC Member States established some conditions that the Yugoslav Republics had to fulfil if they wish to be recognized as new states: (i) the wish to be

Zeitung wondered to what extent Genscher's insistence on rapid recognition was at least partially responsible of the Yugoslav dissolution. Daniel Brössler, 'Genschers Alleingang' *Süddeutsche Zeitung* (Munich, 23 November 2011) <http://www.sueddeutsche.de/politik/slowenien-und-kroation-jahre-unabhaengigkeit-genschers-alleingang-1.1112330%20accessed%202%20September%202015> accessed 2 September 2015.

[114] Lucarelli (n 91) 27.

[115] Caplan (n 96) 23.

[116] According to Lucarelli, France had a pro-Serb attitude at the beginning being concerned with the destabilizing effects of the conflicts. She was also worried about the hegemonic role Germany could play in the region. However, when the situation seemed irreversible, France understood the importance of maintaining the Franco-German axis and how vital was to keep Germany under collective, institutional control. Lucarelli (n 91) 154-157. In the case of the other great player, the UK, it has been suggested that John Major could have reached an implicit agreement with Germany: recognition in exchange for German support over the opt-out issue at the Maastricht summit. ibid 147.

[117] ibid 148.

[118] Opinion no 1 reproduced in (1993) 3 (1) European Journal of International Law 182 (emphasis added).

[119] According to the guidelines, recognition of new states required fulfilment of five conditions: (i) respect for the provisions of the Charter of the United Nations, the Final Act of Helsinki and the Charter of Paris; (ii) respect for the rights of ethnic and national groups and minorities; (iii) respect for the inviolability of frontiers; (iv) commitments to disarmament and nuclear non-proliferation and (v) commitment to peaceful conflict settlement. Reproduced in (1993) 4 (1) European Journal of International Law 72.

[120] Reproduced in (1993) 4 (1) European Journal of International Law 73.

recognized as an independent state (namely, to apply for recognition); (ii) the acceptance of the commitments established in the guidelines; (iii) guarantees for the protection of human rights and particularly minorities; (iv) support to the UN efforts and the conference on Yugoslavia. Finally, given the Greek pressure out of Macedonian claims, it was also required to abandon territorial claims towards neighbouring EC Member States and the use of any denomination which could imply those claims.

It is important to underline the Greek imposition, because it proves, again, that when an EC Member State considers an issue to be vital (and provided that such issue does not affect the national interest of other Member States), EC policy tries to accommodate its position in order to satisfy the concerned Member State.

Subsequently, the Badinter Commission examined the requests for recognition submitted by Bosnia-Herzegovina, Croatia, Macedonia and Slovenia. As for Macedonia and Slovenia, the Commission ruled that both entities had fulfilled all the conditions.[121] Regarding Croatia, the Commission considered that the treatment of the large Serb community was not in accordance with the EC conditional policy.[122]

As for Bosnia-Herzegovina, the Commission concluded that the absence of a referendum meant that 'the will of the people of Bosnia-Herzegovina to constitute as a sovereign and independent State cannot be held to have been fully established.'[123] On January 15, 1992, the EC Member States recognized Slovenia and Croatia (after the presentation of written guarantees of future adherence to the EC conditions). The recognition of Macedonia, despite the Badinter Commission Opinion, was postponed until 1993 because of Greek objections. As for Bosnia-Herzegovina, a proper referendum was held from 29 March to 1 April. Despite the ongoing war in the country, Bosnia-

[121] Opinions no. 6 and no. 7 reproduced in (1993) 4 (1) European Journal of International Law 77-84.
[122] Opinion no. 5 reproduced in (1993) 4 (1) European Journal of International Law 76-77.
[123] Opinion no. 4 issued on 14 January 1992. Reproduced in (1993) 4 (1) European Journal of International Law 74-75.

Herzegovina was recognized on April 7.[124] As has been shown, the EC Member States did not entirely follow the Badinter Commission Opinions on recognition:[125] in effect, despite the Opinions, the EC Member States did not recognize immediately Macedonia (because of Greek objections) and opted for Croatian recognition (despite the Badinter objections), given the vigorous German support. In fact, Germany had already announced in December 1991 its intention to recognize Croatia and Slovenia regardless of the Badinter Commission opinions.[126]

The Yugoslav case had many particularities. As in the case of Czechoslovakia (and unlike the Baltic independence movements), there was no Soviet threat. But whereas the Czechs and the Slovaks were able to reach an agreement, the different Yugoslav nations engaged in wars. The lack of a peaceful settlement did not enable quick EC recognition. However, the irreversible dissolution of the mother State, i.e. Yugoslavia, (as the Badinter Commission acknowledged), together with the German impulse[127] allowed for a conditional EC recognition policy once it was evident that the pre-war situation could not be restored. Another lesson that can be drawn from the Yugoslav experience is that EC Member States' political preferences trumped the legal opinions of the experts Commission they themselves had created. Europeans did not base their arguments primarily on legal considerations. 'Recognition was clearly used as a political tool.'[128]

The Yugoslav example might have showed the Czechs and Slovaks the risks of a break up without agreement and thus might have contributed to the peaceful dissolution

[124] Rich (n 80) 49-51.
[125] Roland Bieber, 'European Community Recognition of Eastern European States: A New Perspective for International Law?' (1992) 86 American Society of International Law Proceedings 374, 376.
[126] Caplan (n 96) 38.
[127] Marc Weller, 'The international response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 (3) The American Journal of International Law 569, 605.
[128] ibid 587.

of Czechoslovakia.[129] In this case, unlike in Yugoslavia, the EC attitude could be described as non-interference.[130]

Dissolution of Czechoslovakia

Czechoslovakia was created out of the Treaty of Versailles, as a new buffer State in Central Europe, with two culturally and linguistically similar nations (Bohemia and other Czech lands and Slovakia).[131] Slovaks became a minority in their own new country[132] and the relationship between both communities was described as almost colonial.[133] Slovak disappointment within Czechoslovakia was a constant throughout the 20th century, as they saw themselves primarily administered by the more politically and economically advanced Czechs.[134] During the 60s and the famous 'Prague Spring', while Czech communists demanded political reform, Slovaks argued that 'democratization could not take place until national equality between Czechs and Slovaks had been achieved.'[135] The 1968 Constitution reflected Slovaks' aspirations for greater autonomy.[136] Czechs and Slovaks protested united after the East Germany regime collapsed in November 1989 and

[129] Jacques Rupnik, 'The International Context' in Jiri Musil (ed), *The End of Czechoslovakia* (Central European University Press 1995) 273.
[130] ibid 276.
[131] Both Bohemia, Moravia and Czech Silesia (current Czech Republic) and Slovakia belonged to the Austro-Hungarian Empire. But while Bohemia and the rest of Czech lands were placed under the dominant rule of Austria, Slovakia remained under Hungarian authority. Their economic and social development was highly divergent.
[132] Salvatore Massa, 'Secession by mutual assent: a comparative analysis of the dissolution of Czechoslovakia and the separatist movement in Canada' (1995) 14 Wisconsin International Law Review 183, 185.
[133] Eric Stein, *Czecho/Slovakia: ethnic conflict, constitutional fissure, negotiated breakup* (University of Michigan Press 1997) 302.
[134] Holly A. Osterland, 'National self-determination and secession: the Slovak model' (1993) 25 Case Western Reserve Journal of International Law 655, 685. Czech literacy rate was among the highest in the empire, unlike the Slovak rate. Besides, after WWI the Czech lands (Bohemia, Moravia, and Silesia) concentrated almost the entire industrial plant of the Austro-Hungarian Empire. Stein (n 133) 25.
[135] Osterland (n 134) 690.
[136] Massa (n 132) 186.

a bloodless revolution (the 'Velvet Revolution') occurred. Nobody then expected the dissolution of the country.[137]

In June 1990, free elections to the Federal Parliament, as well as in the Czech and Slovak Republican Parliaments, were held. The federal mandate was to write a new federal Constitution. Similarly, the Czech and Slovak Parliaments had to adopt Constitutions for their respective republics. Diverging policy views in the two enclaves exacerbated the debate over the breakup of the country: 'different perceptions of a common history, different attitudes towards modernity and particularly the transition to a market economy, different political orientation and strategies of the post-communist elites.'[138] 'Secession' entered the public debate, which induced the Federal Parliament to pass a mandatory referendum as a legal requirement for any partition of the country.

The 1992 elections accentuated the political division among the two Republics. The huge economic disparity did not help to mitigate the tense situation.[139] Add to that the constitutional super-majority provisions that precluded any progress. The political paralysis, some degrees of indifference on the Czech side and resentment on the Slovak side led the leaders of both Republics, Vaclav Klaus and Vladimir Meciar, to negotiate

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[137] Interesting to note a New York Times report appeared in February 1990 where two East European politics experts review the challenges ahead in some former Soviet countries. When it comes to Czechoslovakia, there is no fear that the country might dissolve. In fact, there is no reference at all to internal divisions and independence feelings among the population. The main challenges are how to proceed to a market economy (and what shape it should take), the election of a new President and the drafting of a new constitution. Marc D. Charney and Anne Zusy, 'Up-to-the-Minutes Scores From the Revolution in the East Bloc' *New York Times* (New York, 18 February 1990) <http://www.nytimes.com/1990/02/18/weekinreview/up-to-the-minute-scores-from-the-revolution-in-the-east-bloc.html?pagewanted=1> accessed 30 August 2015. Such missing reference should not surprise. Researchers who had been working in Czechoslovakia for years did not expect the federation to fail either. 'Although I had worked for several years on 'Czechoslovak' politics, I did not expect this federation to fail. At the time, it did not make sense to me: it seemed at odds with the shared ambition to join the EU, another federation of sorts; and neither Slovaks nor Czechs seemed at all sure they wanted separate states (which was why their leaders avoided putting the question to the test of a referendum).' Judy Batt, 'Making a success of Montenegrin independence – lessons from Slovakia' (*ISS*, 1 June 2006) <http://www.iss.europa.eu/fr/publications/detail-page/article/making-a-success-of-montenegrin-independence-lessons-from-slovakia/> accessed 30 August 2015.

[138] Rupnik, 'The International Context' (n 129) 272.

