SOVEREIGNTY CONFLICTS: THE EUROPEAN DEBATE

How and Why Should the EU Intervene in Conflicts of Sovereignties on its Territory?

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Conflicts of sovereignties is a traditional topic of international law, in which two sovereign entities (States) are in conflict around one of their constitutive elements – usually a piece of territory – that they both claim as their. This is however not what is being discussed in the present chapter, since one of the parties is claiming its right to access to sovereignty, while the other is already enjoying sovereign rights, including over the territory and population of the claiming party. We are thus dealing with an asymmetric conflict [1] in which one party claims sovereignty and the other "defends sovereignty".

Contemporary international law proposes a conceptual frame for the management of such conflicts through what is known as the "principle of equal rights and self-determination of peoples" [2], embedded in the first article of the UN Charter. As rightly underlined by the brilliant mind of Martti Koskenniemi, this principle is extremely difficult to implement in international law, since it constitutes both the foundation for the existing national sovereignty —in which sovereignty is justified because it is the expression of the will of the people of a given State, usually qualified as a Nation-state, or in other terms the ground for the legitimation of the "defending party"— while constituting at the same time the

legitimate ground for a "people without a State" to claim its right to have its own sovereign State [3].

> The principle of self-determination of peoples is extremely difficult to implement in international law, since it constitutes both the foundation for the existing national sovereignty as well as the legitimate ground for a "people without a State" to claim its right to have its own sovereign State

Thus, even if the principle should be uncontested [4], its materialization in international law is extremely arduous, due to the asymmetry of the legal situation of the parties to the conflict of sovereignties. One (the "defending State") is *de jure* a subject of the international legal order. From its side, accepting to settle the dispute under international law would pre-empt the outcome of the dispute, since by doing so, it would already recognize a measure of international subjectivity to the other party. Considering that under current international law, the only territorially based subjects of international law are sovereign States, the "defending party" usually denies access to the international arena to the contending party. On the other hand, dealing with such conflict of sovereignties within a single national legal order is impossible, since according to the politico-legal frame of Nation-States, the sovereignty of the State cannot be challenged on the State territory [5].

This is why we advocate in the present paper, that EU is the most appropriate existing legal framework for dealing with such conflicts of sovereignties, when they emerge on EU's own territory. EU being neither the genuine international order but "a new order of international law" [6], in which sovereignty is a property that is less rigid than in other politico-legal frameworks.

Premises

The following article is based on the four following premises:

- The conflicts of sovereignties we're dealing with in the present chapter are non-violent conflicts. If violence –on either side– emerges, it is then another body of law that shall be mobilized and implemented, namely International Humanitarian Law (IHL). By the way, IHL recognizes, through the two 1977 Geneva Protocols to the 1949 Geneva Conventions, a specific international legal status to the "non-State" party to such violent conflicts of sovereignty [7].
- Second, both parties to such sovereignty conflicts must base their respective claims of sovereignty on the outcome of genuine democratic processes.
- Third, both parties have to respect democratic principles and human rights even during such conflicts, as expressly required within the EU [8].

- Fourth, such conflicts of sovereignties are exclusively bilateral and only concern one State. Foreign State intervention in the conflict is forbidden under the principle of "territorial integrity of the State". This principle is to be found in art. 2 § 4 of the UN Charter. It was reaffirmed as regards Europe in the 1975 Helsinki decalogue [9] and is also – since the entry into force of the Lisbon Treaty (December 2009) – embedded in art. 4 § 2 TEU [10]. However, the ICJ had the opportunity to explicit that "the scope of the principle of territorial integrity is confined to the sphere of relations between States" [11] and does in no way impede the realization of the right of peoples to self-determination. Further, European practice since 1975 amply confirms such interpretation and new European States were allowed to emerge, despite the continuing relevance of the principle if territorial integrity of States [12].

Structure of the article

The aim of this contribution is to propose concrete steps for using the EU as a politico-legal framework for settling conflicts of sovereignties (under the conditions set above) on its own territory. In order to do so, we shall first attentively frame the issue at stake, before explaining why the EU constitutes a proper framework for dealing with such issue. In a more normative second part, we shall explore proposals on how to launch a process for conflict resolution at EU level and briefly explore possible outcomes, within the EU politico-institutional framework, of such conflicts of sovereignties.

