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EUROPEAN UNION, SECESSION AND CUSTOMARY INTERNATIONAL LAW**

SUMMARY: 1. Introduction. – 2. Secession in International Law and Customary International Law. – 3. Customary International Law as a Source of EU Law. – 4. Secession in EU Law and applicable of Customary International Law. – 5. Secession in practice. – 5.1. Kosovo. – 5.2 Crimea. – 5.3. Scotland. – 5.4. Catalonia. – 6. Final Remarks.

1. *Introduction*

The aim of this paper is to analyse the case of secession of a part of the territory of an EU Member State and the applicable principles of Customary International Law. First, mention should be made of the complexity of the phenomenon of secession, which is not regulated by International Law or, therefore, by European Law. However, this legal concept has traditionally been condemned in International Law as being in violation of the essential principle of the territorial integrity of States.

Recent political movements in European territories such as Catalonia in Spain and Scotland in the United Kingdom have revived the question of secession, raising the need to identify the applicable principles recognised as part of General International Law and the regulation of secession in International and European Law alike. Hence, it is essential to examine International Law in order to establish the scope and application of the principles and thus determine the legal feasibility of any secession process. It must also be borne in mind that the possible consequences of a secession under European Law will in turn affect the principles of Customary Law, since it would alter the parent State's position on the international stage. In this respect, recent cases on the European Continent may shed light on the applicable legislation. The aim of the conclusions is to underscore the legal

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feasibility or not of a process of secession in light of the current applicable principles of Customary International Law.

2. *Secession in International Law and Customary International Law*

As one of the forms of succession of States, secession under International Law refers strictly to the separation and independence of a part of the territory of a sovereign State[1]. There are three possible routes to such secession: first, an agreement between the parent State and the newly created State, being applicable in this case the Vienna Convention of 23 August 1978 *on the Succession of States in respect of treaties* and the Vienna Convention of 8 April 1983 *on the Succession of States in respect of State Property, Archives and Debts*[2]. The second option is secession through the use of armed force, which is totally prohibited under International Law. The third and last option is secession by peaceful means but through a Unilateral Declaration of Independence. In addition, except in the case of the use of armed force, such independence would only be rendered effective by achieving territorial control and receiving recognition from other States, especially from the parent State indicating that it agrees to lose a part of its territory[3]. This latter element is of crucial importance, since International Law has always defended the integrity of States, thus maintaining the opposite position to the parent State that accepts the loss of a part of its territory[4].

In my opinion, it is the third option that of unilateral secession in order to create a new State, which has aroused most controversy in recent times, with cases such as those of Kosovo, Crimea and more recently, Catalonia. International Law does not appear to have clear rules in this regard, except when secession occurs in breach of the basic principles of coexistence or, as I argue in this chapter, in violation of the principles of Customary International Law such as Territorial Integrity and the Inviolability of Borders.

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[1] J. DUGARD, *The Secession of States and Their Recognition in the Wake of Kosovo*, in *Recueil des Cours,* 2011, vol 357, pp. 2-222, p. 181. Also, A. TANCREDI, *La secessione nel diritto internazionale*, Padova, 2001; D. TOSI, *Secessione e costituzione tra prassi e teoria,* Napoli, 2007.

[2] The Vienna Convention of 1978 on Succession of States in respect of Treaties (1978 *I.L.M.* p. 1488) came into force in 1996, but was only ratified by 22 States. The EU States only included Slovenia, Slovakia, Estonia, the Czech Republic, Cyprus and Croatia. The Vienna Convention of 1983 (1983, *I.L.M.* p. 306) has not yet entered into force, and has only been ratified by seven States, including Croatia, Estonia and Slovenia.

[3] See M.P. ANDRES SAENZ DE SANTAMARIA, *Problemas actuales de la sucesión de Estados*, in *Cursos de Derecho Internacional de Vitoria-Gasteiz*, 1993, pp. 157-214; J. CRAWFORD, *The Creation of States in International Law*, Oxford, 1979 (2nd ed., 2006); P. DUMBERRY, D. TURP, *La succesion en matière de Traités et le cas de la séccession: du principe de la table rase à l'émergence d'une présomption de continuité des Traités*, in *Revue Belge de Droit International*, 2003, pp. 377-412; P. EISSEMANN, M. KOSKENNIEMI, *La succession d'États: la codification à l'éprueve des faits*, Académie de Droit International de La Haye, La Haye, 2000; *Encyclopedia of Public International Law*, Vol. IV, North-Holland, Amsterdam, 2000, pp. 354-359 ("Secession") and pp. 641-656 ("State succession") ; M. KOHEN (Ed.), *Secession. International Law Perspectives*, Cambridge, 2006; J.M. ORTEGA TEROL, *La sucesión de Estados en materia de bienes, archivos y deudas del Estado: la puesta a prueba de un ejercicio codificador*, in *Revista Española de Derecho Internacional*, 2002, vol. LIV, pp. 131-142; X. PONS RAFOLS, *Cataluña: Derecho a decidir y Derecho internacional*, Madrid, 2015, pp. 157-216.

[4] In fact, no State that has emerged from the decolonisation process has been accepted by the United Nations without the agreement of the original State. The only cases of secession have been Pakistan (1947), Singapore (1965) and Bangladesh (1971). See J. CRAWFORD, *State practice and International Law in relation to secession,* in *British Yearbook of International Law*, 1999, vol. 69, pp. 85-117.

In accordance with the general theory of International Law, it is accepted by legal opinion that the resolutions of the General Assembly may have a declaratory, a crystallising, and even a generating effect, contributing to the formation of Customary Law whenever they concern widely agreed and accepted rights. In this respect, the principle of the Self-determination of Peoples, recognised in a series of resolutions of the General Assembly of the United Nations and considered a principle of Customary Law[5], has made a significant contribution to the process of creating new States. This principle is also recognised in what is known as the *Magna Carta of decolonisation*, contained in General Assembly Resolutions 1514 (XV) and 1541 (XV)[6]. The former states that colonial peoples have the right to Self-determination and defines colonial countries as territories that are geographically separate from, and ethnically or culturally different to, the country that administers them. Hence, it is already possible to state that cases such as Crimea, Scotland or Catalonia are not colonial countries but rather regions of sovereign States with different internal characteristics, but in no instance with a presumed right of Self-determination.

Meanwhile, Resolution 1541 (XV), adopted one day later, specifies other modes of exercising Self-determination that do not necessarily entail independence, and always require the agreement of the parent State. Thus, it envisages concepts such as association and integration with an independent State.

In complement, Resolution 2625 (XXV), the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, of 24 October 1970[7], states the following:

«By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic,

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[5] This has been recognised by the International Court of Justice. See *Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* para. 110; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* para. 52; *East Timor (Portugal* v. *Australia), Judgement, I.C.J. Reports 1995,* para. 31. See also *General Assembly Resolution A/RES/73/160, Universal realization of the right of peoples to self-determination, of 17 December 2019*. See, J. SOROETA, *La Corte Internacional de Justicia y la descolonización*, Madrid, 2020.

[6] *General Assembly Resolution 1514 (XV), Declaration on the granting of independence to colonial countries and peoples, of 14th December 1960; General Assembly Resolution 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e) of the Charter, of 15th December 1960. See also, General Assembly Resolution 1654 (XVI), The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples, of 27th November 1961.*The position of the United States in the case of *Chagos Archipelago* before the ICJ (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion of 25 February 2019*)) is interesting, since it considers that before adoption of Resolution 1514, there was no consolidated Customary International Law on the right to self-determination. See, Written Comments of the United States of America on the Written Replies of other participants to the question put by Judge Cançado Trindade at the end of the hearing held on 5 September 2018. Also, *Advisory Opinion*, para. 142, 148 and 152. See, R. MCCORQUODALE, J. ROBENSON, N. PEART, *Territorial Integrity and Consent in the Chagos Advisory Opinion*, in *The International and Comparative Law Quarterly,* vol. 69 (2020), pp. 221-238; PIGRAU SOLÉ, *El caso de la Isla de Diego García: Territorio sin Derecho Internacional, personas sin derechos*, in *Revista Electrónica de Estudios Internacionales*, 2016, nº 31; F. SALERNO, *L´obbligo di non riconoscimento di situazioni territoriali illegittime dopo il parere della Corte internazionale di giustizia sulle Isole Chagos*, in *Rivista di Diritto Internazionale*, 2019, vol. 102, pp. 729-752. Also, J. TRINIDAD, *Self-determination in disputed colonial territories*, Cambridge, 2018.

[7] On this Resolution as Customary Law, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgement. I.C.J. Reports 1986,* para. 188; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* para. 226; *Legal Consequences of the Construction of a Wal1 in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004*, para. 88.

social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter».

This latter resolution reflects the principle of equal rights and Self-determination of Peoples, extending Self-determination beyond colonial countries to other peoples constituted into States or incorporated into a State[8].

However, I believe that this right of Self-determination has a clear exception in cases where there is an attempt to disrupt territorial integrity and national unity —or rather the inviolability of borders— by violent means. Thus, Resolution 1514 (XV) prohibits the right of general secession, noting that:

«Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations».

In addition, Resolution 2625 (XXV), states:

«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».