[139] While the Czechs were thriving, the Slovaks were struggling, e.g. unemployment rate among the Czechs was just about 3%, while initial privatization policies contributed to 13% unemployment among Slovaks. Massa (n 132) 190.

the end of the federation through the 1968 constitutional amendment process. Although the Czech side agreed to it, the dissolution of the country was clearly launched by Slovakian leaders.[140] The constitutional amendment process did not foresee the organization of any popular consultation (unlike the recent bill to dissolve the federation that required a national referendum).[141] 2,5 million Czechoslovaks submitted a petition demanding a referendum on secession.[142] Vaclav Havel, President of Czechoslovakia, also favoured the consultation. However, no referendum was held in either Republic. The leaders of both Republics refused to organize it, as public opinion polls showed that a majority of Czechoslovaks favoured unity.[143] Thus, in January 1993 Czechoslovakia ceased to exist and two new countries emerged: the Czech Republic and Slovakia. The breakup occurred against friendly (and unofficial) advice from members of the European Community.[144] Their concern was the risk of instability in a geopolitically important area. However, such concern was satisfied by the peaceful and negotiated path of the dissolution. Therefore, the EC did not oppose the dissolution. Informally it just required a customs' union between the two new states.[145] With no other official references to what was called the 'Velvet Divorce', in February 1993 the Commission asked the Council for authorization to enter into negotiations with the Czech Republic and the Slovak Republic to sign an agreement which would be identical in terms of content, except for a few

[140] Stephen Engelberg, 'Czechoslovakia Breaks in Two, to Wide Regret' *New York Times* (New York, 1 January 1993) <http://www.nytimes.com/1993/01/01/world/czechoslovakia-breaks-in-two-to-wide-regret.html> accessed 30 August 2015.
[141] Massa (n 132) 191.
[142] Engelberg (n 140)
[143] Osterland (n 134) 692. See also Massa (n 132) 192, Emanuela Macek-Macková, 'Challenges in conflict management in multi-ethnic states – the dissolution of Czechoslovakia and Serbia and Montenegro' (2011) 39 (4) Nationalist Papers: The Journal of Nationalism and Ethnicity 615, 619.
[144] On 22 June 1992, the then EC spokesman said that dissolution was an 'internal decision'. He also revealed his disappointment 'because the aim should be integration rather than disintegration'. In April 1993, the French Minister for European Affairs admitted that 'it is paradoxical that commercial barriers are being erected between Bohemia and Slovakia, or between Slovenia and Croatia, at the very moment when we are considering doing away with them between the EC and these countries.' Rupnik, 'The International Context' (n 129) 276.
[145] Macek-Macková (n 143) 626.

technical and legal adjustments, to the Europe Agreement signed with the Czech and Slovak Federal Republic in December 1991.[146] The split was possible thanks to the lifting of the Soviet imperial constraint, which had imploded rapidly in summer 1991.[147] But more importantly, the breakup was a peaceful dissolution carried out through a negotiated settlement. Despite the fact that no popular consultation was held, what seemed relevant to European leaders was the peaceful character of the agreement reached between Czech and Slovaks elites.

These three cases show that for the EC the 'agreement' factor has been key in determining its policy. As for the Baltic States, only after the Soviet Union opposition vanished, did the EC Member States accept their independence. In Czechoslovakia, despite a contested procedure (no popular referendum), EC Member States did not oppose the dissolution of the country since there was a peaceful agreement. And in the Yugoslav case, it was precisely the lack of such agreement (namely Serbia's opposition) that prevented a quick EC common policy. EC Member States accepted the emergence of new States in the former Yugoslavia only after violence made clear that its dissolution was an irreversible fact.

4. Secession after the dissolution of Yugoslavia: Montenegro and Kosovo

As a common introduction to the relevant cases of Montenegro and Kosovo and in order to understand the key role played by the EU (particularly in the case of Montenegro), it is important to emphasize that EU foreign policy towards the Western Balkans[148] (which

[146] Bol. EC 1/2-1993, point 1.3.12.

[147] Jacques Rupnik, 'The International Context' (2000) 11 (2) Journal of Democracy 115, 115. See also Samuel Huntington, 'Will more countries become democratic?', (1984) 99 (2) Political Science Quaterly 193, 197 and 214. According to Huntington, the former Soviet presence was a decisive overriding obstacle for any development in countries like Czechoslovakia, Poland or Hungary.

[148] The 'Western Balkans' is an EU term invented in 1999 to cover the countries of the region targeted as potential candidates. The EU had understood that a substantive engagement with the Western Balkans meant not only preparing them for a free trade area with the EU, but for potential candidacy. In June 2000,

includes the secession of Montenegro and Kosovo) lies within the framework of their (potential) membership. This provides the EU with a unique position to exert influence, with a set of carrots and sticks that cannot be used, for instance, in post-Soviet frozen conflicts like Transnitria or South Ossetia, as will be seen.[149]

Montenegro (Serbia)

Montenegrins and Serbians share the same religion and language. There used to be more Montenegrins in Serbia than in Montenegro itself. Montenegro has no history of conflict with Serbia. In fact, historically they have been allies, not rivals. 'Montenegrins have not traditionally thought of their national identity as separate from the Serbian one, but as interwoven with it…'[150] However, Montenegro decided to separate from Serbia in 2006.

In the 1990s Montenegro participated together with Serbia in the wars against Bosnia and Croatia, and then joined together with Serbia in the Federal Republic of Yugoslavia in 1992, a decision ratified by popular vote. But political trends began to turn within Montenegro[151] and the West's sanctions on Serbia and its generous assistance to Montenegro provided further incentives to distance Podgorica from Belgrade. Tensions

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the European leaders assumed the possibility of Balkans accession: 'All countries concerned are potential candidates for EU membership. The Union will support the Stabilisation and Association process through technical and economic assistance.' Santa Maria da Feira European Council 19-20 June 2000. Presidency Conclusions. Available at <http://www.europarl.europa.eu/summits/fei1_en.htm> accessed 17 August 2015. After the Thessaloniki European Council (June 2003) it became clear that European leaders were ready to repeat with the Western Balkans the successful experience of the Central and Eastern European enlargement that were going to accede to EU membership in 2004: 'The European Council, recalling its conclusions in Copenhagen (December 2002) and Brussels (March 2003), reiterated its determination to fully and effectively support the European perspective of the Western Balkan countries, which will become an integral part of the EU, once they meet the established criteria.' Thessaloniki European Council 19-20 June 2003. Presidency Conclusions. Available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/76279.pdf> accessed 18 August 2015.

[149] Stephen Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (2nd edn, Palgrave 2014) 242.

[150] Judy Batt, 'The question of Serbia' (2005) 81 Chaillot Paper, 22 <http://www.iss.europa.eu/uploads/media/cp081-English.pdf> accessed 17 August 2015.

[151] 'Serbia's legacy of war in the Balkans and its policies towards Kosovo sparked Montenegro's desire to secede.' Tocci (n 47) 156

came to a head when Montenegro sided with NATO in the 1999 Kosovo war.[152] Montenegro unilaterally adopted the German mark in 1999 and the Euro in 2002. After the overthrow of Milosevic in 2000 Montenegro had two options: either a reintegration into Serbia or the path of independence. Montenegro's President Djukanovic[153]favoured independence, despite the division among the population.[154] The EU repeatedly argued against further secession in the Western Balkans region:

> The European Council (…) recalls its firm attachment to the principles of inviolability of borders and territorial integrity of the countries of the region. (…) The European Council calls on Montenegro and the FRY/Serbian authorities to agree on new constitutional arrangements within a federal framework through an open and democratic process in order to contribute to stability in the region.[155]

In April 2001 after elections in Montenegro with pro-independence parties taking the lead, the declarations made by EU institutions were read by the press as warnings against secession (at least, against unilateral and not agreed secession):

> The European Union today cautioned Montenegro's pro-independence movement against taking unilateral action to break away from Yugoslavia following its narrow election victory. The EU's High Representative for Common Foreign and Security Policy, Javier Solana, said the EU fully supports a democratic Montenegro within a democratic Yugoslavia. 'The EU opposes any unilateral steps which could run contrary to the stability of the region,' he said.[156]

Also, the German and French Foreign Ministries issued a statement reaffirming their support for 'a democratic Montenegro in a democratic Yugoslavia.'[157] Sweden's Foreign

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[152] ibid 83.

[153] Milo Djukanovic was President of Montenegro from 1998 to 2002. Before he had been Prime Minister (1991 to 1998). Since 2002 he has held the Prime Minister Office in several occasions (2003-2006), (2008-2010) and (2012-present). Like in the case of the dissolution of Czechoslovakia (and unlike the Baltic states where there was a large popular movement aiming at independence), the role played by Montenegrin politicians was key in the path for independence. Elites pushed for it despite the population was not convinced, at least at the beginning. Macek-Macková (n 147) 619.

[154] 'Support for independence dropped after the ouster of Milosevic, and stayed below 50 per cent in most opinion polls thereafter.' Batt, 'Making a success of Montenegrin independence – lessons from Slovakia' (n 137).

[155] Stockholm European Council 23- 24 March 2001. Presidency Conclusions. Available at <http://europa.eu/rapid/press-release_DOC-01-6_en.htm> accessed 17 August 2015.

[156] 'EU warns Montenegro against secession' *The Guardian* (London, 23 April 2001) <http://www.theguardian.com/world/2001/apr/23/balkans> accessed 17 August 2015.

[157] 'Pressure grows to preserve Yugoslavia' *BBC News* (London, 24 April 2001) <http://news.bbc.co.uk/2/hi/europe/1293971.stm> accessed 17 August 2015.