Framing the issue

First, I suggest that the issue shall be framed as a conflict of sovereignties, without reference to territories. Framing the issue as a conflict of territorial sovereignties, implies logically that the outcome of the conflict shall take the form of a territorially based solution. Interestingly, the European integration process has been very vaguely concerned with territorial issues for a long-time (it is less true nowadays as regards the external borders of the EU and its "migration and asylum policy"); focusing on the territorial dimension of the conflict may make the search for a solution more difficult. EU is largely based on institutional innovations, and it seems likely that an EU solution for such conflict of sovereignties on its own territory may take the form of an institutional solution, not primarily based on territorial control by one or the other party to the conflict. For these reasons, I suggest we focus on conflict of sovereignties, and not conflicts of "territorial sovereignties".

Second, as I indicated in the introduction, the issue shall be framed as a materialization of the equal right of all peoples to self-determination. If the right of peoples to self-determination is not expressly mentioned in EU law, the ECJ has recognized in its case-law, that this right is a right *erga omnes* –as the ICJ had acknowledged in its 1995 *East Timor* decision [13]— and as such, imposes itself to EU institutions and member States [14]. Many authors still consider that the right of peoples to self-determination only applies to colonial situations. This argument has been clearly set aside in recent case-law of the ICJ [15] and all

EU member States have accepted this right to self-determination as a provision of positive law by ratifying the UN Charter and the 1966 Human Rights International Covenants [16], whose article 1 –common to both 1966 Covenants– recognizes that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

As the UN Human Right Committee had the occasion to state in its General Comment n° 12, "the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants" [17].

> By ratifying the UN Charter and the 1966 Human Rights International Covenants, all EU member States have accepted this right to self-determination as a provision of positive law

Not only do the States who accepted these 1966 Covenants – this is the case of all 27 EU member States – recognize this right to all peoples, but they further take the commitment to "promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations" [18]. Let us further note that according to art 2 TEU, the EU is "founded on the value of the respect of human rights" [19] and, as rightly pointed out by the UN Independent expert on the promotion of a democratic and equitable international order" in its 2014 report to the UNGA [20], it is this right to self-determination of peoples which constitutes the foundation of the democratic legitimacy of State sovereignty. Once again, let us emphasize that as regards the EU, democracy as well as the respect for human rights are some of the values on which the EU is founded and that "are common to the Member States" [21].

For all these reasons, EU and its member States are in several clear legal ways bound by the international law principle of the equal right of all peoples to self-determination, and internationally, as well as by EU law [22], committed to promote and respect that right.

Thirdly, it is important to emphasize that the issue in EU law, as in any other legal setting, cannot be framed as a "claim right", that is a right whose implementation may be obtained by a Court ruling. Seized on 30 September 1996 by "a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada", the Supreme Court of Canada came to the conclusion that Quebec (through a majoritarian vote of its population on the issue) would not have a right to unilateral secession from Canada. However, if such eventuality was to occur, the Canadian government would, under Canadian constitutional law, be in no position to impose to the Quebec authorities a denial of the democratic choice of Quebecers [23].

Actually, as says in rather eloquent terms the Supreme Court, such unilateral vote for secession on the part of Quebec would necessarily lead to a "negotiation process [which] would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole" [24]. And, specify the judges as regards the outcome of this negotiation process, "there would be no conclusions predetermined by law on any issue" [25]. In other terms, "the reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role [26].

The important point there is this clear understanding that the conflict of sovereignties may not be settled as a legal issue of national law – because it would from the onset deny the *de facto* situation that there is a conflict of sovereignties on the State territory, which has built its legal order on the principle of the State sovereignty, exerted through its citizens constituting a single people. This is the "nation-State" model, which is dominant in practice and academic literature. Some authors are nevertheless trying to work on concepts of pluri-national democracies, either in a federal context [27] or as "*demoicracies*" [28]. Despite these solid academic efforts, the ultra-dominant constitutional models are still based on the concept of a single sovereignty (thus based on a single nation) national-legal order. And as we have seen in the introduction, the Sovereign State should not accept to settle the issue under international law, because it would imply from the onset that the contending party already enjoys a degree of international subjectivity. This is why, as the Canadian Supreme Court clearly understands, it is a political conflict that requires a negotiated political solution, outside of the national constitutional framework, but neither under international law. The same would be true within the EU.