This safeguard clause can be interpreted in several different ways[9]. For example, it can be used by States to protect their territorial integrity and prohibit the possibility of secession of a part of their territory. Conversely, the clause could equally lead to the possibility of a legitimate secession in the case of non-respect for fundamental rights, thus permitting independence.

In line with this second interpretation, it could be argued that independence would be justified when a national minority has been discriminated against in terms of political participation in the State or has been persecuted for reasons of race, creed or colour — arguments that seek parallels in Kosovo[10]. This is what has been called "remedial secession"[11]. However, this situation could only ever give rise to *autonomy* within the State,

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[8] According to Garzón Clariana: "El texto citado permite una afirmación de capital importancia: *el derecho a la libre determinación incluye a todos los pueblos*, y no sólo a los pueblos coloniales" [An extremely important conclusion can be drawn from the cited text: *the right of self-determination applies to all peoples, not just colonial countries*]. See G. GARZÓN CLARIANA, *Los propósitos y principios de las Naciones Unidas*, in M. DÍEZ DE VELASCO, *Las Organizaciones Internacionales*, 16th ed., Madrid, 2010, p. 182. Also, J. SOROETA, *La Corte International de Justicia…cit.*, pp. 20-30.

[9] See C. LÓPEZ JURADO ROMERO DE LA CRUZ, *La secesión de territorios no coloniales y el soberanismo catalán*, in *Revista Electrónica de Estudios Internacionales*, 2013, nº 26, pp. 1-22, on pp. 3-17; X. PONS RAFOLS, *Cataluña…cit.,* pp. 144-154.

[10] See, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, para. 82. Also Written Comments of Germany, Netherlands and United Kingdom in this case.

[11] J. SOROETA LICERAS, *La opinión consultiva de la Corte Internacional de Justicia sobre Kosovo de 22 de julio de 2010: Una interpretación judicial sui generis, para un caso que no lo es. Aplicabilidad de la cláusula de salvaguardia de la Resolución 2625 (XXV) o de la "secesión como remedio",* in *Revista Electrónica de Estudios Internacionales*, 2013, nº 25, pp. 20-23. See also L. BUCCHEIT, *Secession: The Legitimacy of Self-determination,* New Haven, 1978, p. 94; TH. CRISTAKIS, *Le droit à l'autodétermination en dehors des situations de décolonisation,* Paris, 1989, p. 192; M. GJIDARA, *Cadres juridiques été règles applicables aux poblèmes européens de minorités*, in *Annuaire Français de Droit International,* vol. 37 (1991), pp. 365 ss.; H. HANNUM, *Rethinking self-determination,* in *Virginia Journal of International Law,* vol. 34 (1993), p. 11; R. MCCORQUODALE, *Self-determination: a human rights approach*, in *International and Comparative Law Quarterly,* vol. 43

which would imply access to political participation and representation in the organs of power, but under no circumstances to *independence* as if the minority were a colonial people. In other words, the international legal system would recognise the right of the national minority to participate in political life and to be treated equally, but in no instance would this lead to total independence from the State to which the minority belongs. In short, the concept to apply would be "autonomy", not "independence"[12], in accordance with the principle of territorial integrity.

Hence, it appears that there is an accepted difference between the recognised rights of colonial peoples —the right of self-determination, among others— and those of minorities, limited to their right to respect for their different characteristics and at most, internal autonomy[13].

Regardless, concerning the independence of Kosovo, it is important to note that the International Court of Justice established that "the scope of the principle of territorial integrity is confined to the sphere of relations between States"[14]. In my opinion, a flexible interpretation should be given to this statement, as argued by some States in the case of *Chagos Archipelago*[15]. Hence, the territorial integrity of the parent State should be respected against secessionist movements in non-colonial territories, including before third States, and without the existence of a prior agreement between the affected parties. This would, for example, be the case of Crimea and Russian intervention.

However, it should always be borne in mind that there is also the possibility of an agreed process of secession by peaceful means, as indicated earlier. This implies the existence of an agreement between the parent State and the region that wishes to decide its own future. In such a case, International Law —as reflected in the International Court of Justice Advisory Opinion of 2010 on the independence of Kosovo— clearly takes its lead from internal legislation.

(1994), pp. 857 ss.; X. PONS RAFOLS, *Cataluña:…*, pp. 150-154 ; F. ROCH, *Réflexions sur l'évolution de la positivité du droit des peuples à disposer d'eux mêmes en dehors des situations de décolonisation*, in *Revue québécoise de droit international,* vol. 15.1 (2002), pp. 33-100; P. THOMBERRY, *Self-determination, minorities, human rights,* in *International and Comparative Law Quarterly,* vol. 38 (1989), pp. 868 ss.; CH. TOMUSCHAT, *Self-determination in a post-colonial world*, in CH. TOMUSCHAT (Ed.), *Modern Law of Self-determination*, Dordrecht, 1998, p. 7. According to J. CRAWFORD, *The Creation of States... cit.*, p. 119, "*at least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State".* Similarly, J.A. CARRILLO SALCEDO, *Sobre el pretendido derecho a decidir en Derecho internacional contemporáneo,* in *El Cronista del Estado Social y Democrático de Derecho,* nº 33 (2012), pp. 20-22. According to Orihuela Calatayud "General International Law has not yet completed the path to recognizing a right of remedial secession for peoples subjected to massive and systematic violations of human rights and IHL, incluiding the internal aspect of self-determination". See, E. ORIHUELA CALATAYUD, *Does a Right of Remedial Secession exist under International Law?*, in *Spanish Yearbook of International Law*, 2018, pp. 251-268, on p. 267. Finally, "Statement on the Lack of Foundation in International Law of the Independence Referendum in Catalonia", *Revista Española de Derecho Internacional*, 2018, nº 1, pp. 297-298.

[12] It would obviously be another question entirely if the State exercised the use of force against the minority to prevent the right of self-determination. This would entail the possibility of the latter receiving support and help from third parties.

[13] See G. ANDERSON, *Unilateral Non-Colonial Secession and Internal Self-Determination: a Right of Newly Seceded Peoples to Democracy*, in *Arizona Journal of International and Comparative Law*, 2017, vol. 34, pp. 1-63. Also, J. SOROETA LICERAS, *Current validity of the external dimension of the self-determination of peoples. Pending cases of decolonization*, in *Spanish Yearbook of International Law*, 2018, nº 22, pp. 131-164.

[14] Parr. 80. See, also Written Statements of United Kingdom (p. 5-8-5.11) and United States (pp. 11-15).

[15] See, Written Comments of Cyprus, 15 May 2018, and Written Statement of the Netherlands, 27 February 2018, (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion of 25 February 2019)).*

Therefore, at least in non-colonial territories, International Law seems to give precedence to the principle of the territorial integrity of the State over a process of self-determination, with its complex procedures and uncertain result.

Regarding this principle of territorial integrity and the inviolability of borders[16], the Helsinki Final Act of 1 August 1975, adopted by the then Conference on Security and Cooperation in Europe, now the Organisation for Security and Cooperation in Europe (OSCE), places special emphasis on respect for these principles as the cornerstone of world peace and stability. In addition, International Law opposes, among other things, changes in existing borders, as we have seen with Declaration 2625 (XXV) of the United Nations General Assembly. However, it could be argued that giving precedence to the protection of fundamental rights to territorial integrity implies a violation of the basic principle in International Law of not to intervene in matters within the domestic jurisdiction of any State (Article 2.7 of the Charter). Thus, in its *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* of 24 October 1995, the General Assembly expressly stated in paragraph 1.3 that the UN would:

«-Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the *territorial integrity* or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind»[17].

Similarly, the resolution adopted by the General Assembly on 27 March 2014 on the *Territorial Integrity of Ukraine*, based on Article 2 of the Charter and Resolution 2625 (XXV), stated that it:

«1. Affirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders; 2. Calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means»[18].

Under International Law, these texts prohibit secession in violation of international principles, except when the parent State does not respect the rights of minorities within the structures of the States, when a case might be made for internal independence — autonomy— but under no circumstances for external independence[19].

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[16] See J. MARTÍN PÉREZ DE NANCLARES, *Legal considerations regarding a hypothetical unilateral declaration of independence by Catalonia. A legally unfeasible political scenario*, in *Spanish Yearbook of International Law*, 2015, pp. 35-59, on pp. 44-49.

[17] General Assembly Resolution, A/RES/50/6, of 24 October 1995.

[18] General Assembly Resolution A/RES/68/262, of 27 Mars 2014.

[19] See Canada Supreme Court, Opinion about certain questions relating to the secession of Quebec, of 20.08.1998 (http://www.canlii.org/fr/ca/csc/doc/1998/1998canlii793/1998canlii793.pdf). See, P. ANDRÉS SAENZ DE SANTAMARÍA, *A right of all peoples: the internal dimension of self-determination and its relationship with democracy,* in *Spanish Yearbook of International Law*, 2018, nº 22, 165-179.