Minister Anna Lindh (Sweden was holding temporarily the EU presidency), urged Montenegro to resume 'serious negotiations with Serbia "on their common future" adding that '[t]he election results in Montenegro give no clear mandate for continuing with a referendum on independence.'[158] Given the EU Member States opposition to a new split, Javier Solana stepped in and mediated the Belgrade Agreement on 14 March 2002,[159] which gave birth to the State Union of Serbia and Montenegro (the 'Union'). The text established a loose federal level of government (a type of confederal regime) and allowed for a referendum on secession in either one or in both republics after three years of its establishment. The Union came into effect in 2003. For Serbia and Montenegro, the motivation behind it was not the Union itself (no one wanted it), but the prospect of EU integration, since the EU had made the Union a condition of Serbia and Montenegro's admission.[160] The EU priority then was to develop and implement the new constitutional edifice:[161] 'The key Commission message to Belgrade and Podgorica is that the state which results must be functional, particularly with a view to future contractual relations with the EC/EU and WTO membership.'[162] The message was that the future EU membership of Montenegro and Serbia depended on the continuity of its new state. 'But the Union was unpopular in both Serbia and Montenegro, and the Montenegrin government never gave up on independence.'[163] The Belgrade Agreement only avoided divorce temporarily.[164] One of the reasons why the EU was particularly interested in a

[158] 'Pressure builds on Djukanovic' *CNN* (Atlanta, 24 April 2001) <http://edition.cnn.com/2001/WORLD/europe/04/24/montenegro.poll/index.html> accessed 17 August 2015.
[159] Text of the agreement to be found at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/declarations/73447.pdf> accessed 17 August 2015.
[160] Macek-Macková (n 143) 627.
[161] Tocci (n 47) 81.
[162] Commission, Federal Republic of Yugoslavia Stabilisation and Association Report, SEC (2002) 343 <http://ec.europa.eu/enlargement/archives/pdf/serbia_and_montenegro/com02_343_en.pdf> accessed 17 August 2015.
[163] Macek-Macková (n 143) 621.
[164] ibid 624.

functioning (though loose) union between Serbia and Montenegro was Kosovo. As the Balkans expert Judy Batt points out:

> [T]here has certainly been no appetite among the EU Member States to take the risk of allowing a new failing state to emerge, all the more so while Western policy-makers were unready to tackle the really intractable problem of Kosovo's 'final status'. EU policy-makers believed – rightly or wrongly – that international recognition of Montenegrin independence would precipitate a similar outcome in Kosovo. While there was no consensus within the international community on Kosovo's 'final status', some still hoped that after the change of regime in Belgrade, the Kosovars could be shifted from their goal of independence. If so, then a renegotiated loose union between Serbia and Montenegro might provide a framework within which Kosovo could enjoy 'substantial autonomy', an alternative to independence that would be less destabilising not only for Serbia but for the rest of the Balkans. Of course, this scenario assumed not only that the Kosovars would accept it, but also that FRY could be reconstituted as a new union that would be sufficiently loose to satisfy Montenegro yet sufficiently robust to be valid.'[165]

Despite international efforts, the regime was highly dysfunctional[166] and it failed to gain domestic support and legitimacy.[167] The impression among the local population was that the Union was hindering the accession prospects of both republics, since it was hampering the process of economic development and reform.[168] However Solana still claimed that a constitutional link between Serbia and Montenegro was a requirement for EU accession and threatened Montenegro that separation would jeopardize international assistance.[169] EU officials invested a lot of efforts and spent many hours 'trying to persuade Montenegrin Prime Minister Djukanovic to abandon his independence bid.'[170] But by 2005 trends inexorably pointed towards a referendum in Montenegro. The Serbs had resigned themselves when faced with the political stalemate.[171] 'Most Serbs (…) would

[165] Batt, 'The question of Serbia' (n 150) 25.
[166] Tocci (n 47) 86.
[167] ibid 87.
[168] ibid.
[169] ibid 94.
[170] Tihomir Loza and Ky Krauthamer, 'Montenegro: The Gray Zone' (2006) 5/16 Transitions Online 1, 3.
[171] Macek-Macková (n 143) 628. In fact, before Solana's intervention in late 2001 and the signing of the Belgrade Agreement, the Serbs and the Montenegrins had almost reached an agreement over the Montenegrin referendum on independence. ibid. See also International Crisis Group, 'Still buying time: Montenegro, Serbia and the European Union' (7 may 2002)

not try to prevent Montenegro leaving the Union, if that were the settled will of a convincing majority of that Republics…'[172] Since the situation seemed irreversible, the EU[173] decided to cooperate and make sure that the process went as smoothly as possible. The Constitutional Charter was revised in 2005 to ensure that an eventual referendum would comply with the guidelines of the Council of Europe's Venice Commission, an essential prerequisite to gain international legitimacy.[174] At first there was no consensus among Montenegrins regarding referendum law. The EU stepped in[175] again to 'resolve' the issue (or, in other words, 'more or less imposed that law on the government').[176] It was decided that there would have to be a required turnout of 50 per cent + 1 voter and a 55 per cent majority in favour of independence. The EU supervised the formation of the Montenegrin Referendum Commission, as well.[177] The referendum took place on the 21 May 2006 with a 86,5% voter turnout and a sufficient (albeit extremely narrow) 55,5 per cent majority in favour of independence. It was considered a major success for EU's soft

<http://www.crisisgroup.org/en/regions/europe/balkans/montenegro/129-still-buying-time-montenegro-serbia-and-the-european-union.aspx> accessed 18 August 2015.

[172] Batt, 'The question of Serbia' (n 150) 32.

[173] At first there was no consensus either within the EU, since Spain tried to forestall the referendum in Montenegro in order to prevent any kind of precedence in European soil. Tocci (n 47) 99. Solana, a Spaniard himself, rapidly reminded in a Press conference held on 22 May 2006 that any comparison between Montenegro and the territorial debate in Spain was close to 'delirium tremens'. Declarations to be found in Spanish Press: Andreu Missé, 'Toda comparación con España raya en el "delirium tremens"' *El Pais* (Madrid, 23 May 2006) <http://elpais.com/diario/2006/05/23/internacional/1148335203_850215.html> accessed 18 August 2015.

[174] Venice Commission, 'Opinion on the compatibility of the existing legislation in Montenegro concerning the organisation of referendums with applicable international standards', CDL-AD(2005)041: '[T]he requirement in the present Referendum Law (namely, that the result of a referendum may be decided by a simple majority of those voting in the referendum, provided that at least 50% of the electorate have voted) is not inconsistent with international standards… However, in order that the result of a referendum should command more respect, the Commission considers that the political forces in Montenegro may wish to agree to change the present rules for the proposed referendum, either by adopting a higher percentage rate for participation, or by requiring support for the decision by a percentage of the electorate to be defined. A change of this kind would certainly be consistent with international standards and would help to ensure greater legitimacy for the outcome.'

[175] 'The Montenegrin opposition refused to negotiate directly with the government: only the mediation of EU High Representative Miroslav Lajčák, who arrived late 2005, eventually solved the problem regarding the terms of the referendum.' Macek-Macková (n 143) 625.

[176] Loza and Krauthamer (n 170) 2.

[177] Tocci (n 47) 88.

power (i.e. EU brokering rules of the game for the celebration of the referendum).[178] The EU recognized its outcome and stressed both the legal conformity of the process and the agreement and consent of Serbia:

> The Council has taken note that, on 3 June 2006, based on Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro and following the Montenegrin referendum of 21 May 2006, the Parliament of Montenegro has passed a Declaration on the Independence of the Republic of Montenegro which states that the Republic of Montenegro is an independent State with full legal personality under international law.
>
> Furthermore, the Council has taken note that, on 5 June 2006 following the abovementioned Declaration, the Parliament of Serbia has passed a Decision that defines the Republic of Serbia as the continuing State of the State Union of Serbia and Montenegro. (…)
>
> The European Union and its Member States have therefore decided that they will develop further their relations with the Republic of Montenegro as a sovereign, independent State, taking full account of the referendum result and the aforementioned Parliamentary Acts.[179]

At first there was firm EU opposition to Montenegro's independence. When it was clear that the situation was irreversible (and bearing in mind that the Belgrade Agreement did already provide for such scenario), the EU decided to step in to make sure that the procedure was carried out according to the law. The consent of Serbia seemed also key to facilitate the final acquiescence of the EU, as was the lack of veto by any EU Member State.

Kosovo, as we will see next was (and still is) a much more complicated scenario, because it involves a human rights violation record. However, due to Serbian opposition, it has led to the unyielding position of some EU Member States, that still today are unwilling to recognize Kosovo's sovereignty.

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[178] Judy Batt, 'Montenegro and Serbia after the referendum' (*ISS,* 1 May 2006) <http://www.iss.europa.eu/publications/detail/article/montenegro-and-serbia-after-the-referendum/> accessed 18 August 2015.

[179] 2737th Council Meeting General Affairs and External Relations, Luxembourg, 12 June 2006. Available at <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/90014.pdf> accessed 17 August 2015.

Kosovo (Serbia)

As has been shown in the case of Montenegro, the EU was committed to the maintenance of the territorial integrity of former Yugoslav republics. That meant that Bosnia and Herzegovina had to stay together, that the Serb communities in Slovenia could not secede or join Serbia and that Kosovo had also to be kept within Serbia. This position was in accordance with the classical principles of international law, which favour territorial unity over demands of self-determination outside the colonial context.[180]

Although the Serbian autonomous province of Kosovo has been mainly inhabited by ethnic Albanians, Serbs historically have considered it the cradle of its own history. Serbia had made clear that Kosovo was a highly sensitive issue.[181] Thus, when in December 1991 Kosovo, along with Croatia, Slovenia, Macedonia and Bosnia and Herzegovina, applied to the EC states for recognition, Kosovo's application was simply ignored.[182] But dramatic events in the following years made the international community change its mind. Serbia (under the rule of Slobodan Milosevic) virtually abolished Kosovo's autonomy and a period of repression followed. There were signs of (at least) attempts of ethnic cleansing of the Albanian inhabitants of Kosovo. Given UN paralysis (Russia, as a traditional ally of Serbia, vetoed any attempt of UN intervention in Kosovo), NATO intervened and launched a bombing campaign on Serbia in 1999. After that and pursuant to UNSC Resolution 1244 (1999), the Security Council decided to establish the United Nations Interim Administration Mission in Kosovo ('UNMIK').[183] During the

[180] Marc Weller, 'Negotiating the Final Status for Kosovo' (2008) 114 Chaillot Paper, 8-9 <http://www.iss.europa.eu/uploads/media/Thessalonikiat10.pdf> accessed 20 August 2015.
[181] Kosovo occupied (still does) a central place in the Serbian national myth. Serbs were convinced that Kosovo's loss would undermine the core of their national identity. Batt, 'The Question of Serbia' (n 150) 65.
[182] Weller, 'Negotiating the Final Status for Kosovo' (n 180) 13.
[183] UN doc. S/RES/1244 (1999) 10 June. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> accessed 21 August 2015.

following years various rounds of negotiations between Kosovo and Serbia were held to discuss a settlement proposal. One of the guiding principles of the negotiations was the following:

> [A]ny solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected.[184]

However, it also seemed clear that 'independence would be the only way out, all avenues of negotiation having been exhausted.'[185] The parties were unable to make any progress and in his March 2007 report the UN Special Envoy concluded that:

> Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.[186]

Further negotiations were held between August and December 2007 under the auspices of representatives of the European Union, Russia and the US: 'the parties were unable to reach an agreement on Kosovo's status. Neither side was willing to yield on the basic question of sovereignty.'[187]As Weller explains, during those negotiations Serbia did not play her cards properly. At first, she was convinced i) that traditional international law was on her side[188] and ii) that Russia would never allow the secession of Kosovo in the

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[184] 'Guiding principles of the Contact Group for a settlement of the status of Kosovo' UN doc. S/2005/709 10 November. Available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20S2005%20709.pdf> accessed 21 August 2015.