> The EU intervention in a sovereignty conflict should be a political process, not a judiciary process, which should have a chance to lead to an effective solution to the conflicts and not to a deadlock. The conflict of sovereignties may not be settled as a legal issue of national law

Thus, and it is our fourth "framing parameter", EU should consider intervening in such a conflict of sovereignties on its territory as a political process, not a judicial one. Naturally, that does not preclude some European institutions, such as the European Court of Human rights for example, to be competent to settle through a judicial due process violations during such conflicts of individual rights guaranteed by European legal instruments, *in casu* the European Convention on Human Rights. But such legal ruling would redress torts committed by one of the parties to such dispute [29], but not bring a solution to the conflict of sovereignties – such for example as it apparently exists between Catalonia and Spain [30].

Thus, EU intervention in such conflict of sovereignty should be a political, not a judiciary process. Needless to insist that such process, even though genuinely political, should have a chance to lead to an effective solution to the conflicts, and not lead to a deadlock, such as for example is the case with the "political mechanism" proceduralized in art. 7 TEU, in case of violation of EU values.

EU as a framework for seeking solutions

As exposed in the above paragraphs, we advocate seeking a solution based on the implementation of the right of peoples to self-determination. As we have shown, it is currently a provision of positive human rights law which binds the EU and its member States. The structure of the International Human rights law regime is that most fundamental rights are nowadays enunciated in international Law —UN Office of the High Commissioner for Human Rights identifies 18 international Conventions constituting the bulk of International Human Rights Law [31]— but have to be primarily implemented by States. Since the right of peoples to self-determination is a Human right, as shows its inclusion in both 1966 UNHR Covenants, its implementation mechanisms should be of the same type. However, legal scholars immediately notice that this common article 1 constitutes a separate part, distinct from part two of either Covenant, which incorporate other substantial Human rights provisions.

The reason for this singular position of the Right of Peoples to Self-determination within Human rights law is, according to us —and that is also the Canadian Supreme Court conclusion in its 1998 decision— that the implementation of this right cannot be achieved through a comparable process than other Human rights. If a non-controversial implementation of this right could and should be carried through democratic processes within the State, guaranteeing that the exercise of the State sovereignty properly reflects the will of its constituent people(s), in case of controversial claims between different groups asserting concurrent sovereign claims, it inevitably leads to a conflict of sovereignties that can neither be settled by a judicial process, nor within the existing limits of the national constitutional order [32]. Then, the implementation of such a right needs to be materialized through a negotiation process between legitimately contesting claimants.

As the Canadian Supreme Court stated, "the Constitution vouchsafes order and stability, and accordingly secession of a province under the Constitution' could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework". This assertion is in my view the weak point of the "solution" proposed by the Canadian Supreme Court. As the Court writes, the secession could not take place "under the Constitution", but the negotiation has to take place "within the existing constitutional framework [33]. As the Canadian judges write "no one suggests that it would be an easy set of negotiations" [34]; and I would add, no one even knows the framework within which such negotiations shall take place. Even though the Canadian judges bravely affirm that it should be "within the constitutional framework", they derive this conclusion from "the constitutional right of each participant in the federation to initiate constitutional change" [35]. It is easy to understand that if the right to initiate –and

obviously eventually obtain– constitutional changes exists, the effective implementation of this right may not be bound by the existing constitutional framework.

This is where, in the European context, the EU appears as an interesting and potentially promising framework for conducting such negotiations. As we have mentioned in the introductory paragraphs, the EU has structural characteristics that are different from the international order (only composed of States and their joint creations such as IO or international tribunals) which is grounded on "the principle of the sovereign equality of all its Members" [36]. The EU, and before it the European Communities, are not based on a respect for equal sovereignty of its constitutive members35, but on a pooling of their sovereignties within a novel institutional polity that is "a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common" [37]. Thus the EU constitutes a proper framework, both as regards the principles on which it is grounded and which should be enforced during the political process of negotiations, aiming at resolving the conflict of sovereignties, as well as an institutional framework for conducting the negotiations and even, potentially, for devising a solution.

In this respect, I would like to emphasize that the outcome of such negotiation within the framework of the EU is not left entirely open. It is here important to underline that in all the existing or potential conflicts of sovereignties within the EU, the claimants for their own national solution never called for a solution outside of the EU. Scots —as they demonstrated by the clear result that was recorded in Scotland on the 23 June 2016 Brexit referendum [38]— or Catalans, always expressed their wish to separate from the State in which they are incorporated, while remaining within the EU.