In sum, the separation of a territory as a model of the principle of self-determination is only applicable to colonial countries that have been annexed through conquest, foreign domination or occupation (e.g. the Baltic countries after the Cold War) and peoples oppressed through massive and flagrant violation of their rights (e.g. South Sudan or, according to some, Kosovo)[20]. In addition, irrespective of the above, this right must respect the Charter of the United Nations and the principles of International Law governing the matter, as well as the International Court of Justice case-law. Hence, I believe that aside from cases of decolonisation[21], the principles of territorial integrity and the inviolability of borders[22] would prevail over the principle of Self-determination of peoples, and thus should be considered principles of Customary Law that are widely accepted by the International Community[23].

Lastly, as regards the succession of States in respect of treaties, in other words successions agreed to by the parties and respecting International Law, the abovementioned Vienna Convention of 1978 would apply, together with the principles of Customary Law it cites[24]. Thus, the general rule would be that provided for in Article 34, namely automatic succession in continuity of the treaty with respect to the seceding territory that has created a new State[25]. However, the existence of a Customary Law is doubtful in the absence of consistent and repeated practice at international level[26], if only a few provisions have been declared to be of a customary nature[27] and the agreement has barely been ratified. Thus, practice indicates that the general rule tends to be the principle of *tabula rasa*, whereby the treaties of the parent State do not apply to the new State, which must negotiate them *ex novo*[28].

In this regard, it is interesting to note the first time that the question of succession of States was raised within the United Nations. This was in 1947 and concerned British India, an original member of the UN, which was being divided into two states: India and Pakistan. For the purposes of succession, the United Nations considered that India was the

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[20] J.A. CARRILLO SALCEDO, *Sobre el pretendido derecho a decidir…,loc. cit.*, pp. 20-22.

[21] Or even of what is termed "remedial secession". As we have seen, this would be the case of Kosovo, which was classified as a special case that would not create a precedent, following a very controversial Opinion of the International Court of Justice. See *Revista Española de Derecho Internacional,* 2011, vol. LXIII.

[22] *Encyclopedia of Public International Law*, vol. IV, North-Holland, Amsterdam, 2000, pp. 812-818 ("Territorial Integrity and Political Independence"). See also J. DUGARD, *The Secession of States and their Recognition...*, *loc. cit.,* pp. 98-121; C. JIMÉNEZ PIERNAS, *Los principios de soberanía e integridad territorial y de autodeterminación de los pueblos en la opinión consultiva sobre Kosovo: una oportunidad perdida*, in *Revista Española de Derecho Internacional*, 2011, vol. LXIII, pp. 29-54.

[23] See, Written Statement of the Netherlands, 27 February 2018, p. 3.16 (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion of 25 February 2019),* about the obligation under international law to respect the territorial integrity of a colonial territory.

[24] A. MANGAS MARTÍN, *La sucesión de Estados*, in M. DÍEZ DE VELASCO (Coord.), *Instituciones de Derecho Internacional Público*, 18th ed., Madrid, 2013, pp. 344-357.

[25] This has already been put into practice by States such as Germany, the Netherlands and the United States.

[26] See C. GUTIÉRREZ ESPADA, *Sobre la sucesión de Estados en materia de tratados*, in M. PÉREZ GONZÁLEZ (Coord.), *Hacia un nuevo orden internacional y europeo — Libro homenaje al profesor Diez de Velasco*, Madrid, 1993, pp. 361-375, on pp. 370-375. Also P. DUMBERRY, D. TURP, *La succession d'États en matière de traités et le cas de la secession: du principe de la table rase à l'émergence d'une présomption de continuité des traités*, in *Revue Belge de Droit International* 2003, vol. 36, pp. 377-412; P. EISSEMANN, M. KOSKENNIEMI (Eds.), *State Succession: Codification tested against the facts—La succession d'États: La codification à l'épreuve des faits*, Leiden-the Hague-Boston, 2000.

[27] *Gabcikovo-Nagymaros Project (Hungary l Slovakia), Judgement, 1. C. J. Reports 1997,* para. 120-124.

[28] See A. REMIRO BROTÓNS et alii, *Derecho Internacional*, Valencia, 2007, p. 492. Also K.G. BÜHLER, *State succession and membership in international organizations: legal theories versus political pragmatism*, The Hague, 2001.

legitimate successor and could immediately join the ranks of the United Nations, whereas Pakistan would need to submit a formal request for membership in accordance with the Charter. In this respect, the Sixth Committee of the United Nations established general directives to evaluate succession as a member of the UN in the following terms[29]:

«1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

2. That when a new State is created, whatever may be the territory and populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim that status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits».[30]

3. *Customary International Law as a Source of EU Law*

Although the position of Customary International Law as a source of European Law is widely analysed by doctrine, it will be useful here to identify the principles applicable to secession when it concerns a Member State of the EU.

The first references in Treaties to Customary and Conventional International Law appear in Articles 3.5 and 21 of the TEU. In reference to the objectives of the EU, the first of these indicates the following:

«5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter».

In addition, Article 21 of the TEU, on the objectives and principles of the EU's foreign policy, indicates:

«1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

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[29] C.K. CONNOLLY, *Independence in Europe: Secession, Sovereignty and the European Union*, in *Duke Journal of Comparative & International Law,* 2013, vol. 24, pp. 51-105, on p. 86.

[30] Chairman of the Sixth Committee, letter dated Oct. 8, 1947 from the Chairman addressed to the Chairman of the First Committee, U.N. Doc. A/C.1/212 (Oct. 11, 1947).

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2.The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

...

b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purpose and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to *external borders*...».

A cumulative analysis of both articles highlights a number of elements. First, there is clear reference to the principles of International Law and the Charter of the United Nations as higher values. Thus, in its origin, European law is based on International Conventional Law, and also recognises the precedence of the Charter of the United Nations in line with its Article 103[31]. Second, the principles of the Charter are contained in Article 2 of the same, especially those related to the sovereignty and equality of States, the prohibition of the use of force and not to intervene in matters within the domestic jurisdiction of any State. Third, all this is complemented by the Helsinki Final Act, the aims of the Charter of Paris and the protection of external borders. I believe this implies a clear reference to the territorial integrity of States and the inviolability of their borders, terms which form part of Customary International Law, as unanimously established in the two resolutions of the General Assembly cited previously. I refer here to Resolution 1514 (XV) of the General Assembly, the *Declaration on the granting of independence to colonial countries and peoples* of 14 December 1960, and more specifically to Resolution 2625 (XXV), the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* of 24 October 1970.

There is an abundance of European case-law on the recognition of Customary International Law as part of European law and as an instrument for applying principles regarding the interpretation of treaties, non-recognition of States and the succession of States and international organisations[32]. However, criticisms have been levelled at the

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[31] An obstacle has been found in the *Kadi* case before the former Court of First Instance. In fact, the Court has ignored the scope of Article 103 of the Charter, and given precedence to the constitutional principles of the Treaty over those established in the Charter of Nations. See *Judgment of 21 September 2005, Kadi / Council and Commission* (T-315/01, ECR 2005 p. II-3649) ECLI:EU:T:2005:332. This argument was clarified by the Court of Justice in the appeal, in the terms indicated by the Advocate General in its Conclusions, and from the case law of *Van Gend and Loos*. Hence, the Court has recognised the autonomy of the Community legal order. See the Opinion of AG M. Poiares Maduro, of 16 January 2008, and the Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation / Council and Commission* (C-402/05 P and C-415/05 P, ECR 2008 p. I-6351) ECLI:EU:C:2008:461.

[32] See, e.g., European Court of Justice, Judgment of 24 November 1992, *Anklagemindigheden/Poulsen and Diva Navigation* (C-286/90, ECR 1992 p. I-6019), (SVXIII/I-189 FIXIII/I-191) ECLI:EU:C:1992:453, para. 9; Judgment of 16 June 1998, *Racke/Hauptzollamt Mainz* (C-162/96, ECR 1998 p. I-3655) ECLI:EU:C:1998:293, para. 45-46; Judgment of 10 January 2006, *IATA and ELFAA* (C-344/04, ECR 2006 p. I-403) ECLI:EU:C:2006:10, para. 40; Judgment of 19 November 2009, *Commission/Finland* (C-118/07, ECR 2009 p. I-10889) ECLI:EU:C:2009:715, para. 39; Judgment of 7 June 2012, *Vinkov* (C-27/11) ECLI:EU:C:2012:326, para. 33. European General Court, Judgment of 22 January 1997, *Opel Austria/Council* (T-115/94, ECR 1997 p. II-39) ECLI:EU:T:1997:3, para. 90; Judgment of 14 June 2012, *Stichting Natuur en Milieu and Pesticide Action Network Europe/Commission* (T-338/08, Publié au Recueil numérique) ECLI:EU:T:2012:300, para. 72. Also, Opinion of AG M.P. Maduro, of 30 September 2009, *Rottmann (C-135/08, ECR 2010 p. I-1449)*

absence of a reference to Customary International Law in European primary law, which would have led to greater clarity in its application[33].

For example, in a 1997 resolution on the relationship between international law, European law and national constitutional law, the European Parliament indicated that it:

«14. Calls for a clear statement of the relationship between international law and European law to be written into the EC Treaty, in terms of the EC being equated with nation states, which means that international law is applicable not directly but only after it has been declared applicable by an internal legal act of the EC or after its substance has been transposed into EC legislation»[34].