[185] Weller, 'Negotiating the Final Status for Kosovo' (n 180) 30.

[186] 'Report of the Special Envoy of the Secretary-General on Kosovo's future status' UN doc. S/2007/168 26 March, para 5. Available at <http://www.unosek.org/docref/report-english.pdf> accessed 21 August 2015.

[187] 'Report of the European Union/United States/Russian Federation Troika on Kosovo' UN doc. annexed to S/2007/723 4 December, para 11. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2007/723> accessed 21 August 2015.

[188] As if international law was sufficient when dealing with high politics. Serbia herself should not have ignored that the 1999 NATO-led bombing campaign was a flagrant violation of the legal international regime of the use of force as commonly understood until then. A good account of that regime and an excellent debate on the convenience of still arguing in legal terms when it comes to the use of force to be found in Michael J. Glennon, *Limits of Law, Prerogatives of Power. Interventionism after Kosovo* (Palgrave 2001).

United Nations Security Council. Only at the end of the negotiations did Serbia get deeply involved and offer extended autonomy guarantees.

> [O]ne wonders what would have happened if Belgrade had engaged with the debate on status as openly and decisively [before] (…) Had Serbia opened the door for discussions along those lines a year and a half earlier, it would have been very difficult for Kosovo to resist the dynamic towards such a solution.[189]

After elections held in November 2007, in February 2008 the new elected Assembly of Kosovo adopted the declaration of independence.[190] Pursuant to a Serbian request, the UN General Assembly asked the ICJ to assess the compatibility of the declaration with international law.[191] Literature about the legality of the declaration of independence is extensive (chapter 2). Let us simply recall that in the 22 July 2010 Advisory Opinion the ICJ concluded that 'the adoption of that declaration did not violate any applicable rule of international law.'[192] West European states hoped to present the case of Kosovo as a

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[189] Weller, 'Negotiating the Final Status for Kosovo' (n 180) 65.

[190] Kosovo Declaration of Independence available at <http://www.assembly-kosova.org/?cid=2,128,1635> accessed 21 August 2015. It has been argued that this declaration was drafted with the help of foreign governments. Weller, 'Negotiating the Final Status for Kosovo' (n 180) 70.

[191] 'Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law' UN doc. A/RES/63/3 8 October 2008. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/3> accessed 21 August 2015.

[192] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 403, 122. Available at <http://www.icj-cij.org/docket/files/141/15987.pdf> accessed 21 August 2015. There were basically two main points in the ICJ legal discussion: (i) whether international law prohibits secession and (ii) whether the specific international law regime of Kosovo (namely UN Security Council legal framework) precluded such outcome. The Court accepted the argument (advanced by many states) that the principle of territorial integrity is opposable only to states. (para. 80). Therefore, it has nothing to say in the case of secession (by definition, an internal act): '… the Court considers that general international law contains no applicable prohibition of declarations of Independence.' (para. 84). International law is neutral on the issue of secession, which is a matter of fact; (ii) as for the second issue, 'The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal regime…' (para. 100) When adopting the declaration of independence, the Assembly of Kosovo acted '… as representatives of the people of Kosovo outside the framework of the interim administration.' (para 109) And therefore it cannot be said that their acts were not in conformity with that interim legal framework, since they were not subject to it. Finally, the Court also observed that '…Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.' (para. 114) Therefore, it cannot be argued that the resolution prohibited any type of outcome, like, for instance, the independence of Kosovo. It could have been more interesting if the ICJ had addressed another issue: 'Does the recognition by states of the juridical independence of Kosovo violate their obligations under international law not to interfere with the territorial integrity and political independence of Serbia?' As Hurst Hannum recalls, this is precisely where the nexus of the dispute with international law actually lies. Hurst Hannum, 'The Advisory Opinion on Kosovo: an opportunity lost, or a poisoned chalice refused?' (2011) 24 (1) Leiden Journal of International

unique one, given its previous recent history of violent tensions with Serbia and the prolonged period of international administration. In its Conclusions on Kosovo, adopted immediately after the declaration of independence, the Council of the European Union noted that 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo.'[193] This pragmatic approach avoided a split within the Union, which would not have been able to agree a common stance on this issue.[194] After reaffirming the EU commitment to the stabilization of the area, the Council added:

> The Council reiterates EU's adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council Resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.

To sum up, the Council was trying to send a calming message when affirming that Kosovo would not be accepted as a precedent for other conflicts or disputes. The European States viewed the situation as a very special and unique one. In the 18 February 2008 Security Council meeting Belgium reaffirmed this position noting that:

> Kosovo's independence is situated within a historical context that no one can ignore: the disintegration of Yugoslavia, which led to the creation of new independent States. The independence of Kosovo is part of this framework and can thus in no way be considered a precedent.[195]

Law 155, 158. In fact, the Court did not address many of the questions that underpin the request: the need of Serbian consent following the spirit of the UNSC 1244 Resolution; Kosovo's positive entitlement to statehood in accordance with self-determination theory; the consequences of the declaration of independence and the issue of the validity of recognition by third States. This was due probably to the narrowly framed question submitted by the General Assembly. Marc Weller, 'Modesty can be a virtue: judicial economy in the ICJ Kosovo Opinion?' (2011) 24 (1) Leiden Journal of International Law 127, 132.

[193] General Affairs and External Relations Council of the European Union, 18 February 2008. Available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/98818.pdf> accessed 21 August 2015.

[194] Weller, 'Negotiating the Final Status for Kosovo' (n 180) 73.

[195] UN doc. S/PV.5839 18 February 2008. Available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.5839> accessed 21 August 2015. This position has been consistently held in the following years. For instance, this was the opinion of the UK in the 2010 Security Council meeting that discussed the ICJ Advisory Opinion: 'Kosovo is a unique case. Its independence is contingent on its particular facts. It does not provide a template for secession elsewhere.' See UN doc. S/PV.6367 3 August 2010. Available at <http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6367&Lang=E> accessed 21 August 2015.

Almost all EU Member States did recognize Kosovo's independence immediately. Only five EU Member States (Spain, Greece, Slovakia, Romania and Cyprus) did not do so because of domestic concerns.[196] Despite the repeated statements about Kosovo not being a precedent, it was precisely this fear that prevented recognition.[197] But 'such disagreement over Kosovo's status has not prevented the EU from developing a comprehensive policy towards Kosovo.'[198] In fact, the EU has not only launched the EU mission supporting the Rule of Law in Kosovo ('EULEX'),[199] but it also played a role facilitating a political agreement between Kosovo and Serbia on normalization of their relations in April 2013, the so-called Brussels Agreement.

The uniqueness of Kosovo lies not so much in the historical context, but in its 'sponsorized' independence process. '[T]he decision on independence was not quite a unilateral decision. It resulted from the United Nations-sponsored process…'[200] Kosovo was not a free rider as South Ossetia, Abkhazia or Crimea (entities attempting independence with almost the sole international support of Russia). A good number of Western countries pushed Kosovo for independence and prepared it for it. That is precisely what makes it a unique case.

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[196] In order to honour the different positions of EU member states concerning Kosovo, when referring to her, EU documents always include an asterisk clarifying that '[t]his designation is without prejudice to position on status, and is in line with UN Security Council Resolution 1244/99 and the International Court of Justice Opinion on the Kosovo declaration of independence.'

[197] 'The major Western powers and a number of other countries eventually recognized Kosovo's second unilateral declaration of independence in 2008, but most recognizing countries went to extraordinary lengths to justify their move as a special, no-precedent-creating exception to, rather than as a qualification or abandonment of, the post-decolonization norm of territorial integrity.' Fabry (n 101) 180.

[198] Keukeleire and Delreux (n 149) 245. It has been argued that the ICJ opinion 'did have a catalytic effect on the EU's influence on the Serbia-Kosovo and EU-Serbia relationships.' Since then the EU has played a more active role in the region. Etain Tannam, 'The EU's Response to the International Court of Justice's Judgment on Kosovo's Declaration of Independence' (2013) 65 (5) Europe-Asia Studies 946, 947 and 956.

[199] Details to be found at <http://www.eulex-kosovo.eu/?page=2,16> accessed 20 August 2015.

[200] Weller, 'Modesty can be a virtue: judicial economy in the ICJ Kosovo Opinion?' (n 192) 142.

5. Secession within former Soviet Republics

The position of the EU in Transnitria, Abkhazia and South Ossetia, Nagorno-Karabakh and Crimea has to be examined through the lens of EU-Russia relations. The EU is not united in relation to Russia and therefore it is difficult to form a common policy towards all these conflicts. On the one hand, Central and Eastern European Member States, along with the European Parliament, are generally in favour of the EU adopting a more assertive attitude. By way of contrast, France, Germany, Italy and Spain prioritize national economic interests and the need to gain Russia's strategic partnership in crucial foreign issues (Iran, terrorism, and the like) and then the UK, inspired by its more transatlantic orientation, also has a more problematic relationship with Russia.[201]To understand the EU low involvement in these conflicts compared with its role in Cyprus or the Balkans, one has to bear in mind that '[t]he conflicts in Cyprus and the Balkans were situated in prospective EU Member states.'[202]

Transnitria (Moldova)

Transnitria is strip of land next to Ukraine. In the late 1980's, the perestroika environment allowed the resurgence of pro-Romanian nationalism among ethnic Moldovans, which was also addressed against the Russian-dominated political, economic, and cultural elite.[203] It was called a rediscovery of the Moldovans' 'true' Romanian identity after decades of official Soviet assimilation. As plans for major cultural changes in Moldova were made public, tensions with ethnic minorities rose further. The Transnitrians (where

[201] Keukeleire and Delreux (n 149) 283.
[202] Nicu Popescu, *EU Foreign Policy and post-soviet conflicts. Stealth intervention* (Routledge 2011) 20.
[203] Until the 1970s all First Secretaries of the Communist Party of Moldova and the majority of the nomenklatura were either from Russia or from Transnistria. Andrei Panici, 'Romanian nationalism in the Republic of Moldova' (2003) 2 (2) The Global Review of Ethnopolitics 37, 40 <http://miris.eurac.edu/mugs2/do/blob.pdf?type=pdf&serial=1047909431571> last accessed 11 May 2015.