> The EU is not only the frame for the negotiation process, but it will also constitute the institutional framework in which the outcome of the conflict of sovereignties should take place. The chances to arrive at a solution within the European Union are much more bigger than in any other legal or institutional setting

Thus the EU is not only the frame for the negotiation process, but it will also constitute the institutional framework in which the outcome of the conflict should take place. As art. 1 TEU states, the EU is only "the process of creating an ever closer union among the peoples of Europe" [39], not the purpose in itself. And the quest for peoples (or nations) without a State in Europe is nothing more than a quest for a proper participation in this process of an ever closer union among the peoples of Europe. As we shall see in the fourth part of this Chapter, such a quest does not necessarily equate with becoming a new State in Europe, which could then join the EU according to the process laid out in art. 49 TEU. Actually, seriously considering the proper participation to the process of an ever closer union among the peoples of Europe as the outcome of an existing conflict of sovereignties within the EU offers quite a diversity of possible outcomes to the political negotiation, always within the EU, and possibly outside or inside the institutional framework of the existing State party to that conflict of sovereignties.

In other words, framing the dispute within the EU sets the threshold for a solution lower than it would be under international law (a framework in which the claimant party either becomes a new State or renounces its claim). This is, in my view, a huge advantage, making the chances to arrive at a solution to such conflict of sovereignties within the EU much more likely than in any other legal/institutional setting.

How to launch the European process?

This is obviously the most complex and delicate issue. And as a legal scholar, I am in no good position to offer a solution to this difficult question. However, as any legal scholar, I properly appreciate the value of precedents. As regards such puzzle, it seems to me that at least once, the European Council [40] did adopt "conclusions" enclosing both conditions for joining the EU as a new member State, and the Commitment by EU Member States of the time –they were 12– to admit as new member States any "European State" meeting the conditions set forth in these Conclusions of the Presidency" [41]. Such commitment and conditionality are nowadays found in art. 49 TEU, which states: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union".

We learn from these conclusions that in June 1993, "[t]he European Council held a thorough discussion on the relations between the Community and the countries of Central and Eastern Europe with which the Community has concluded or plans to conclude European agreements ("associated countries"), on the basis of the Commission's communication prepared at the invitation of the Edinburgh European Council" [42]. The discussion had been thorough and tough, because EEC member States were not in agreement on the strategy for the future development of European integration, some wishing to privilege the "deepening" of European integration and strengthening of EEC institutions, while other pushed for a rapid enlargement to Eastern European Countries, in order to stabilize the potentially unstable geopolitical situation.

The outcome was that "the European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union" [43]. This paragraph is often referred to as the "Copenhagen criteria" for joining the EU.

The point I want to underline with this reference to the 1993 Copenhagen conclusions is that the European Council took the initiative to offer policy guidelines, both to the EEC/EC/EU itself, recognizing the right of associated Countries of Central and Eastern Europe to access

to membership [44], but under specific conditions, set forth in the same paragraph. If the right to apply for accession did exist under the Treaties, the major geopolitical changes of 1989-91 made its implementation a debated political issue. By taking the initiative to clearly reassert that right as regards countries of Central and Eastern Europe, and by indicating clear conditions to be met by candidate member States for accessing what was to become EU, took a political initiative going beyond Treaty implementation, it was playing the role it was instituted for. As is stated in art. 15 § 1 TEU, "the European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof". This is what it did in 1993, and this is what it should be doing as regards conflicts of sovereignties on its own territory in the second decade of the 21st century.

> The European Council should recognize the legitimacy of the claim for sovereignty by "peoples without a State in Europe". In the same document, it should set obligations and processes that have to be respected by all parties to such conflicts of sovereignties, in order to establish conditions and eventually limits under which such claim could be materialized within the EU

I do not propose that conditions for "separatist entities" to become EU member States should be set forth by the European Council. As we shall see in the last section, I am far from certain this is, from the vantage point of the EU at least, the most desired outcome to such conflicts. What I propose is that the European Council recognizes the legitimacy of the claim for sovereignty by "peoples without a State in Europe", as it is bound to do according to positive international law. However, and without prejudging the outcome of such conflicts, it should in the same document set obligations and processes that have to be respected by all parties to such conflicts of sovereignties. Even though the European Council now has a permanent President (Charles Michel, a Belgian politician) whose duty should be to initiate such process, I dare suggesting that Slovenia, which will hold the rotating presidency of the EU in the second Semester of 2021 –and which has itself emerged as a European State following a conflict of sovereignties with the Socialist Federative Republic of Yugoslavia initiated by an independence referendum held in Slovenia in 1991– should try to promote such a "political approach at EU level of conflicts of sovereignties on EU own territory".