Of particular importance regarding the subject addressed in this chapter is the opinion of Advocate-General M. Wathelet in the case of *Western Sahara Campaign UK*, who in reference to the Self-determination of peoples indicated its customary nature:

«114. In that regard, the International Court of Justice has established, in Article 1(2) of the United Nations Charter, the existence of a 'right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'.

115. The content of that right is stated in detail in Article 1 common to the ICESCR and the ICCPR and the details of its implementation are set out in a number of United Nations General Assembly resolutions, including Resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), to which the International Court of Justice has often referred.

[...]

119. Last, Resolution 2625 (XXV) contains the 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations'. Under the heading 'The principle of equal rights and self-determination of peoples', that resolution imposes on all States 'the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter [of the United Nations]'.

122. Last, in the general part, Resolution 2625 (XXV) declares that 'the principles of the Charter which are embodied in this Declaration constitute basic principles of

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ECLI:EU:C:2010:104, para. 29; Opinion of AG J. Kokott, of 28 January 2010, *TNT Express Nederland* (C-533/08, ECR 2010 p. I-4107) ECLI:EU:C:2010:243, para. 65; Opinion of AG J. Kokott of 6 October 2011, *Air Transport Association of America and others* (C-366/10, ECR 2011 p. I-13755) ECLI:EU:C:2011:864, paras. 115-116; Opinion of AG Y. Bot, of 6 Mars 2012, *Hungary / Slovakia* (C-364/10) ECLI:EU:C:2012:630, para. 56; Opinion of AG P. Mengozzi, of 29 January 2015, *Commission / Council* (C-28/12) ECLI:EU:C:2015:282, para. 65; Opinion of AG A. Kokott, of 19 Mars 2015, *Inuit Tapiriit Kanatami and others / Commission (C-398/13 P) ECLI:EU:C:2015:535*, para. 86. See J. DÍEZ-HOCHLEITNER, *La posición del Derecho Internacional en el Ordenamiento Comunitario*, Madrid, 1998, pp. 11-15; A. GIANELLI, *Unione Europea e diritto internazionale consuetudinario*, Torino, 2004; ID., *Customary International Law in the European Union*, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (Eds.), *International Law as Law of the European Union,* Leiden, 2012, pp. 93-110; J. KLABBERS, *International Law and Community Law: The Law and Politics of Direct Effect,* in *Yearbook of European Law*, 2002, nº 21, pp. 263 ss.; T. KONSTADINIDES, *Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?,* in *Yearbook of European Law*, 2016, vol. 35, pp. 513-532; J. VANHAMME, *Formation and Enforcement of Customary International Law: the European Union's Contribution*, in *Netherlands Yearbook of International Law*, 2008, vol. XXXIX, pp. 127-154.

[33] See P. GRAGL, *The silence of the Treaties: General International Law and the European Union,* in *German Yearbook of International Law,* 2014, pp. 375-410.

[34] European Parliament Resolution, of 2 October 1997, on the Relationships between International Law, Community Law and the Constitutional Law of the Member States, *OJ*, 1997, C 325, para. 14.

international law, and [the General Assembly] consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles'.

123. It follows from the foregoing that the right to self-determination is not subjected, in its implementation or in its effects, to the adoption of any subsequent measure»[35].

4. *Secession in EU Law and Applicable Principles of Customary International Law*

European Union law is completely independent of the internal administrative structure of Member States. Thus, there are centralised States such as France or the United Kingdom; federal States such as Germany; regional States such as Italy; and autonomous community States such as Spain. This is reflected in Article 4.2 of the TEU, which indicates the following:

«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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.»

There are two expressions of interest here pertaining to the subject of the present chapter. The first of these is the reference to "national identities". Member States are sovereign and independent and can freely legislate recognition of local, regional or federal entities, as well as their internal powers and independence. The second is that "It shall respect their essential State functions, including ensuring the territorial integrity of the State". This implies that in the first instance, the EU has no jurisdiction over any decision of the basic subject of International Law, the State, with regard to modification or alteration of its borders and territories: this is an internal matter for each State. It is for this reason that the Treaties do not contain any provision on the possibility of secession of a part of the State, as the EU has no powers in this respect[36]. Some authors have argued, without foundation, that rejecting a process of secession would equate to denying a voice

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[35] Opinion of AG M. Wathelet, of 10 January 2018, *Western Sahara Campaign UK (C-266/16) ECLI:EU:C:2018:118*. See also European Court of Justice, Judgment of 12 September 2006, *Spain / United Kingdom* (C-145/04, ECR 2006 p. I-7917) ECLI:EU:C:2006:543, para. 83; and Judgment of 21 December 2016, *Council / Front Polisario* (C-104/16 P) ECLI:EU:C:2016:973, paras. 24 ss.

[36] See M. CAMPINS ERITJA, *The EU and the secession of a territory from an EU member State*, in *Diritto pubblico comparato ed europeo*, 2015/2, pp. 479-502; C. CLOSA, *Secession from a Member State and EU Membership: the View from the Union*, in *European Constitutional Law Review*, 2016, vol. 12, pp. 240-264; C. LÓPEZ JURADO ROMERO DE LA CRUZ, *La secesión de territorios no coloniales…*, *loc. cit.,* 18-20; A. MANGAS MARTÍN, *La secesión de territorios en un Estado miembro: efectos en el Derecho de la Unión Europea,* in *Revista de Derecho de la Unión Europea*, 2013, nº 25, pp. 47-68, on pp. 50-51. Also J. RIDAO, A. GONZÁLEZ BONDÍA, *La Unión Europea ante la eventual creación de nuevos Estados surgidos de la secesión de Estados miembros*, in *Revista de Derecho de la UE*, 2014, nº 28, pp. 363-390; and the answer, E. LINDE PANIAGUA, *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*, in *Revista de Derecho de la UE*, 2014, nº 28, pp. 391-412. Finally, "Statement on the Lack of Foundation in International Law…", *loc. cit.,* p. 298.

to a part of the citizenship. This has been termed the "right to decide", the alleged fundamental right of a group of citizens to express their views concerning the political and administrative structure of the territory where they reside. Its non-observance could be regarded as a flagrant violation of their fundamental rights pursuant to Articles 6 and 7 of the TEU. However, this "right to decide" does not exist in International Law; therefore, any process of secession that disrupts national law, contravenes it[37].

Along the same lines, the EU as such is not territory. That is, the territory of the Union is provided by its Member States. One might therefore conclude that in the first instance, any change or modification of the territory of a Member State – for example due to secession – would only affect that Member State and indirectly the EU[38]. If the territory of a State is reduced or enlarged, in accordance with International Law and pursuant to Articles 52 of the TEU and 355 of the TFEU, this would not necessarily entail a change in the scope of application of the treaties, which would remain unchanged in the territories of Member States. It would be another thing entirely if a State unilaterally ceased to apply the Treaties in its own territory, as was the case in Greenland (Article 355.6 of the TFEU)[39]. For the Commission, Greenland is the only case of secession within the Union; however, it does not constitute a precedent for two reasons: first because the Member States and institutions underscored its exceptional nature at the time; and second because Greenland is not a European State[40].

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[37] See X. PONS RAFOLS, *Cataluña:...cit*, pp. 263-278. A position agreed with "right of decide" in the case of Catalonia, in, J. COSTA, ¿*Tiene Cataluña derecho de autodeterminación*?, in *CEPRID*, 26 September 2017.

[38] A. MANGAS MARTÍN, *La secesión de territorios en un Estado miembro:…*, *loc. cit*., pp. 48-54. Also J.M. SOBRINO HEREDIA, *Unité de l´État, sécession et construction européenne*, in *Revue de droit de l´Union européenne*, 2019, pp. 101-113.

[39] Greenland is a very special case. In 1984, this territory under the sovereignty of Denmark was withdrawn from the application of EU law. This was not a territorial separation, but Greenland was excluded from the scope of application of Community treaties by altering the Danish Accession Treaty. This necessarily led to a modification of the Treaties. See F. WEISS, *Greenland's withdrawal from the European Communities*, in *European Union Law,* 1985, vol. 10, pp. 173-185.