Russians and Ukrainian ethnic origins are higher than in the rest of Moldova) were convinced that the new laws on language would lead to their forced assimilation into Romanian culture.[204]

Events followed in rapid succession. Transnitria declared its independence from Moldavia (a Soviet Republic) in September 1990, while the Moldovan Parliament seceded from the Soviet Union in August 1991. A short war from March 1992 to July 1992 between the secessionist entity and the mother state was ended by Russian military intervention, which used the entity to maintain influence and military presence in the region. The war did not lead to a high number of casualties and therefore the animosity was not high. It was a resolvable conflict. Unlike the rest of the conflicts reviewed in this section, Transnitria is not a classic ethnic conflict, despite the ethnic undertones mentioned. Populations are highly mixed.[205] But the *status quo* is lucrative for Transnitrian leadership and for the corrupt elites in Moldova.[206] No European State has recognized the *sui generis* independence of Transnitria (in fact, the entity could not survive without Russian aid).[207]

At first the EU was not interested in contributing to conflict settlement in Transnitria.[208] However, by the second half of 2002, the EU was actively looking for ways to play a bigger role in resolving a conflict that would border the EU in just a few

[204] ibid 41.
[205] According to some scholars, the conflict is basically economic: 'elites benefit from lucrative criminal businesses' Nicu Popescu, 'The EU in Moldova – Settling conflicts in the neighbourhood' (2005) 60 Occasional Paper, 6 <http://www.iss.europa.eu/uploads/media/occ60.pdf> accessed 30 August 2015.
[206] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 44.
[207] 'Economically, Transnitria has survived by trade – legal at times, but mainly semi-legal and illicit. Transnitria's economic survival has been assured by Russian gas, which is never paid for by Transnitria, and amounts to a significant underwriting of Transnitrian separatism.' Popescu, 'The EU in Moldova' (n 205) 17. Russian dependency has been acknowledged by the European Court of Human Rights in the Case of *Ilascu and Others v Moldova and Russia* App no. 48787/99 (ECtHR, 28 July 2004) when it concluded that Transnitria 'remained under the effective authority, or at the very least under the decisive influence, of Russia, and in any event that it survived by virtue of the military, economic, financial and political support that Russia gave it.' (para 392).
[208] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 42.

years.[209] EU engagement, though, is limited to technical and low-politics instruments, in order to avoid direct confrontation with Russia. To be clear, the approach is twofold: (i) contributing to create a more prosperous, economically attractive and democratic Moldova to make it more attractive to Transnitrian residents (e.g. visa-facilitating agreement in 2007, increasing financial assistance, granting of the Generalized System of Preferences Plus trade regime); and (ii) reducing the benefits of the *status quo* (pressure on the Transnitrian elite like visa bans, pressure on Ukraine to increase border control and decrease smuggling and trafficking activities).

It should be highlighted that the EU official position supporting the territorial integrity and sovereignty of Moldova has been constant.[210] However, it has not been translated into a commitment to restore such integrity. Moldova has asked for stronger EU support, but when the Commission or the EU Special Representative for Moldova, appointed in 2005, have tried to launch any initiative that could complicate EU-Russia relations (like, for instance, a peace operation led by the EU), some EU Member States[211] have opposed it. Scholars note that 'the EU remains an observer, rather than a policy

[209] In 2003, the EU Council became involved for the first time in negotiations over the status of Transnitria. In parallel, the European Commission supported Moldova's proposals for the creation of a joint border control between Moldova and Ukraine to ensure control over all of Moldova's external border. Besides, the EU has been imposing travel bans against the Transnitrian leadership since February 2003, although these sanctions have not achieved the expected results: staying in power is more important than traveling to the West. ibid 44 and 45.

[210] See the 2004 ENP Action Plan with Moldova, where territorial integrity is mentioned in page 11. Or the conclusions of the Foreign Affairs Council (22 February 2010) where restrictive measures against the leadership of Transnitria are imposed and where the Council reminds 'the full respect of the territorial integrity and sovereignty of the Republic of Moldova.' Available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/112952.pdf> accessed on August 6 2015.

[211] For instance, Central and East European EU Member States plus UK, the Netherlands and Ireland supported a EU peace operation in Moldova, but since Russia was adamantly opposed to such measure, the issue entered the realm of high-politics for many states, who were reluctant to irritate Russia on an issue like Transnitria. Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 61.

shaper.'[212] The EU non-involvement in the Transnitrian conflict is a good example of the clash between EU's interests and Russia's assertion of her sphere of influence.[213]

As for our concerns, this case highlights the attachment of the EU to the traditional principles of territorial integrity and non-recognition without a negotiated settlement between the secessionist entity and the mother State.

Abkhazia and South Ossetia (Georgia)

Abkhazia (a former autonomous republic within Soviet Georgia) is a region on the Black Sea bordering Russia that *de facto* seceded from Georgia after a war in 1992-1993. The population is ethnically mixed: around 45% Georgians, 17% Abkhaz and the rest Russians and Armenians. The 90's conflict claimed more than 10,000 lives, with atrocities on both sides. Georgians were forced out of the region.[214] South Ossetia (also a former autonomous region within Soviet Georgia) is located in the southern side of the Caucasus Mountains. It also fought a secession war against Georgia in 1992. It borders the Russian region of North Ossetia, which has the same ethnic population as South Ossetia. Georgians have also been expelled from the region.

Both the Abkhaz and the Ossetians are considered culturally and linguistically distinct from Georgians. Russia is deeply engaged in these two conflicts,[215] particularly since Georgia expressed its desire to join NATO. Moscow policies have consolidated

[212] Bohdana Dimitrovova, 'Imperial re-bordering of Europe: the case of the European Neighbourhood Policy' (2012) 25 (2) Cambridge Review of International Affairs 249, 253. The key element of this unsolved conflict is the fierce presence and support of Russia and lack of EU will to address the issue. Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 65.
[213] Liliana Popescu, 'Challenges at EU's New Eastern Frontier Twenty Years after USSR's Fall' (2011) 2 Romanian Journal of Political Science 4.
[214] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 67.
[215] For instance, inhabitants in the regions have Russian passports, Russia pays most of the pensions, Russian rouble is the official currency, Russia provides military and economic assistance and appoints many state officials, including the Prime Minister, in both Abkhazia and South Ossetia. None region would have survived without Russia's support. ibid 68.

their *de facto* independence, but also their integration into Russia.[216] In the 90's there was virtually no common EU policy towards Georgia.[217] After the peaceful 2003 Rose Revolution in Georgia, the EU was committed to supporting Georgia's reform process as technical assistance, but not willing to challenge Russia by assuming a too high profile in the secessionist conflicts. [218] In August 2008, a five-day war between Russia and Georgia took place. The date was not irrelevant. Kosovo had declared its independence in February (with fierce Russian opposition and decisive support of the US and some EU Member States) and in April NATO had held discussions considering Georgia's admission, (which was a red line for Russia) at the end of the year. Given NATO's commitment to guarantee the sovereignty and territorial integrity of its members, Russia had all the interest in seeing the situation deteriorate. 'The less secure Georgia looked, the less likely its chances to join NATO.'[219] Since the issue was very highly divisive among EU Member States, the EU's response was very limited: deployment of a civilian observation mission.[220] After the war, Russia unilaterally recognized South Ossetia and Abkhazia claiming that Kosovo had been a precedent. Russian President Medvedev openly acknowledged that the decision was in part retaliation for the West's support for Kosovo's independence.[221] In an extraordinary EU summit dedicated to the war in Georgia on 1 September 2008, the EU managed to reach a united position:

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[216] Tocci (n 47) 134.
[217] Since different EU member states had national interests at stake in Abkhazia. Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 71.
[218] For instance, by launching a Rule of Law mission to address the criminal-justice sector problems or sending border experts to advise Georgia on border reform. However, the mandate of the border experts did not cover areas of the Georgia-Russia border that were controlled by the secessionists. ibid 78. When after some years, in 2007 it was proposed to extend the border mission to the secessionist zones, it was vetoed by Greece, probably with the implicit support of other EU member states. ibid 82.
[219] ibid 86.
[220] ibid 87.
[221] Clifford J. Levy, 'Russia Backs Independence of Georgian enclaves' *New York Times* (New York, 26 August 2008) <http://www.nytimes.com/2008/08/27/world/europe/27russia.html?pagewanted=all&_r=0> accessed 11 August 2015. In 2014 Kosovo will also be used as the precedent that justified Crimea's annexation. See in this regard the discussion between Nico Krisch, Christian Marxsen and Anne Peters at the Blog of the European Journal of International Law. Anne Peters, 'Crimea: Does "The West Now Pay

> The European Council strongly condemns Russia's unilateral decision to recognise the independence of Abkhazia and South Ossetia. That decision is unacceptable and the European Council calls on other States not to recognise this proclaimed independence and asks the Commission to examine the practical consequences to be drawn. It recalls that a peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity recognised by international law, the Final Act of the Helsinki Conference on Security and Cooperation in Europe and United Nations Security Council resolutions. (…)
>
> EU Member States can have whatever foreign policy they want, 'so long as the fundamental principles of respect for sovereignty, territorial integrity and the independence of States are respected.[222]

Virtually all EU declarations on these two conflicts (before and after the 2008 war) have emphasized the non-negotiable principle of Georgia's sovereignty and territorial integrity.[223] Besides, the EU has used extreme caution in avoiding official contact with secessionist authorities.[224]

As has been said, when it comes to high-politics issues that could imply confrontation with Russia, EU institutions have kept an extremely low profile and intergovernmentalism has prevailed.[225] Germany, Italy and the UK have emphasized the

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the Price for Kosovo?' (*Blog of the European Journal of International Law*, 22 April 2014 <http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/> accessed 11 August 2015.

[222] Extraordinary European Council 1 September 2008. Presidency Conclusions. Available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/102545.pdf> accessed 11 August 2015.