It would be a recognition of the legitimacy for European peoples without a State to claim full participation, as a proper people of Europe, to "the ever closer Union among the peoples of Europe", but could at the same time establish conditions (and eventually limits) under which such claim could be materialized within the EU.

Possible outcomes of the process

It is naturally too early at this stage to discuss outcomes of such political negotiations between two parties claiming competing sovereignties. On the other hand, knowing the horizon of possible solutions may help to initiate the political process at European level. This is why in this last section, I want to sketch, very summarily, the three most likely possible outcomes I can imagine to such conflicts of sovereignties within the EU.

First, it is very possible that a negotiation process between the two legitimate sovereignty claims leads to an institutional solution within the previously existing national polity. In the 2014 Scottish referendum, the UK authorities a few weeks before the vote, had promised, in case of a negative vote to independence for Scotland, to implement a "devo max" project, meaning an institutional rearrangement within the UK to better recognize the right to express and implement collective preferences by Scotland, within the UK. Naturally, even such a solution, within the EU context, should include measures linked to a proper access to EU decision-making mechanisms. In such endeavor, the potentialities of institutional creativity, both at national and at EU levels should not be underestimated.

Second, substantial reforms of EU institutions and decision-making processes could be envisaged in order to accommodate the claim for self-determination by European peoples without a State within the EU. In other words, an institutional solution could be envisaged, short from requiring this people of Europe to have its own State to fully participate to this "ever closer Union among the peoples of Europe". Naturally, such a reform should go well beyond a reboot of the Committee of the Regions, or the creation of a specific "second class" status in some newly created chamber of an existing institution. Some of the peoples of Europe without a State live in regional authorities which, demographically, would compare to the top-tier of "middle-sized European countries". The EU citizens belonging to such a people of Europe should then —even without necessarily having the status of citizens of a European State member of the EU— have a proper say in EU decision-making processes, compatible with the principles of democratic representation, as requested by the Treaties [45].

Third, the "regional claim for sovereignty" could lead to accession to Statehood. The new sovereign territorial entity would then be a European State, and, as such, have the right to access to EU membership, provided it fulfils the conditions set forth in art. 49 TEU. There is an ongoing academic debate about such "internal enlargement", and notably about the sequences of the process. The heart of the debate relates to a territory (and its population) in which the EU rule is implemented and which has for destiny to remain –even under a different status– a territory under the jurisdiction of the EU, is it then wise to ask it to leave the EU first, to be readmitted later. Without entering this debate here, I think there is a need to point out another issue raised by such a solution.

It appears likely, if one of the peoples of Europe without a State currently on EU territory succeeds with its claim for sovereignty to acquire Statehood and later membership as an EU member State, that it will induce a "domino effect". This is why the President of the

European Commission in 2017, Jean-Claude Juncker, stated a few days after the aborted Catalan referendum, that he could not envisage the functioning of an EU with 90-member States [46]. Mr. Juncker was certainly right about that. This then implies that this third potential outcome would necessarily bring us back to the second potential outcome, that is a major overhaul of EU institutions, in order to allow all peoples of Europe an equal participation to that process of an ever closer Union among the peoples of Europe, as stated in article 1 § 2 TEU. A long overdue overhaul [47] that would greatly benefit, not only the peoples of Europe currently without a State, but the European integration process itself.

So for all these reasons, it seems appropriate and actually evident that the EU does offer a proper framework for attempting to settle conflicts of sovereignties on its own territory, while relaunching the European integration process itself.

REFERENCES

1 — Berglund, C., i Souleimanov, E. A. (2020). What is (not) asymmetric conflict? From conceptual stretching to conceptual structuring. *Dynamics of Asymmetric Conflict*, 13(1), 87-98.

2 — Carta de les Nacions Unides, art. 1 § 2.

3 — Koskenniemi, M. "National self-determination today: Problems of legal theory and practice", *ICLQ* 43.2 [1994], 241. Vegeu l'informe de 2014 a l'Assemblea General de les Nacions Unides de De Zayas, A., expert independent sobre la promoció d'un ordre internacional democràtic i equitatiu de les Nacions Unides des del 2012 fins al 2018 (doc. A/69/272), en el qual proposa que "la consecució del dret d'autodeterminació és una estratègia vital de prevenció de conflictes". Disponible en línia.