[40] Written question to the Commission (E-2398/01) by C. Huhne (ELDR), EU secession, of 20 August 2001. Answer by R. Prodi, of 24 September 2001, *OJ*, 2002, C 40 E.
Other cases include the region of Sarre in 1957, which passed from France to Germany, and German unification in 1990, in addition to the case of Algeria, all atypical secession processes which are not easily comparable with the cases of Catalonia and Scotland. See P. BOSSACOMA BUSQUETS, *Secesión e integración en la Unión Europea. Cataluña ¿nuevo Estado de la Unión?,* Institut d´Estudis de l´Autogovern, Barcelona, 2017, pp. 85-92; J. DE MIGUEL BÁRCENA, *La cuestión de la secesión en la Unión Europea: una visión constitucional*, in *Revista de Estudios Políticos*, 2014, nº 165, pp. 211-245, on pp. 225-227; T. FREIXES SANJUÁN, *Secesión de Estados e integración en la Unión Europea. A propósito del debate sobre la permanencia en la Unión de Escocia y Cataluña como Estados segregados del Reino Unido y España*, in *Revista Jurídica de Cataluña*, 2014, pp. 297-329, on pp. 314-316; C. LÓPEZ JURADO ROMERO DE LA CRUZ, *La secesión de territorios no coloniales…,loc. cit*., pp. 10-17; A. LÓPEZ BASAGUREN, *La independencia de Escocia en la Unión Europea. Los efectos de la secesión de territorios en la UE entre política y derecho*, UNED, *Teoría y Realidad Constitucional*, 2014, nº 33, pp. 69-98, on pp. 75-78; A. MANGAS MARTÍN, *La secesión de territorios en un Estado miembro:…*, *loc. cit*., pp. 55-57; J. MARTÍN Y PÉREZ DE NANCLARES, *Legal considerations regarding a hypothetical unilateral declaration of independence by Catalonia…*, *loc. cit*., pp. 57-58. Finally, the case of Czechoslovakia is very particular, given that it began with a secession from Slovakia region but finally there was, with the consent of the central authorities, the dissolution of the State and the creation of two new subjects of international law: the Czech Republic and Slovakia. See, J. MALENOVSKY, *Problèmes juridiques liés à la partition de la Tchécoslovaquie, y compris tracé de la frontier,* in *Annuaire Français de Droit International*, 1993, vol. XXXIX, pp. 305-336; R. YOUNG, *The Breakup of Czechoslovakia*, in *Institute of Intergovernmental Relations, Research Paper,* 1994, nº 32.

According to Tajadura Tejada, any process of secession, whether unilateral or agreed upon, would affect the principle of territorial integrity enshrined in Article 4 of the TEU as well as the application of European law itself, and should consequently be prohibited[41]. In my opinion, this interpretation is unduly restrictive, since it does not take into account that the original subjects of International Law are the States, that the EU has powers legally conferred by these and that these States are sovereign and independent with the powers to dispose of their territory as they see fit. However, as we have seen, the consequences of secession as regards altering the territorial scope of application of European law is another question altogether.

In International Law, and more specifically in the 1978 Vienna Convention on the succession of States in respect of treaties mentioned above, if a State loses a part of its territory, the parent State enjoys the principle of continuity of international agreements and treaties, especially as regards membership of an international organisation. Such would be the case of Spain and the United Kingdom in the hypothetical event of the independence of Catalonia and Scotland, respectively.

However, with respect to new territories, in the event that they constitute themselves as new sovereign States[42], the applicable principle would be that of *tabula rasa*, as mentioned earlier, whereby the new sovereign and independent entity would have complete freedom to decide whether or not to request accession to existing international agreements.

So, in the case of *Budějovický Budvar*, the Advocate-general A. Tizzano indicated that:

«101. The Austrian and German Governments and the Commission observe that general international law provides for the automatic succession of States emerging from the dissolution of a previous State in respect of the bilateral agreements concluded by the latter. The Austrian Government in particular emphasises that the international custom in this regard was codified in Article 34(1) of the 1978 Vienna Convention on Succession of States in respect of Treaties, which contains precisely the rule on automatic succession.

…

109. However, as we know, this finding does not rule out the possibility that the provisions contained in the convention in question, as in general in conventions codifying international law, could be binding even on States which have not ratified them. In the view of those who draw up and adopt such conventions, they constitute, to a large extent, the mere codification of general international law in force, and the convention at issue is no exception. Therefore, the fact that Austria is not party thereto may not be of decisive importance if it is shown that the provisions of the convention relevant to this case merely recognise pre-existing principles of international law».

…

and continued:

«113. In respect of all other cases in which a new State is formed, either as a result of its secession or dismemberment, Article 34 lays down a contrary rule which follows the principle of the continuity of international treaty obligations and provides for the *automatic* succession of the new State in respect of the treaties concluded by the predecessor State.

114. The provision lays down just two exceptions to this rule. It does not apply if the States concerned otherwise agree or if the application of the treaty in respect of the new

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41 See J. TAJADURA TEJADA, *Los procesos secesionistas y el derecho europeo*, UNED, *Teoría y Realidad Constitucional*, 2016, nº 37, pp. 347-379, on p. 374.

42 This would rule out the case of union with or annexation to another State, such as the case of Crimea.

State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

115. However, I should note straightaway that, in my view, the principle laid down in Article 34 of the convention does not reflect the content of a pre-existing general rule of international law.

…

117. I should add that the academic opinion prevalent at the time of the codification also tended to exclude the principle of automatic succession and as a rule gave preference to the *tabula rasa* principle, albeit with significant exceptions in relations to particular types of agreement or particular situations in which sovereignty changed

…

122. Below I will attempt to outline the practice which developed following those events and in particular that relating to bilateral agreements. I should note straightaway that, in my view, this practice is evidence of a significant change in the state of general international law because it indicates that, from the early 1990s, an international custom based on the principle of the continuity of international treaty obligations was established, albeit with less rigid automatism than that which follows from Article 34 of the Vienna Convention

…

143. Consequently, I consider that the examination of the practice both of the new States and of the contracting third States confirms the view set out above (paragraph 122) that a customary rule based on the principle of automatic succession has now been established, albeit with less rigid contents than those which follow from Article 34 of the Vienna Convention, to the effect that it does not operate if one of the two States affected by the succession phenomenon has expressed an intention to the contrary».[43]

Along the same lines, in the case of the *Czech Republic / Commission*, the General Court stated the following:

«63… Moreover, even if the rule expressed by Article 30(3) of the Vienna Convention constitutes an international custom, persons recognised as having rights and duties in international law may, in their mutual relations, agree that, under a later treaty, the rules arising from an earlier treaty continue to apply to certain legal relationships...»[44].

The foregoing indicates that there is no customary rule on succession that is widely accepted by the international community in the case of international treaties, as stated earlier. Furthermore, this has been confirmed by European case-law.

Based on the example of Algerian independence from France in the 1960s, a series of questions were posed to the Commission in February 2004, including the following:

«Could the Commission confirm whether a newly independent region would have to leave the EU and then apply for accession afresh?».

In line with the above, the Commission stated in its response that in the case of secession from a Member State, the newly independent region would become a third State as regards the EU, and the treaties would no longer be applicable to the new territory. It

[43] Opinion of AG A. Tizzano, of 22 May 2003, and European Court of Justice, Judgment of 18 November 2003, *Budějovický Budvar (*C-216/01, ECR 2003 p. I-13617) ECLI:EU:C:2003:618, para. 157.

[44] European General Court, Judgment of 15 April 2011, *Czech Republic / Commission* (T-465/08, ECR 2011 p. II-1941) ECLI:EU:T:2011:186.

also noted that the provisions of Article 49 of the TEU would apply to requests for membership[45].

Also, in response to a parliamentary question on secession from a Member State and admission to the EU, and in the absence of any corresponding text in the treaties, the then President of the Commission, J. Barroso, indicated the following:

«It is not the role of the Commission to express a position on questions of internal organisation related to the constitutional arrangements in the Member States.

Concerning certain scenarios such as the separation of one part of a Member State or the creation of a new State, these would not be neutral as regards the EU Treaties. The Commission would express its opinion on the legal consequences under EC law, on request from a Member State detailing a precise scenario.

Concerning the general question of the accession of States to the European Union, the Commission recalls that this must be fully in line with the rules and procedures foreseen by the EU Treaties»[46].

In other words, the independence or secession of a territory of an EU Member State does not automatically entail the succession of the seceded territory in the European Union[47]. It would therefore be necessary to consult the treaties creating such international organisations and examine the specific rules governing the process of accession. In the case of the EU, this is Article 49 of the TEU, which requires unanimity on the part of the Member States, including the parent State from which the agreed or unilateral secession has occurred[48].

Hence, in the case of the EU, the new State would not automatically belong to the organisation and would have to start its membership application from scratch; it would be excluded from the Customs Union, the Internal Market, Trade Policy and the application of trade treaties, internal policies and their Structural and Cohesion Funds, participation in the institutions and from the Economic and Monetary Union itself[49].

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[45] Written question to the Commission (P-0524/04), by E. Morgan (PSE), The Constitution, of 12 February 2004. Answer by R. Prodi, of 1 Mars 2004. See also written question to the Commission (P-009664/2011), by G. Lyon (ALDE), Secession from a Member State and accession to the European Union, of 20 October 2011; answer by R. Prodi, of 10 November 2011 "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", *OJ*, 2012, C 168 E.

[46] Question for written answer from the Commission (E-008133/12), by I.B. Barandica (ALDE), R. Tremosa i Balcells (ALDE), S. Sedó i Alabart (PPE) and R. Romeva i Rueda (Verts/ALE), Secession within the Union and European citizenship, of 17th September 2012, and answer of the Commission, of 12th November 2012, *OJ*, 2013, C, 308 E.

[47] See J.D. GONZÁLEZ CAMPOS, *Notas sobre la práctica de las organizaciones internacionales respecto a los efectos de la sucesión de Estados en el estatuto de miembro de la organización*, in *Revista Española de Derecho Internacional*, 1962, pp. 465-508, on p. 508.