[223] The following extracts as examples: 'The European Union reiterates its full support for the territorial integrity of Georgia and emphasises that it does not recognise the legitimacy of the so-called 'parliamentary elections' held in Abkhazia, Georgia, on 2 March 2002.' Declaration of the Presidency on behalf of the EU concerning the recent 'parliamentary elections' in Abkhazia, Georgia 12 March 2002. Available at <http://europa.eu/rapid/press-release_PESC-02-30_en.htm> accessed on 11 August 2015; 'The Council reiterated the European Union's serious concern about the recent series of events that have raised tensions between Georgia and the Russian Federation. In this context, the Council reaffirmed its full commitment to the principles of the sovereignty, independence and territorial integrity of Georgia within its internationally recognised borders, as most recently reaffirmed in the UNSC Resolution 1808 of 15 April 2008.' Council of the European Union 26 May 2008. Council Conclusions on Georgia. Available at <http://eeas.europa.eu/delegations/georgia/documents/eu_georgia/26may2008_en.pdf> accessed 11 August 2015; 'The EU considers this visit as incompatible with the principle of territorial integrity and is concerned about its effects on the international efforts to stabilise the region. The EU reiterates its support for Georgia's sovereignty and territorial integrity.' Declaration by the Presidency on behalf of the European Union on Russian President Medvedev's visit to the Georgian region of South Ossetia 16 July 2009. Available at <http://eeas.europa.eu/delegations/georgia/documents/eu_georgia/16july2009_en.pdf> accessed 2011 August 2015.

[224] Tocci (n 47) 142. This also means that 'the scope to influence them through dialogue and persuasion has been virtually nil.' ibid 147

[225] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 91.

importance of not bothering Russia in its backyard,[226] with the consequence that EU involvement has been limited.[227] Unlike in the case of Transnitria and Moldova, the strategy of making Georgia attractive was almost non-existent: a richer Georgia would not alter the situation. These two conflicts have deeper ethnic roots, greater Russian implication and more resentment among South Ossetia and Abhjazia inhabitants.[228] Like in the case of Transnitria, the EU seems inflexible in its non-recognition policy.

Nagorno-Karabakh (Azerbaijan)

Nagorno-Karabakh is an enclave between Armenia and Azerbaijan. It was an autonomous region of the Soviet Azerbaijan, where Azeris, Muslims, are the predominant ethnic group. In contrast, Nagorno is inhabited mainly by ethnic Armenians, Christians. In February 1988, they voted to leave Azerbaijani Soviet Socialist Republic and join the Armenian Soviet Socialist Republic. That provoked an ethnic conflict that led to mass expulsions of Azeris from Armenia and Armenians from Azerbaijan. The conflict created hundreds of thousands of refugees and internally-displaced persons. In December 1991, the conflict over Nagorno became an inter-state war.[229] A full scale war took place between 1992 and 1994. The number of casualties was over 20,000 deaths and ended with a military victory of Armenia and a 1994 cease-fire agreement.[230] Azerbaijans claim that Nagorno was unlawfully occupied by Armenia, violating international law. Today there is no doubt that Nagorno's survival depends on the support given by Armenia.[231] In 2006,

[226] Tocci (n 47) 128. For Keukeleire and Delreux not to undermine the relationship with Russia is also the reason that explains the EU poor engagement record in conflict resolution in the eastern neighbourhood. Keukeleire and Delreux (n 149) 261.
[227] Tocci (n 47) 144. In fact, '[t]he EU's common foreign and security policy in the South Caucasus is neither sufficiently common nor sufficiently clear to be perceived in the region as being a policy.' ibid 149
[228] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 92.
[229] Details of the historical developments of the conflict to be found in Alec Rasizade, 'Azerbaijan's prospects in Nagorno-Karabakh' (2011) 13 (2) Journal of Balkan and Near Eastern Studies 215.
[230] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 97.
[231] '[T]he Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the 'NKR', that the two entities are highly integrated in virtually all important

the EU negotiated with both Azerbaijan and Armenia their ENP[232] Action Plans[233]. The EU tried to keep the negotiations as technical and depoliticized as possible.[234] However, the second paragraph of the EU-Azerbaijan Action Plan reads as follows:

> The European Neighbourhood Policy of the European Union sets ambitious objectives based on mutual commitments of the EU and its Member States and Azerbaijan to common values, including the respect of and support for the sovereignty, territorial integrity and inviolability of internationally recognised borders of each other and compliance to international and European norms and principles as well as support for effective implementation of political, economic and institutional reforms.[235]

Despite the abovementioned statement and in line with the EU position in neighbouring secessionist conflicts, EU engagement is almost non-existent. In this post-Soviet frozen conflict, there is no direct confrontation with Russia, (as in the cases of Transnitria and particularly South Ossetia and Abkhazia), but it lies in the high politics domain, where EU involvement (with risk aversion) is always more problematic.[236] Besides, Nagorno is located in an area geographically far from the EU and it is a conflict between two (already) recognized States, Armenia and Azerbaijan, each having its own partnership with the EU. That is why the EU has tried to keep a neutral and low-profile position.[237] Furthermore, unlike Moldova, Azerbaijan prefers not to have international presence on the zone. Azerbaijan fears that a greater EU involvement would legitimize the

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matters and that this situation persists to this day. In other words, the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh…' *Chiragov and others v. Armenia* App no. 13216/05 (ECtHR, 16 June 2015) para. 186.

[232] The ENP was developed in the context of the 2004 Eastern enlargement. From the point of view of the EU it can be seen as an alternative to EU membership, as a way to avoid further enlargements. The ENP includes Moldova, Ukraine and Belarus, three Caucasian republics (Armenia, Georgia and Azerbaijan), the Middle East (Israel, Jordan, Lebanon, the Palestinian territory and Syria) and Northern Africa (Morocco, Algeria, Egypt, and Tunisia.). Dimitrovova (n 212) 250.

[233] The ENP has been translated into specific Action Plans negotiated with some of the ENP countries that focuses on strengthening democracy, good governance, the Rule of Law, human rights, economic modernization and liberalization. Keukeleire and Delreux (n 149) 252.

[234] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 102.

[235] Details to be found at <http://eeas.europa.eu/enp/pdf/pdf/action_plans/azerbaijan_enp_ap_final_en.pdf> accessed 7 August 2015.

[236] Popescu, *EU Foreign Policy and post-soviet conflicts* (n 202) 101.

[237] ibid 99.

secessionist entity, since they have concluded that the international peacekeeping force presence was a factor that facilitated Kosovo's independence.[238] Thus, there is almost no participation of the EU in the international community mediation efforts.[239]

Again, we find EU opposition to the independence of the secessionist entity despite the irreversibility of the situation due to the lack of consent of the Mother State.

Crimea (Ukraine)

Crimea has been a 'hot spot' since the collapse of the Soviet Union.[240] Crimea had a long history of independence, but since the 18th it belonged to the Russian Empire. It remained part of Russia until 1945, when it was ceded to Ukraine. After the fall of the Soviet Empire in 1991, it remained under Ukrainian jurisdiction,[241] with episodes of growing separatism.[242]

Crimea is an ethnically mixed peninsula in the south of Ukraine. Ethnic Russians (while comprising only 22% of Ukraine) represent the majority of the population (around 66%). There are significant Ukrainian and Crimean Tatar minorities. Crimea enjoyed the status of 'autonomous republic' within Ukraine. At the end of 2013, as a response to the government's abandoned plans to sign an EU trade agreement, Ukrainian protesters

[238] ibid 114.
[239] Peace negotiations have been held under the aegis of the OSCE Minsk Group (co-chaired by Russia, France and the US). As recent European Court of Human Rights' judgments have made clear (*Chiragov and Others v. Armenia* App no. 13216/05; *Sargsyan v. Azerbaijan* App no. 40167/06), settlement negotiations have repeatedly failed due to the uncompromising attitude of both Governments.
[240] In the 90s scholars already noted that Crimea was one of the most sensitive regions in South-Eastern Europe and that a joint sovereignty model could be a solution to avoid future tension. Philip Chase, 'Conflict in the Crimea: An examination of ethnic conflict under the contemporary model of sovereignty' (1994) 34 Columbia Journal of Transnational Law 219.
[241] After the fall of the Soviet Union, Ukraine inherited the third largest nuclear arsenal in the world and agreed to transfer it for reprocessing. In return, Ukraine wanted some security assurances, which lead to the 1994 Budapest Memorandum. The treaty, signed by Ukraine, the US, the UK and (ironically) Russia required that the signatories 'respect the independence and sovereignty and the existing borders of Ukraine' and 'refrain from the threat or use of force against the territorial integrity or political independence of Ukraine.' Available at <http://www.cfr.org/nonproliferation-arms-control-and-disarmament/budapest-memorandums-security-assurances-1994/p32484> accessed 12 August 2015.
[242] Susan Stewart, 'Autonomy as a mechanism for Conflict Regulation? The Case of Crimea' (2001) 7 (4) Nationalism and Ethnic Politics 113, 118.

began to gather at the Maidan square in central Kiev. In the context of a deep division between East (pro-Russian territories) and West (pro-European regions), in early 2014 President Yanukovych and opposition leaders reached an agreement to end the crisis (which included early elections). The day after the agreement was reached, Yanukovych left Kiev and taking advantage of this absence, the opposition occupied his official residency and the Parliament resolved that he had abdicated. Yanukovych resurfaced a few days later in Russia and held a press conference decrying the coup. Meanwhile, Russian troops emerged in Crimea and the city of Sebastopol. Russia alleged that their forces were there to protect Russian military assets and to avoid the humanitarian crisis (or more precisely, threats against Russian minority groups).[243] However, international NGO's did not find evidence of such risk.[244] The Crimean regional parliament voted on March 6 to hold a referendum ten days later on the region's secession from Ukraine and possible reunification with Russia.[245] Putin lauded the referendum as an act of self-determination, which was in line with the precedent set by Kosovo. Legally speaking, it must be underlined that the referendum was inconsistent with the Ukrainian Constitution, which makes clear that any change in Ukraine's borders has to be decided by all of Ukraine. This was the position of the Constitutional Court of Ukraine[246] and was later

[243] An account of the events to be found at Stefan Kirchner, 'Crimea's declaration of independence and the subsequent annexation by Russia under international law' (2015) 18 Gonzaga Journal of International Law 1.

[244] J. Paul Goode and Marlene Laruelle, 'Putin, Crimea and the legitimacy trap' (*OpenDemocracy*, 13 March 2014) <https://www.opendemocracy.net/od-russia/j-paul-goode-and-marlene-laruelle/putin-crimea-and-legitimacy-trap-nationalism> accessed on August 11, 2015.