4 — A la pràctica, això és lluny de ser el cas. Vegeu per exemple Michael Keating et al. (ed.), *Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, Routledge, 2018, un llibre del qual la meva contribució "The Right to National Self-determination within the EU: a Legal Investigation" (sèrie de documents de treball EUborders, setembre de 2017, 23 p.) ha estat exclosa, ja que l'opinió defensada pels editors era la no aplicació del dret d'autodeterminació a la UE, excepte en virtut de la tesi de la "secessió reparadora"; vegeu Vidmar, J. (2018). "Secession and the limits of democratic decision making" que constitueix el capítol 12 del llibre editat per Keating i al. l'any 2018.

5 — Aquesta és la posició del dret internacional, que ho qualifica com "el principi de territorialitat o sobirania territorial". Segons aquest principi, els estats han de mantenir la seva sobirania vigent i, per tant, han d'evitar qualsevol acte de sobirania d'un altre actor en el seu propi territori (vegeu *Island of Palmas case*, 4 d'abril de 1928, *Reports of International arbitral Awards*, vol. II, 829-871). Tanmateix, volem cridar l'atenció sobre possibles excepcions tal com s'explora en la molt interessant contribució de Hugues Dumont i Mathias El Berhoumi "La reconnaissance constitutionnelle du droit de demander la sécession dans les états plurinationaux", a Gagnon A.-G. i Noreau, P. (ed.), *Constitutionnalisme, droits et diversité: Mélanges en l'honneur de José Woehrling*, Montréal, Les éditions Thémis, 2017, 461-503.

6 — TJUE, 15 de febrer de 1963, *van Gend & Loos v. Fiscal administration of The Netherlands*, cas 26/62.

7 — Vegeu Dinstein, Y. (2016). *The conduct of hostilities under the law of international armed conflict*. Cambridge University Press.

8 — L'art. 2 del Tractat de la Unió Europea (TUE) estableix que: "La Unió es fonamenta en els valors del respecte de la dignitat humana, la llibertat, la democràcia, la igualtat, l'estat de dret i el respecte dels drets humans, incloent-hi els drets de les persones que pertanyen a les minories. Aquests valors són comuns als estats membres en una societat en què prevalen el pluralisme, la no discriminació, la tolerància, la justícia, la solidaritat i la igualtat entre dones i homes" (TUE, art. 2, *DOUE*, C 202/17 de 7 de juny de 2016).

9 — El principi IV del Decàleg d'Hèlsinki fa referència a la "integritat territorial dels estats" i diu el següent: "Els estats participants respectaran la integritat territorial de cadascun dels estats participants. En conseqüència, s'abstindran de qualsevol acció incompatible amb els propòsits i els principis de la Carta de les Nacions Unides contra la integritat territorial, la independència política o la unitat de qualsevol estat participant, i en particular de qualsevol acció que constitueixi una amenaça o ús de la força".

10 — "La Unió respectarà la igualtat dels estats membres davant els Tractats, com també la seva identitat nacional, inherent a les seves estructures fonamentals, polítiques i constitucionals, incloent-hi l'autogovern regional i local. Respectarà les seves funcions estatals essencials, incloent-hi la garantia de la integritat territorial de l'estat, el manteniment de la llei i l'ordre i la protecció de la seguretat nacional. En particular, la seguretat nacional continua sent responsabilitat exclusiva de cada estat membre" (TUE, art. 4 § 2, *loc. cit.*, 18).

11 — CIJ, Opinió del 22 de juliol de 2010, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, opinió consultiva, *I.C.J. Reports* 2010, p. 403, § 80.

12 — Des de 1975, han aparegut a Europa nous estats, com Bòsnia i Hercegovina, Croàcia, la República Txeca, Estònia, Letònia, Lituània, Montenegro, Sèrbia, Eslovàquia i Eslovènia; fins i tot set d'aquests nous estats han estat admesos com a estats membres de la UE. Vegeu sobre aquest número, Levrat (2017), "The Right to National Self-determination within the EU: a Legal Investigation" (sèrie de documents de treball EUborders, setembre de 2017, 23 p.).