[48] See C. BRÖLMANN, T. VANDAMME (Coords.), *Secession within the Union. Intersection points of International and European Law,* Amsterdam Centre for European Law and Governance, Amsterdam, July 2014; J. M. SOBRINO HEREDIA, *Unité de l'État, secession…,loc. cit.*, pp. 108-112. Also J. DE MIGUEL BÁRCENA, La *cuestión de la secesión en la Unión Europea*:…, *loc. cit.*, p. 232; A. GALÁN GALÁN, *Secesión de Estados y pertenencia a la Unión Europea. Cataluña en la encrucijada*, in *Istituzioni del Federalismo*, 2013, nº 1, pp. 95-135, on pp. 108 ss.; A. MANGAS MARTÍN, *La sucesión de Estados…loc. cit.*, pp. 350-351.

[49] A. MANGAS MARTÍN, *La secesión de territorios en un Estado miembro*:…, *loc. cit*., pp. 63-64.

Furthermore, if the secession had contravened national constitutional law, the EU Member States could refuse to recognise it, since this would violate the customary principle of the territorial integrity of States, as we have seen, as well as Article 4.2 of the TEU. In practice, this would render the State in question inoperative. Moreover, turning to the 1978 Vienna Convention, Article 4 —*ratione materiae*— must be viewed in conjunction with Article 6 on legal successions, i.e. those made in accordance with International Law[50]. This should be interpreted in the sense that the Convention, *strict senso*, would not apply in the case of a unilateral secession, given that it would have violated the principle of Customary International Law of territorial integrity. Therefore, to achieve some sort of international recognition and activity, the new entity would need to observe the procedures laid down in the Treaties and under no circumstances could it claim continuity of membership in the same way as the parent State. This argument refutes the claims of some authors who, on the basis of Article 35 of the 1978 Vienna Convention[51], contend that the new State would continue to be a member of an organisation of which the parent State was a member. In the case of the EU, this assertion relies upon an alleged "internal expansion" without legal basis in either European or International law[52].

In contrast, if there is a bilateral agreement between the parent State and the new State body, in line with the provisions of the 1978 Vienna Convention it would be necessary to determine the elements of this bilateral agreement and subsequently regulate the independence and process of recognition of the new international subject[53]; regardless, it would be necessary to adhere to the TEU and apply the rules established with respect to membership.

5. *Secession in Practice*

In recent times, the EU has had to address the phenomenon of secession. With the exception of Kosovo, which besides its possible violation of International Law must be understood as an exceptional situation that does not create a precedent, the European Union can be assumed to have maintained a coherent discourse. Thus, the EU seems to

[50] Art. 4 "The present Convention applies to the effects of a succession of States in respect of: a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization; b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization"; Art. 6 "The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".

[51] Art. 35 "When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless: a) the States concerned otherwise agree; b) it is established that the treaty related only to the territory which has separated from the predecessor State; or c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation".

[52] See P. BOSSACOMA BUSQUETS, *Secesión e integración en la Unión Europea…cit.,* pp. 46-47 and 53-61.

[53] D. KOCHENOV, M. VAN DEN BRINK, *Secession from EU Member States: The imperative of Union's Neutrality*, in *European Papers*, 2016, vol. 1, nº 1, pp. 67-92; M. MEDINA ORTEGA, *El Derecho de secesión en la Unión Europea*, Ed. Marcial Pons, Madrid, 2014, pp. 111 ss.

have always maintained the same position with regard to the territorial integrity of the State, be it in the case of third States or in the case of Member States. Also, it has stated that should a new State emerge, it would not form part of the integration process and would be treated, for all applicable legal purposes, as a third State. Furthermore, it would need to apply for membership in line with the provisions of Article 49 of the TEU.

5.1. *Kosovo*

According to International Law, an entity can only be recognised as an independent and sovereign State if it possesses all the basic elements that characterise it as such: territory, population and self-government[54]. Without these, it cannot be recognised as a State and any such recognition would be considered an intervention in the internal affairs of another State, in violation of the principle enshrined in Article 2.7 of the Charter. Nor can entities that have emerged in violation of International Law, for example through the use of armed force, be recognised as States.

However, recent years have witnessed the greater involvement in practice of international organisations in the recognition of States. Thus, on the occasion of the break-up of Yugoslavia, the then European Communities agreed to recognise the new republics provided that a series of conditions were met[55]. Such consensus on recognition is accepted in international relations if accompanied by the requirement to observe the principles of General International Law. Thus, in December 1991, the Member States of the European Communities adopted a series of directives on the recognition of the new States that had emerged from the former Yugoslavia and the USSR[56]. In the case of Yugoslavia, the most

[54] Recognition is a discretionary unilateral act freely available to States, but is neither arbitrary nor formal, being first necessary to verify the existence of the constituent elements. If it possesses these elements, the State should be in a position to fulfil its state functions in the internal sphere and to meet its commitments with other subjects of international law. See *Encyclopedia of Public International Law cit.*, vol. IV, pp. 33-41 ("Recognition"). Also O. CORTEN, *Déclarations unilatérales d´indépendence et reconnaissances prematurées: du Kosovo à l´Ossétie du Sud et à l´Abkhazie*, in *Revue Générale de Droit International Public*, 2008, pp. 721-759; E. JOUANNET, *Le droit international de la reconnaissance*, in *Revue Générale de Droit International Public*, 2012, pp. 769-800, S. D. MURPHY, *Democratic legitimacy and the recognition of States and Governments*, in *International and Comparative Law Quarterly*, 1999, vol. 48, pp. 545-581; J. QUEL LÓPEZ, *La práctica reciente en materia de reconocimiento de Estados: problemas en esencia*, in *Cursos de Derecho Internacional de Vitoria-Gasteiz*, 1992, pp. 39-81; A. REMIRO BROTONS et alii, *Derecho Internacional*, *cit.*, pp. 108-115; J. VERHOEVEN, *La reconnaissance internationale: déclin ou renouveau ?*, in *Annuaire Français de Droit International*, 1993, vol. XXXIX, pp. 7-40; E. WYLER, *Théorie et pratique de la reconnaissance d'État. Une approche épistémologique du droit international*, Bruxelles, 2013.

[55] Actually, what occurred was consensus among all Member States to start the recognition process, in accordance with internal rules, provided that a series of conditions were met. Therefore, in no case would the European Communities be subrogated to the position of the Member States when exercising the prerogative of recognition.

[56] "Declaration on Guidelines for the Recognition of new States in Eastern Europe and the Soviet Union", of 16th December 1991, *EEC Bull.* nº 12-1991, p. 1.4.5; "Declaration on Yugoslavia" (Extraordinary meeting of Ministers, Brussels, of 16 December 1991), *EEC Bull.* nº 12-1991, p. 1.4.6. See R. BERMEJO GARCÍA, C. GUTIÉRREZ ESPADA, *La disolución de Yugoslavia,* Pamplona, 2007, pp. 33-66; V. CONSTANTINESCO, *La politique de l'Union européenne fâce au phénomenon de la fragmentation des États: de l'ex Yougoslavie aux Balkans occidentaux*, in S. PIERRE-CAPS, J.D. MOUTON (Dirs.), *États fragmentés*, Nancy, 2012, pp. 143-164; R. KHERAD, *La reconnaissance des États issus de la dissolution de la République Socialiste Fédérative de Yougoslavie par les membres de l'Union européenne*, in *Revue Générale de Droit International Public*, 1997/3, pp. 663-693; F.M. MARIÑO MENÉNDEZ, *El reconocimiento*

striking aspect of the directives is that they referred solely to the republics, without mentioning Kosovo, which continued to be regarded as an autonomous province. They also defended the inviolability of borders, which could only be changed by mutual agreement and peaceful means, as set out in the main principles of International Law -the directives cited the United Nations Charter, the Charter of Paris and the Helsinki Final Act -. In accordance with the declaration, Member States would recognise new States that were based on democracy, accepted international obligations and had observed a peaceful negotiation process in good faith[57]. Basically, the goal was to maintain stability and protect national minorities by requiring democratic legitimacy in the new States.

With Kosovo's unilateral declaration of independence in February 2008, these directives, which had been presented as binding conditions, were clearly abandoned by a large number of Member States, shattering the previous consensus and in my opinion, violating the basic principles of coexistence established in General Assembly Resolution 2625 (XXV)[58]. Those States that proceeded to recognise Kosovo gave precedence to the principle of Self-determination of peoples over territorial integrity, in response to the conflict that ended in 1999. This was an example of the previously mentioned "remedial secession"[59], and demonstrates a double standard with regard to situations in other parts of the world where the rights of national minorities are also violated, but on which the EU and its Member States do not adopt a common position. This practice of prioritising self-determination over the principle of territorial integrity should be considered very dangerous, since it could give rise to the emergence of numerous micro-States without their own resources and with broad social and economic deficits, ultimately destabilising the region in question.

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de los nuevos Estados nacidos del desmembramiento de Yugoslavia, in *Tiempo de Paz*, nº 23, primavera 1992, pp. 61-72; N. NAVARRO BATISTA, *La práctica comunitaria sobre reconocimiento de Estados: nuevas tendencias*, in *Revista de Instituciones Europeas*, 1995, vol. 22, nº 2, pp. 475-510, on pp. 475-510; J. QUEL LÓPEZ, *La práctica reciente en materia de reconocimiento de Estados:…,loc. cit.,* pp. 54-60; R. RICH, *Recognition of States. The Collapse of Yugoslavia and the Soviet Union*, in *European Journal of International Law*, 1993, nº 1, pp. 36-65; J. VERHOEVEN, *La reconnaissance internationale:...*, *loc. cit.,* pp. 18-28.