[245] According to the Resolution passed, the voters were given two options: '1) Do you support the reunification of the Crimea with Russia as a subject of the Russian Federation? 2) Do you support the restoration of the Constitution of the Republic of Crimea as of 1992 and the status of the Crimea as a part of Ukraine?'

[246] In effect, on March 14, 2014 the Constitutional Court of Ukraine declared unconstitutional The Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 1702-6/14 'On holding of the all-Crimean referendum' 6 March 2014. Available at <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu> accessed on 11 August 2015.

confirmed by an Opinion of the Venice Commission.[247] According to the data released, the turnout was high (around 82%) and almost 96% voted in favour of reuniting with Russia.[248] On March 17 Russia recognized Crimea as an independent State, despite strong opposition from Ukraine.[249] On March 18 Russia and the Republic of Crimea signed an accession agreement. Crimea is now *de facto* part of Russia. This process received immediate condemnation from the EU (and the US[250]). In effect, on 16 March 2014 the European Union released a Joint statement on Crimea by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Durao Barroso declaring that:

> The European Union considers the holding of the referendum on the future status of the territory of Ukraine as contrary to the Ukrainian Constitution and international law. The referendum is illegal and illegitimate and its outcome will not be recognised.[251]

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[247] Venice Commission, 'Opinion on whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles', CDL-AD(2014)002, para. 15 'It is therefore clear that the Ukrainian Constitution prohibits any local referendum which would alter the territory of Ukraine and that the decision to call a local referendum in Crimea is not covered by the authority devolved to the authorities of the Autonomous Republic of Crimea by virtue of Article 138 of the Ukrainian Constitution.' The Opinion continues as follows: 'If the Constitution of Ukraine does not allow a referendum on secession, this does not in any wat contradict European constitutional standards. Rather, it is typical for constitutions of Council of Europe member states not to allow secession. (…) The decision of the Ukrainian constituent power not to grant a right to secession can therefore not be criticised on the basis of European constitutional standards.' Paras 17 and 19.

[248] 'Referendum in Crimea: more than 95% voted for joining Russia - official results' *Sputnik News* (Moscow, 17 March 2014) <http://sputniknews.com/voiceofrussia/news/2014_03_17/Referendum-in-Crimea-more-than-95-voted-for-joining-Russia-official-results-4575/> accessed 12 August 2015. A Pew survey taken in Crimea in April 2014, a month later, reported that 'just 12% [Crimeans] say Ukraine should remain united, compared with 54% who say regions that want to leave should be allowed to secede, while 34% say they either don't know or do not want to offer an opinion.' Furthermore, 91% of the population of Crimea considered that the referendum process was 'fair' and therefore the government in Kiev should recognize the results. Pew Research Center, 'Chapter 1.Ukraine: Desire for Unity Amid Worries about Political Leadership, Ethnic Conflict' 8 May 2004 <http://www.pewglobal.org/2014/05/08/chapter-1-ukraine-desire-for-unity-amid-worries-about-political-leadership-ethnic-conflict/> accessed 11 August 2015.

[249] On 18 March 2015, the Ministry for Foreign Affairs of Ukraine published a statement whereby he expressed its protest. Available at <http://www.kmu.gov.ua/control/en/publish/article?art_id=247113421> accessed 12 August 2015.

[250] On 16 March 2014, the Press Secretary of the White House delivered a statement rejecting the referendum. Available at <https://www.whitehouse.gov/the-press-office/2014/03/16/statement-press-secretary-ukraine> accessed 12 August 2015.

[251] Joint statement on Crimea by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Durao Barroso, 16 March 2014. Available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141566.pdf> accessed 12 august 2015.

As a response, the Ukrainian government reinforced ties with the EU by signing an association agreement.[252] The European Union position has not varied. Note the Declaration by the High Representative on behalf of the EU on Crimea dated 16 March 2015:

> One year on from the holding of the illegal and illegitimate 'referendum' and the subsequent illegal annexation of Crimea and Sevastopol by the Russian Federation, the European Union remains firmly committed to Ukraine's sovereignty and territorial integrity. The European Union does not recognise and continues to condemn this act of violation of international law. The illegal annexation of Crimea and Sevastopol by the Russian Federation is also a direct challenge to international security, with grave implications for the international legal order that protects the unity and sovereignty of all states. The European Union will remain committed to fully implement its non-recognition policy, including through restrictive measures.[253]

On 18 June, 2018, the Council extended economic sanctions on Crimea and its port city of Sevastopol until June 23, 2019, since it 'does not recognise and continues to condemn the illegal annexation of Crimea and Sevastopol by the Russian Federation and will remain committed to fully implementing its non-recognition policy.' [254] It is still too soon to check whether the EU will maintain restrictive measures in the long term. What seems

[252] In effect, on June 27, 2014 the EU signed an association agreement with Ukraine (and with Moldova and Georgia). This opens the door to potential future accession. According to some analysts, the annexation of Crimea was precisely Putin's reaction to what he sees as the eastward expansion of both the EU and the NATO. To weaken Ukraine with an open territorial dispute in Crimea and with a separatist insurgency in the East, backed by Moscow, might imperil Ukraine future membership to any of these entities. For Russia being encircled by NATO or EU countries might seem a humiliating defeat. Besides, Putin's move in Crimea has also been seen as an attempt to restore Russia's greatness shoring up support at home. 'Vladimir Putin: The Rebuilding of 'Soviet' Russia' *BBC Magazine* (London, 28 March 2014) <http://www.bbc.com/news/magazine-26769481> accessed 11 August 2015; Lilia Shevtsova, 'Humiliation as a Toolf of Blackmail' (*Brookings*, 2 June 2015) <http://www.brookings.edu/research/opinions/2015/06/02-humilitation-tool-blackmail-russia-shevtsova> accessed 11 August 2015.

[253] Declaration by the High Representative on behalf of the EU on Crimea, 16 March 2015. Available at <http://www.consilium.europa.eu/en/press/press-releases/2015/03/16-declaration-high-representative-crimea/> accessed 10 August 2015.

[254] Council, 'Council Decision (CFSP) 2018/880 of 18 June 2018 amending Decision 2014/386/CFSP concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol' L 155/5 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018D0880> accessed 17 December 2018.

clear is that without a settlement between Ukraine and Crimea, the EU will not recognize Crimea as part of Russia.

All these conflicts confirm the classical EU opposition to unilateral independence and show the EU reluctance to challenge Russian interests.

Conclusions

As has been shown, each of the secessionist conflicts is unique in the sense that it has a very particular background and context. However, some general lessons can be drawn both from those conflicts where EU engagement has been key (e.g. Montenegro's independence), and from those where EU presence has been barely perceived (e.g. Transnitria, Nagorno-Karabakh).

With the exception of Kosovo (which will be addressed later), the EU has always opposed unilateral independence (e.g. Turkish Republic of Northern Cyprus, Transnitria, South Ossetia, Abkhazia, Nagorno-Karabakh, Crimea). Probably such opposition does not come from any particular feature of the EU as such, but derives from the traditional aversion of the international community to the creation of new States. In the case of Yugoslavia, at first EC Member States stood against the declarations of independence of Croatia and Slovenia because there was no agreement with Serbia, the dominant Republic within Yugoslavia. Only when the situation seemed irreversible (Yugoslavia was *de facto* disintegrating in the midst of civil wars), did they reach an agreement to recognize the new States.

The only case divergent from this pattern is Kosovo, where a majority of EU Member States have accepted the independence of the region without Serbia's acquiescence. In this case, it has been argued that the degree of repression from Serbia was the key factor to explain the recognition policy of the majority of EU Member States. In any event, as has been explained in this chapter, Kosovo cannot be identified as an

example of unilateral secession (like the above-mentioned conflicts), since its independence was enabled by foreign powers due, they alleged, to its unique circumstances of gross human rights violations.

In this sense, it could be argued that the EU's main criteria for recognizing a secessionist entity have been the approval of the nation State from which an entity is seceding. The case of the Baltic States is paradigmatic. Only when the Soviet opposition vanished, did the EC Member States welcome the Baltic 'restoration of sovereignty'. Montenegro is also a good example. The EU was at first reluctant, as usual when it comes to a change of frontier, but such reluctance turned into collaboration when it seemed clear that Serbs were willing to accept Montenegrin independence. Czechoslovakia, although not a secessionist process, also confirms this approach to the extent that EC Member States did not oppose the split, given that there was an agreement between the two Republics. The very same emphasis on the need for consensus is to be found in the cases of Greenland and the reunification of Germany.

Another important lesson from the cases reviewed is that the EU position has proved to be highly vulnerable to the national interests or priorities of EU Member States when dealing with secessionist issues. Note the case of Greece and Cyprus, where the EU accepted a radical change in its policy towards the conflict. Or the pressure exerted by Germany when the declarations of independence were made by Croatia and Slovenia. Not truly comparable episodes, but in the cases of Algeria and Greenland their 'representatives' among the rest of EU Member States were France and Denmark, whose voices were mainly listened to.

When touching upon high-politics (like territorial integrity and secession), intergovernmentalism prevails and preferences of EU Member States explain the patterns of EU policy making. In effect, the EU approach to secession is that of 'realpolitik'. That

is why the institutions playing a major role in dealing with these conflicts are the Council and the European Council, which in recent years has evolved into a key institution. In the case of Montenegro, when Javier Solana, the EU High Representative for Common Foreign and Security Policy, played a pivotal role, it should be noted that he was mandated to do so precisely by the European Council.

As a final note, for our purposes let us underline the relevance of the secession of Montenegro: it was the first time that the EU got so deeply involved in a secessionist conflict. What should be highlighted (apart from what has been said about Serbia's acquiescence) is that the EU required respect for the Rule of Law and for the democratic principle (imposing certain rules for the celebration of a referendum on independence). Thus, one could argue that EU policy has undergone evolution. If, at the early stages, EU institutions only demanded consensus and agreement between the sides involved in the conflict, in the recent cases of Montenegro and Crimea, the EU is emphasizing the need to respect the relevant constitutional legal orders. In other words, it seems, parallel also to the increasing constitutionalizing of the EU, that today norms constrain and shape foreign policy to a larger extent than in the past.