13 — CIJ, 30 de juny de 1995, *East Timor* (Portugal v. Austràlia), sentència, *I.C.J. Reports* 1995, p. 90.

14 — TJUE, 21 de desembre de 2016, Council vs Front Polisario, C-104/16 P, ECLI:EU:C:2016:973.

15 — CIJ, opinió del 22 de juliol de 2010, *loc. cit.*, § 79. També CIJ, opinió del 25 de febrer de 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, opinió consultiva, *I.C.J. Reports* 2019, p.

16 — Conveni Internacional de Drets Culturals, Socials i Econòmics i Conveni Internacional de Drets Civils i Polítics, adoptats i oberts a la signatura, ratificació i adhesió per la Resolució 2200A (XXI) del 16 de desembre de 1966 de l'Assemblea General de les Nacions Unides.

17 — Comitè de Drets Humans de les Nacions Unides, “Comentari general núm. 12: article 1 (Dret d’autodeterminació)”, adoptat en la seva 21a sessió (1984).
18 — Art. 1 § 3, comú als dos Convenis de Drets Humans de les Nacions Unides de 1966.
19 — Tractat de la Unió Europea (TUE), article 2, *DOUE*, C 202/17 de 7 de juny de 2016.
20 — De Zayas, A (2014). Informe de l’expert independent de l’Assemblea General de les Nacions Unides sobre la promoció d’un ordre internacional democràtic i equitatius de les Nacions Unides (doc. A/69/272). Disponible en línia.
21 — Tractat de la Unió Europea (TUE), article 2, *DOUE*, C 202/17 de 7 de juny de 2016.
22 — Segons l’art. 3 § 5 del TUE, la UE “contribuirà […] a l’observança estricta i al desenvolupament del dret internacional, incloent-hi el respecte als principis de la Carta de les Nacions Unides”.
23 — Sentència del Tribunal Suprem del Canadà de 20 d’agost de 1998 a “Reference re Secession of Quebec”, *Supreme Court Judgements Report* [1998] 2 SCR 217, número de cas 25506, § 151.
24 — *Ibid*., § 152.
25 — *Ibid*., § 151.
26 — *Ibid*., § 153.
27 — Vegeu Gagnon, A. G. (2020), “Multinational federalism: challenges, shortcomings and promises”, *Regional & Federal Studies*, 1-16.
28 — Nicolaïdis, K. (2004), “The new constitution as european ‘demoi-cracy’?”, *Critical review of international social and political philosophy*, 7(1), 76-93. Cheneval, F. (2011), *The government of the peoples: On the idea and principles of multilateral democracy*. Springer.
29 — És més que probable que aquest sigui el cas pel que fa a les sentències de presó dictades pel Tribunal Suprem d’Espanya per a alguns independentistes catalans, amb un desconsideració considerable per part dels tribunals nacionals espanyols a les disposicions del TEDH.
30 — En haver impedit l’Estat espanyol, mitjançant l’ús de la força (violència física), la celebració d’un adequat referèndum d’independència a Catalunya l’octubre del 2017, es fa impossible afirmar que “una clara majoria” dels catalans ha expressat la seva voluntat d’independència. Naturalment, el comportament del govern espanyol en aquell cas estava en total contradicció amb els seus compromisos internacionals, però el resultat és que la reivindicació del govern català de Puigdemont no va tenir el suport democràtic adequat. Tanmateix, el principi “*ex iniuria ius non oritur*” impedeix que el govern espanyol reclami cap dret sobre la situació que va provocar il·legalment.
31 — Vegeu el lloc web indicators.ohchr.org per conèixer l’estat d’acceptació (signatures, ratificacions) d’aquests Convenis.
32 — Vegeu per al mateix ordre de pensaments, la Comissió Europea per a la democràcia a través del dret (Comissió de Venècia del Consell d’Europa), *Self-determination and secession in constitutional Law*, CDLINF (2000)002-e.
33 — Tribunal Suprem del Canadà (1998), *loc. cit*., § 149.
34 — *Ibid*., § 151.

35 — *Ibid*., § 150.

36 — Article 1 § 1 de la Carta de les Nacions Unides. Els membres de les Nacions Unides són, segons l'art. 4 de la Carta de les Nacions Unides, estats de dret internacional.