[57] To verify these conditions, an Arbitration Commission was created within the European Conference for Peace in Yugoslavia. See A. PELLET, *Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie*, in *Annuaire Français de Droit International*, 1991, vol. XXXVII, pp. 329-349; ID., *L'activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie*, in *Annuaire Français de Droit International*, 1992, vol. XXXVIII, pp. 220-238.

[58] See M.A. ACOSTA SÁNCHEZ, *Kosovo: ¿una (nueva) piedra en el zapato de la política exterior de la Unión Europea?,* in *Revista de Derecho Comunitario Europeo,* 2008, nº 31, pp. 773-804; A. MANGAS MARTÍN, *Kosovo y la UE: una secesión planificada*, in *Revista Española de Derecho Internacional*, 2011, vol. LXIII, pp. 101-123. See, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, para. 82. Also Written Statements of Germany, the Netherlands and United Kingdom. See, A. CARCANO, *Sul rapporto fra diritto all´autodeterminazione dei popoli e secessione. in margine al parere della Corte internazionale di giustizia riguardante il Kosovo*, in *Rivista di Diritto Internazionale*, 2010, vol. 93, pp. 1135-1143; C. JIMÉNEZ PIERNAS, *Los principios de soberanía e integridad territorial y de autodeterminación de los pueblos en la opinión consultiva sobre Kosovo*:…, *loc. cit.*, pp. 43-45.

[59] The result of this position is that the principle of protection of human rights / the right of self-determination prevails over the principle of territorial integrity, and the case of Kosovo is the most evident practical example. See N. NAVARRO BATISTA, *La práctica comunitaria sobre reconocimiento de Estados:…*, *loc. cit.,* pp. 496-502.

Meanwhile, the Member States that declared they were not prepared to recognise Kosovo (Spain[60], Cyprus, Slovakia and Romania) considered Kosovo's unilateral declaration of independence to be an illegal act that violated the United Nations Charter and other international texts. In addition, there were doubts about Kosovo's legal feasibility as a State, creating a dangerous precedent for other regions in conflict and for national minorities (including some located in Member States[61]) hoping to achieve territorial independence through violent means.

5.2. *Crimea*

With respect to Russia's annexation of Crimea[62] after a non-transparent process that even led to a unilateral declaration of independence, albeit one that only lasted 24 hours, the European Union has adopted abundant declarations condemning the secession of Crimea. However, for the most part, it has not gone beyond declarations, and barely any binding decisions have been adopted at high level, due both to a lack of consensus on foreign policy and the national interests of Member States. One must also consider the partial political responsibility that the EU should assume for clearly siding with Ukraine without taking into consideration Russia's geostrategic interests in the region, which had originally triggered the crisis.

With regard to its political declarations, from the outset the EU Council clearly condemned the violation of Ukraine's territorial integrity by Russian troops, asking Russia to withdraw[63]. In addition, the EU applied pressure, breaking off talks on visas and, in conjunction with the United States, vetoing Russia's participation in the G8 meeting in Sochi. At the same time, in a clear challenge, it finalised an Association Agreement with Ukraine[64], and approved financial aid through macroeconomic assistance[65].

The first restrictive measures, based on the "Smart Sanctions" model, followed shortly afterwards, although their scope was limited by the various nationalist visions of the

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[60] On Spain's position, see "Comparecencia, a petición propia, del Presidente del Gobierno ante el Pleno de la Cámara, para informar sobre el reciente Consejo Europeo", *Diario de Sesiones del Congreso de los Diputados*, 2007, VIII Legislatura, nº 309, of 19 December 2007; Press release by the Spanish Ministry of Foreign Affairs and Cooperation, "Declaraciones del Secretario de Estado de Asuntos Exteriores, Bernardino León, sobre la Posición de España respecto a Kosovo", of 20 February 2008.

[61] E. g., Catalonia (Spain), Flemish region (Belgium), Corsica (France), or Lombardia and Veneto (Italy).

[62] See M.A. ACOSTA SÁNCHEZ, *La secesión en Derecho Internacional: el caso de Crimea*, Instituto Español de Estudios Estratégicos, *Documento Marco* 142/2014, of 11 December 2014. Also T. CHRISTAKIS, *Les conflicts de sécession en Crimée et dans l'Est de l'Ukranie et le droit international*, *Journal de Droit International*, 2014 (3), pp. 23-48. About a comparative study between Kosovo and Crimea, see, J.F. ESCUDERO ESPINOSA, *Self-Determination and Humanitarian Secession in International Law of a Globalized World. Kosovo v. Crimea*, Cham,2018, pp. 107-138.

[63] Doc. 7196/14, 3305th Council meeting Foreign Affairs, Conclusions on Ukraine, of 3 Mars 2014; Doc. 7764/14, 3304 Council meeting Foreign Affairs, of 17 Mars 2014. Also European Council Conclusions on Ukraine, of 20/21 March 2014, EUCO 7/1/14 REV 1, of 21 Mars 2014; and Declaration of Heads of State or Government of the Member States, Brussels, of 27 May 2014.

[64] Association Agreement between the European Union and the European Atomic Energy Community and their States, of the one part, and Ukraine, of the other part, *OJ*, 2014, L, 161. This Agreement entered into force on 1 September 2017.

[65] Doc. 8763/14, 3309th Council meeting Foreign Affairs, Conclusions on Ukraine, of 14/15 April 2014.

Member States[66]. Thus, the aim of Decision 2014/145/EU was to prevent the entry into or transit through EU territories of a series of political figures listed in an Annex to the decision, who were responsible for actions that undermined or threatened the territorial integrity, sovereignty and independence of Ukraine[67]. Of a more economic nature, Regulation 2014/692/EU restricted imports into the EU of goods from Crimea or Sevastopol, in response to the illegal annexation[68].

Lastly, albeit with a merely declaratory effect, the European Parliament adopted a highly interesting resolution in legal terms, which listed all the violations committed by Russia in its annexation of Crimea, noted the illegality of the referendum on self-determination and refuted Russia's arguments for invading Ukrainian territory. The resolution was based on the principles of General International Law, such as the principle of the territorial integrity of States, the principles embodied in the United Nations Charter and the numerous bilateral agreements signed between the parties concerned[69].

Finally, I will now briefly discuss two cases of secession, which have had a resounding impact in recent times in Member States and represent completely different cases: Scotland and Catalonia[70].

5.3. *Scotland*

In the case of Scotland, this is a possible secession agreed with the parent State, the United Kingdom, to be decided by a referendum. In the event of a referendum result in favour of secession, negotiations would begin aimed at establishing Scottish independence. Such negotiations would apply the principles of Customary International Law on the succession of States, including the Vienna Convention of 1978.

In this case, the European Commission adopted a prudent attitude in my opinion when asked about the future of an independent Scotland and its possible membership of

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[66] Thus, Germany and France had important military agreements with Russia; Bulgaria and Sweden did not want large-scale economic sanctions for their dependence on Russian gas; and the United Kingdom feared serious negative effects on the economy. See "Europa se resiste a activar las sanciones más duras contra Rusia", *El Mundo*, of 19 Mars 2014; "Londres se opone a sanciones a Rusia que perjudiquen a la City", *El País*, of 3 Mars 2014.

[67] Council Decision 2014/145/CFSP of 17 Mars 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *OJ*, 2014, L 78.

[68] Council Regulation 2014/692/EU of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, *OJ*,2014, L 183.

[69] European Parliament Resolution of 13.03.2014 on the invasion of Ukraine by Russia, *OJ*, 2017, C 378.

[70] In general, see R. BARATTA, *L´appartenenza all´UE della Scozia in caso di secessione dal Regno Unito*, in *Diritto dell´Unione europea*, 2014, vol. 19, pp. 73-80; P. BOSSACOMA BUSQUETS, *Secesión e integración en la Unión Europea...cit.,* pp. 63-65; G. CONTI, *La Catalogna tra secessione e Costituzione*, in *Diritti Comparati*, 28.09.2017; T. FREIXES SANJUÁN, *Secesión de Estados e integración en la Unión Europea….,loc. cit.*, pp. 318-327; L. FROSINA, *La deriva della Catalogna verso la secessione unilaterale e l´applicazione del´articolo 155 Cost.*, in *Nomos*, 2017, nº3; A. GALÁN GALÁN, *Secesión de Estados y pertenencia a la Unión Europea…*, *loc. cit.*, pp. 116-132; A. LÓPEZ BASAGUREN, *La independencia de Escocia en la Unión Europea…*, *loc. cit.*, pp. 80-91; P. MARTINO, *La questione independentista scozzesa: la nuove frontiere della Britishness,* in *Diritto pubblico comparato ed europeo*, 2015/2, pp. 405-428; X. PONS RAFOLS, *Cataluña…cit.,* pp. 263-304; A. TORRE, *Il Regno è ancora unito?: saggi e commenti sul referendum scozzese del 18 settembre 2014*, Santancangelo di Romagna, 2014.

the EU[71]. Thus, it has preferred not to address the question in any depth, simply stressing that it would be a matter for International Law[72], and must be agreed between the parties concerned should the referendum result be in favour of independence. It also noted that the conditions of any EU Treaty are decided by the Member States:

«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.