These conclusions can only be applied with caution to cases of secession within current EU Member States since most of these conflicts (with the exception of Algeria and Greenland) occurred beyond EU frontiers, not within. However, taking into account this warning, it could be argued that from a political point of view an episode like Montenegro's independence would be possible within the EU, but a unilateral secession (meaning by that without the consent of the affected EU Member State) is difficult to imagine. In sum, consensus or agreement and respect for the constitutional legal order of the parent State are the criteria developed by the EU institutions to recognize a secessionist entity. As has been said in the introduction, this chapter shows that the EU

already has a distinctive approach to secession in its external policies, which coincides with the one it should have (normatively speaking) in internal cases, as explained in chapter 4. The practical approach of this chapter shows that the legal analysis developed throughout the thesis is not only legally sound, but also politically feasible.

Conclusions

This thesis has dealt with the EU legal response to pro-independence movements throughout EU Member States. Statehood is an issue that transcends the current Catalan crisis in Spain and affects many other movements aimed at redrawing the map of Europe. We have tried to offer normative support for the position of EU institutions towards secession. Our intention has been to offer a legal reflection that goes beyond a case-specific approach and that can be of relevance to any EU Member State.

The first conclusion is that with regard to secession within EU Member States, there is no conflict between international law and EU law and that, therefore, international law does not constrain the EU's position. The customary right to self-determination, that might lead to secession, cannot be applied to regions within EU Member States, as long as they remain well-functioning democracies, although international law does not prohibit secession either. Therefore, (i) there is no international duty to promote secession throughout the EU and (ii) no obligation to reject, *prima facie*, all types of secession. In sum, the impact of international law is limited.

The second conclusion is that the criteria of consent and lawfulness when it comes to secession are to be found mainly in constitutional legal orders. While international law does not contain any guidance for secession within democracies, constitutional law does. As has been explained throughout the thesis, secessionist attempts are the most acute political crisis a State can endure, because they affect the integrity and continuity of the political subject that founds the State. That is why constitutional legal orders tend to be highly restrictive. It is in fact typical for the constitutions of the Council of Europe Member States not to allow secession or even the organization of self-determination

referendums, following the classic paradigm initiated by the US (e.g. Spain, Italy, Germany). The British and the Canadian positions constitute outstanding exceptions, as they do admit a right to negotiate. In any event, the common approach of all liberal constitutional democracies rejects a unilateral right to secede, since the democratic principle has to be tempered with other principles like the Rule of Law. In this sense, from a constitutional law standpoint unilateralism tends to be equated with unlawfulness.

The third conclusion is that there is no clear and explicit EU law provision regarding secession within EU Member States, no precedent either and the statements delivered so far by the EU institutions cannot be considered a fully articulated policy. Therefore, and despite some scholars taking a different view, it has been concluded that the EU does not have its own legality criteria for secession. This does not mean that the EU does not have its own approach to secession. The thesis propounded in the preceding pages is that the EU is obliged to respect the national identity and the fundamental constitutional structures of the Member States (according to Article 4(2) TEU), which necessarily includes unity or secession clauses (in a broad sense). EU law should therefore show a deferential attitude towards the constitutional legal orders of the Member States. Drawing on a pluralist reading of the relationship between EU law and national law, we conclude that what is unique about the EU is the constitutional tolerance it has to show towards EU Member States' provisions on secession. Accordingly, if domestic law considers that secession is 'unlawful', EU law should respect that position by not recognizing the statehood of the secessionist entity. In this regard, it has been concluded that the EU reaction to the Catalan crisis was in accordance with EU law. If, on the contrary, the domestic legal order has enabled the secessionist attempt, EU law should respect that outcome by recognizing the new entity as a sovereign State and enter into

good faith negotiations. This deferential attitude, though, has certain limits: when enforcing secession clauses, EU Member States will have to respect the values enshrined in Article 2 TEU. If they do not, EU institutions will have to trigger the mechanism envisaged in Article 7 TEU.

The fourth conclusion relates to the life of a new State emerging out of secession within the EU. Despite the hypothetical character of the situation and that there is no clear EU law guidance (i.e., no precedent of successful secession), it has been argued that seceded territories cannot be considered continuing States of the rump State. Therefore, such entities will have to ask for EU membership. EU law can be very pragmatic and history has proven that law is not a hurdle when there is enough political will. However, as has been also pointed out throughout this thesis, the EU is a community based on the Rule of Law, and cannot avoid the legal discipline of certain procedures. Thus, given the *lex specialis* argument, an accession procedure requires compliance with Article 49 TEU, which demands, inter alia, unanimous agreement of all EU Member States. Having said that, and given the political pragmatism of the EU, even this procedure and the negotiations can be accelerated in order to avoid major disruption to the internal market. If as a result of secession, the rump State dispossesses from its nationality all those residents who opt for the nationality of the new State, there is no right to maintain EU citizenship. Nor does EU law force the rump State to offer a dual nationality regime to the inhabitants of the seceded entity. Many of the final results will, perforce, depend on negotiations. Thus, the attitude of those involved in the negotiations, the rump State, the seceded entity and the other EU Member States, will be key to determine the solutions adopted.

The fifth conclusion refers to the fact that the EU has a distinctive approach to secession in its external policy. In effect, EU institutions' practice in past relevant territorial changes within the EU Member States and secession in neighbouring countries coincides with the main claim developed in this thesis, namely, that the EU rejects unilateralism and takes into account the legal order of the parent State affected. Thus, we have seen that with the exception of the unique case of Kosovo (that included gross human rights violations) the EU has always opposed unilateral independence (e.g. Turkish Republic of Northern Cyprus, Transnitria, South Ossetia, Abkhazia, Nagorno-Karabakh, Crimea). One of the EU's main criteria for recognizing a secessionist entity has been the approval of the nation State from which an entity is seceding, i.e. consensus. Czechoslovakia, although not a secessionist process, confirms this approach to the extent that EC Member states did not oppose the split, given that there was an agreement between the two Republics. In the case of Montenegro, where the EU got deeply involved in a secessionist conflict for the first time, the EU additionally required respect for the Rule of Law and for the democratic principle (imposing certain rules for the celebration of a referendum on independence).

This means that ultimately the EU has not only asked for consensus and agreement (like in the case of the dissolution of Czechoslovakia), but it has also requested respect for the constitutional legal order. Thus, one could argue that EU policy has undergone evolution. If, at the early stages, EU institutions only demanded consensus and agreement between the sides involved in the conflict, in the recent cases of Montenegro and Crimea, the EU is now emphasizing the need to respect the relevant constitutional legal orders. In other words, it seems, parallel also to the increasing constitutionalizing of the EU, that norms constrain and shape foreign policy to a larger extent than they used to do in the past. In sum, consensus or agreement and respect for the constitutional legal order of the

parent State are the criteria developed by the EU institutions to recognize a secessionist entity. The practical approach of this chapter shows that the legal analysis developed throughout the thesis is not only legally sound, but also politically feasible. The final remark is as follows: one can assume a fierce opposition towards pro-independence movements that breach the legal constitutional order of EU Member States and that are conducted without the agreement of the EU Member State affected (as the Catalan crisis has proved). However, the position of the EU in a consensual and lawful pro-independence movement (like the Scottish case) would not be so obvious.

Finally, this thesis has pointed out that the EU cannot fully develop its constitutional ambitions, since when tackling issues that touch citizens' sense of national constitutional identity, the ultimate decision relies on Member States. The secession debate might be proving that scepticism about EU constitutionalism is right, for it has certain limits. This thesis has highlighted one of these limits. The pluralist legal order established in the European milieu establishes obligations (Article 4 (2) TEU) to respect the constitutional identity of EU Member States, to show a deferential and tolerant attitude. But, at the same time, it is also true that the EU constrains the behaviour of the Member States: EU Member State are allowed to have different national constitutional responses to secession, but only provided such responses and its subsequent application and enforcement respect the values included in Article 2 TEU. The analysis of secession and EU law carried out in this thesis shows that a legal pluralist reading is the most appropriate approach to review legally the phenomenon of secession in a territory where three different legal orders interact.

Appendix

Questions of European Parliament Members to the European Commission

Question for written answer by Eluned Morgan (PSE) to the Commission, 12 February 2004, P-0524/04

Oral question by Frank Vanhecke (ITS) to the Commission, 10 January 2007, H-0011/07

Question for written answer by Roger Helmer (NI) to the Commission, 1 February 2007, E-0314/07

Question for written answer by Eluned Morgan (PSE) to the Commission, 22 March 2007, P-1625/07

Question for written answer by Robert Kilroy-Silk (NI) to the Commission, 16 April 2007, E-2021/07

Question for written answer by Raul Romeva (Verts/ALE), Oriol Junqueras (Verts/ALE) and Ramon Tremosa (ALDE) to the Commission, 26 July 2010, E-6073/2010

Question for written answer by George Lyon (ALDE) to the Commission, 20 October 2011, P-009664/2011

Question for written answer by Ramon Tremosa (ALDE) to the Commission, 23 January 2012, E-000395/2012

Question for written answer by Izaskun Bilbao (ALDE), Ramon Tremosa (ALDE), Salvador Sedo (PPE) and Raul Romeva (Verts/ALE) to the Commission, 12 September 2012, E-008133/2012

Question for written answer by Ana Miranda (Verts/ALE), Ramon Tremosa (ALDE) and Raul Romeva (Verts/ALE) to the Commission, 21 September 2012, E-008324/2012

Question for written answer by Francisco Sosa Wagner (NI) to the Commission, 28 September 2012, E-008752/2012

Question for written answer by Auke Zijlstra (NI) to the Commission, 8 October 2012, E-009009/2012

Question for written answer by David Martin (S&D) to the Commission, 25 October 2012, P-009756/2012

Question for written answer by Gerard Batten (EFD) to the Commission, 29 October 2012, P-009862/2012

Question for written answer by Ramon Tremosa (ALDE) to the Commission, 27 September 2013, E-011023/2013

Question for written answer by Francisco Sosa Wagner (NI) to the Commission, 27 January 2014, E-000796/2014

Question for written answer by George Lyon (ALDE) to the Commission, 14 February 2014, P-001676/2014

Question for written answer by Mara Bizzotto (EFD) to the Commission, 21 February 2014, E-002111/2014

Question for written answer by Izaskun Bilbao (ALDE) to the Commission, 24 September 2014, E-007129/2014

Question for written answer by José Blanco (S&D) to the Commission, 11 November 2014, E-009058/2014

Question for written answer by Santiago Fisas (PPE) to the Commission, 21 July 2015, E-011776/2015

Question for written answer by Gerolf Annemans (ENF) to the Commission, 9 February 2016, P-001148/2016

Question for written answer by Beatriz Becerra (ALDE) to the Commission, 23 May 2017, E-003486-17

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