37 — Tot i que, com hem subratllat a la nota 11 anterior, el Tractat de Lisboa va introduir un nou art. 4 § 2 que diu: "La Unió respectarà la igualtat dels estats membres davant els Tractats, com també la seva identitat nacional, […]". Tanmateix, aquesta adhesió tardana als Tractats de fundació de la UE no modifica la dinàmica i l'estructura fonamentals de la UE. TUE, art. 1 § 1.

38 — En aquesta votació, 1.661.191 votants, que representaven el 62 % del total dels vots a Escòcia, van expressar la seva voluntat de quedar-se a la UE.

39 — *DOUE*, C 202/16 de 7 de juny de 2016

40 — La composició del Consell Europeu s'estableix a l'article 15 § 2 del TUE: "El Consell Europeu estarà format pels caps d'Estat o de Govern dels estats membres, juntament amb el seu president i el president de la Comissió. L'Alt Representant de la Unió per a Afers exteriors i Política de Seguretat participarà en les seves tasques".

41 — Les conclusions de la Presidència danesa de les Comunitats (en aquell moment, el Tractat de Maastricht que crearà la UE encara no era vigent) del Consell Europeu celebrat a Copenhaguen els dies 21 i 22 de juny de 1993 es poden trobar a la web del Consell Europeu. Disponibles en línia.

42 — Punt 7.A.i de les conclusions de Copenhaguen, *loc. cit*. Disponibles en línia.

43 — *Ibid*., punt 7.A.iii.

44 — En el moment de la Cimera de Copenhaguen de 1993, aquest dret estava regulat per l'art. 237 del Tractat de Roma pel qual es constituïa la CEE i, amb l'entrada en vigor del Tractat de Maastricht (ja signat més d'un any abans, però encara sense vigència), es va acordar a l'art. O del nou Tractat sobre la Unió Europea (*DOUE*, C 191/164 de 29 de juliol de 1992). El dret es va reconèixer per a "tots els estats europeus", però no es van establir condicions específiques: només es troben indicacions de caire procedimental en aquests articles.

45 — L'article 10 § 1 del TUE estableix: "El funcionament de la Unió es basarà en la democràcia representativa". A més, l'art. 9 del TUE garanteix que "en totes les seves activitats, la Unió respectarà el principi d'igualtat dels seus ciutadans, que rebran la mateixa atenció de les seves institucions, òrgans, oficines i agències". Sens dubte, això també cobriria el dret a una representació igualment justa en els processos de presa de decisions de la UE.

46 — En declaracions a un fòrum d'estudiants a Luxemburg el divendres 13 d'octubre de 2017, Jean-Claude Juncker va dir: "Si permetem, però això no és cosa nostra, que Catalunya s'independitzi, altres faran el mateix i això no m'agradaria. No m'agradaria una Unió Europea d'aquí a 15 anys formada per uns 90 estats". Declaracions recollides al mitjà BBC News: article disponible en línia.

47 — Aquest debat ja estava en curs quan es va celebrar el Consell de Copenhaguen de 1993 a què ens referíem anteriorment. Els lectors han de recordar que la major part del marc institucional de la UE ha estat concebut per a una Comunitat Europea del Carbó i de l'Acer amb sis estats membres.

Nicolas Levrat

Nicolas Levrat és professor de la Facultat de Dret de la Universitat de Ginebra des de l'any 2001. Doctor en Dret Internacional Públic, va ser director de l'Institut Européen (IEUG) i del Global Studies Institute (GSI). Els seus àmbits de recerca inclouen el Dret Institucional Europeu, la governança en sistems institucionals complexos, els drets de les minories, l'ordre jurídic europeu, la cooperació transfronterera, les relacions Suïssa-Europa i els estatuts dels poders públics europeus. És membre associat del Centre for International Law i del Center for Public Law de la Universitat Lliure de Brussel·les (ULB), cofundador de la Xarxa per a l'estudi d'estàndards transfronterers i interterritorials (RENTI), membre del Consell Acadèmic d'Erasmus Mundos Globalization Europe (GEM) i codirector de l'Escola de doctorat suïssa sobre els fonaments del dret europeu i internacional. També és integrant del comitè editorial de la *Revue belge de droit international*, membre del comitè directiu del Centre Cultural Europeu i vicepresident de les reunions internacionals de Ginebra. És autor de diversos articles i publicacions, com el llibre *L'Europe et ses collectivités territoriales. Réflexions sur l'organisation et l'exercice du pouvoir territorial dans un monde globalisé* (2005).