The Commission would recall in this context that the terms of any European Union Treaty are decided by the Member States of the European Union»[73].

Therefore, in my opinion, for the European Commission it is an internal matter (art. 4.2 TEU) but one that could have effects on the territorial application of European law in the event of an agreed secession.

5.4. *Catalonia*

The case of Catalonia is more complex than Scotland, because it is based on a complete break with the parent State, Spain, through a Unilateral Declaration of Independence, in violation of national law established by the Spanish Constitution, the ruling of the Constitutional Court, as well as International Law, as we have seen.

In fact, the Commission has adopted a generic stance, aligning itself with the position of the Spanish Government, which is simply full respect for both national and International Law. The measures adopted by the Catalonian parliament, in violation of its own statutes and the rulings of the Spanish Constitutional Court[74], have led to a serious political crisis as well as to a spurious Unilateral Declaration of Independence in October 2017[75].

Thus, with respect to the secession of Catalonia, the Commission has determined that in application of the principles of International Law, its nationals would automatically lose their European citizenship[76]. Hence, losing the nationality of a Member State automatically leads to loss of European citizenship. Moreover, according to European case-law, determination of the territory of a Member State is established solely by national constitutional law, and never by the decision of an autonomous parliament in violation of

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71 Written question to the Commission (E-2012/07) by R. Kilroy-Silk (NI), Independent Scotland in the EU, of 16 April 2007, *OJ*, 2008, C 45; Written question to the Commission (E-000395/2012) by R. Tremosa i Balcells (ALDE), Referendum on independence in Scotland, of 23th January 2012, *OJ*, 2012, C 199 E.

72 Written Question E-2012/07 (above cited), answer of the Commission, of 6 June 2007, *OJ*, 2008, C 45.

73 Written Question E-000395/2012 (above cited), answer of the Commission, of 23 February 2012, *OJ*, 2013, C 199 E.

74 See, P. ANDRÉS SAENZ DE SANTAMARÍA, *A right of all peoples*:…, *loc. cit.*, pp. 176-178.

75 See X. PONS RAFOLS, *Cataluña...cit.,* pp. 19-102.

76Written question to the Commission (E-007453/2012) by M. Bizzotto (EFD), Possibility of secession in a Member State and impact on citizens, of 25 July 2012; and answer of the Commission, of 25 August 2012, *OJ*, 2013, C 228 E. See P. GARCÍA ANDRADE, *La ciudadanía europea y la sucesión de Estados: a vueltas con las implicaciones de una separación territorial en el seno de la UE*, in *Revista de Derecho Comunitario Europeo,* 2014, nº 49, pp. 997-1025.

the Constitution of that State[77]. Even the Court of Justice has clearly affirmed that Spain is the unitary subject, regardless of its internal structure[78].

As regards the argument of an alleged "internal expansion", which would imply that the population of the seceding region would maintain their European citizenship with all the associated rights, the Commission has refused to enter into questions of internal policy, recalling that accession to membership of new state bodies must follow the procedure laid down in Article 49 of the TEU[79].

More recently, in response to a question on the Commission's position on a unilateral violation of the territorial unity of a Member State such as Spain, the European Commission indicated the following:

«As already explained by the Prodi Commission in its answer to the written question P-000524/2004, and as recalled lately by this Commission, in its answer to the written questions E-011776/2015 and E-001376/2017, it is not the role of the Commission to express a position on questions of internal organisation related to the constitutional arrangements in the Member States.

Concerning certain scenarios such as the separation of one part of a Member State or the creation of a new State, these would not be neutral as regards the EU Treaties.

The Commission recalls that the process for the accession of States to the European Union must be fully in line with the rules and procedures foreseen by the Treaties».

In October 2017, the Commission was asked a series of questions concerning the possible violation, through an unilateral declaration of independence, of respect for the rule of law, the territorial integrity of Member States and the inviolability of borders in Europe (Articles 2 and 4.2 of the TEU). In its response, the Commission could have categorically settled the matter by unambiguously stating its position of total opposition to unilateral secession, which would clearly contravene the principle of Customary Law of the territorial integrity of States in the cases envisaged. In contrast, the Commission limited itself to expressing its:

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[77] European Court of Justice, Judgment of 20 February 2001, *Kaur* (C-192/99, ECR 2001 p. I-1237) ECLI:EU:C:2001:106, para. 25; Judgment of 12 September 2006, *Spain / United Kingdom* (C-145/04, ECR 2006 p. I-7917) ECLI:EU:C:2006:543, para. 78; Judgment of 12 September 2006, *Eman and Sevinger* (C-300/04, ECR 2006 p. I-8055) ECLI:EU:C:2006:545, para. 61; Judgment of 2 March 2010, *Rottmann* (C-135/08, ECR 2010 p. I-1449) ECLI:EU:C:2010:104, paras. 54-58.

[78] "Even if the distribution of responsibilities at intra-State level varies according to the institutional make-up of each State, that State must be considered to be a unitary subject of public international law. In the light of that approach, it is essential that the State be represented, vis-à-vis other States and international organisations, by a system of a single diplomatic representation, which reflects the unitary nature of the State concerned, at international level". See European Court of Justice, Judgment of 29 November 2007, *De Bustamante Tello / Council* (C-10/06 P, ECR 2007 p. I-10381, ECR-SC p. I-B-2-39, II-B-2-317) ECLI:EU:C:2007:727, para. 39.

[79] Question for written answer from the Commission (E-008133/12), by I.B. Barandica (ALDE), R. Tremosa i Balcells (ALDE), S. Sedó i Alabart (PPE) and R. Romeva i Rueda (Verts/ALE), Secession within the Union and European citizenship, of 17 September 2012, and answer of the Commission, of 12 November 2012, *OJ*, 2013, C, 308 E. See also question for written answer from the Commission (E-008752/12), by F. Sosa (NI), Consequences at European level of the possibility of a Catalan exit from the European Union, of 28 September 2012, and answer of the Commission, of 28 November 2012, *OJ*, 2013, C, 277 E; question for written answer from the Commission (E-009058/14), by J. Blanco (S&D), Consultation in Catalonia, of 11 November 2014, and answer of the Commission, of 9 February 2015.

«...full respect of the Spanish Constitutional order and its trust in the Spanish Institutions and all political forces who are working towards a solution within the framework of the Spanish Constitution»[80].

In conclusion, the Commission has adopted a clearly prudent approach by refusing to enter into the internal affairs of States and by referring to national and international law on secession. It has also recalled that irrespective of the above, in the event that a new national body emerged it would be necessary to apply the rules laid down in the Treaties, which would entail adhering to the accession procedure established in Article 49 of the TEU.

6. *Final Remarks*

A series of conclusions can be drawn regarding the secession of a part of the territory of an EU Member State and Customary International Law.

First, International Law recognises the right of Self-determination of colonial countries, as reflected in the resolutions of the General Assembly of the United Nations. In turn, due to their universal nature and wide-spread acceptance, these resolutions reflect the principles of Customary International Law, as established by the International Court of Justice.

Second, non-colonial countries would have a right to internal independence or autonomy, in recognition of their different rights in the domestic sphere of the State. Only in cases of flagrant violations of their fundamental rights could consideration be given to the possibility of having a right to independence, case-by-case. This would comprise the so-called "remedial secession". Either way, International Law gives precedence to the principle of the territorial integrity and national unity of States, which is essential for international stability. Widely accepted by the international community, this principle constitutes a rule of Customary International Law as opposed to the Self-determination of non-colonial peoples and national minorities.

Third, within the EU, the principles of Customary International Law form part of European law, as established in the TEU and recognised by European case-law. However, for the purposes of clarity, it would be helpful if the wording of the Treaties were improved to make express reference to General International Law. Irrespective of the above, Article 4.2 of the TEU clearly recognises the principle of the territorial integrity of States, an essential element when addressing the phenomenon of the secession.

Fourth, since it concerns a physical location, secession is an internal matter of an EU Member State, inasmuch as it affects that Member State's territory and internal structure. Secession may be agreed upon with the parent State or pursued through a unilateral declaration of independence. In my opinion, International Law rejects this second possibility, defending the integrity of the territory and opposing violations of national

[80] Question for written answer from the Commission (E-006715/17), by E. Calvet (ALDE), Unilateral declaration of independence in Catalonia: violation of three European principles, of 27 October 2017; and answer of the Commission, of 30 November 2017.

constitutional law. With this objective, there has been a clear commitment in recent years to prevent the emergence of new, non-colonial States by means of secession.

Fifth, last but not least, in accordance with EU law and the position of European institutions, in the case of agreed secession of a part of the territory of a third State, the new state body would be considered as a new State and must apply to join international organizations. And in the case of agreed secession of a part of the territory of a Member State, the new state body would be considered a third State for all legal purposes: European law would cease to apply in this new territory, its nationals would lose their European citizenship and in order to gain EU membership, it would have to observe the procedures established in Article 49 of the TEU, which requires unanimous approval, including from the parent State.