

## Succession of States in the EU

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### **Abstract**

*A specter is haunting Europe – the specter of separatism. Scotland, Catalonia, Flanders, South Tyrol – all these regions have separatist movements pursuing independence from their current National State. The breakup of an EU Member State no longer seems impossible. To date, it is unclear what impact this would have on the EU membership of the new entities (with consequences for the character of citizenship, voting rights in the council, number of MEPs etc.) that emerge from the old States. The common rules of Public International Law governing the succession of States are insufficient in the case of a succession of States in the EU. Although the Treaties do not provide for such a situation and the past 60 years of European history offer only a few and not really persuasive precedents, the nature of the EU as a joint association of sovereign States (“Staatenverbund”) demands a special approach: A separated State will neither be automatically excluded from the EU nor will it automatically become a new Member State. Drawing on the ideas of Articles 49 and 50 TEU this essay develops a procedure for balancing the interests of the EU, its Member States, and the people living in the seceding State, who are likely to be pro-EU. If a Member State breaks up, both the remaining State and the new entity will continue to represent the former Member State in the European institutions. The former Member State will provisionally continue to exist for both the EU and its Member States with respect to European matters. A process of negotiation between the two “new” States themselves and with the other Member States will lead to a new balance within the EU and the adaption of the Treaties – the solution has to be a political one. If the negotiations are successful, the former Member State can finally be dissolved at the EU level. In this case either both new States will become new Members or the remaining State will continue the membership (with necessary modifications) while the separated State will become a new Member. No part of the State would have left the EU – not even for a moment. But if one Member State or one of the two concerned States rejects further negotiations – which must be considered every Member State’s due right – the breakup will be final ex nunc. Whether both States or just one of them leave(s) the EU (while the remaining State continues the former’s membership without being affected by the secession) would then be a question of classical Public International Law governing the succession of States. This solution identifies the legal order of the EU as preeminent while Public International Law is only subsidiary. This political and legal “Staatenverbund”-approach recognizes the EU as a special form of entity, a joint association of sovereign States.*

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## I. The “breakup” of an EU Member State

### A. Possible scenario

If one identifies the EU as a “decisive step towards a politically constituted global society,”<sup>1</sup> then separatist movements within Member States of the EU can be regarded as somewhat anachronistic. Be that as it may – the national existence of several EU Member States is challenged by the ambitions of such separatist groups, often enjoying vast support from politicians and the public. These movements reveal the persistent cohesiveness of ethnic, cultural, and linguistic groups, thought by some to have been overcome by more inclusive supranational identifications. The centrifugal forces in (mostly prosperous) regions at the periphery of their National States seem to increase during times of economic crisis. The secession of a region from a bigger State no longer seems to be merely a “hypothetical”<sup>2</sup> question.<sup>3</sup>

### B. Possible approaches

The succession of States is not a new phenomenon. It is one of the “most disputed parts of Public International Law”.<sup>4</sup> While the *Vienna Convention on the Law of Treaties* does not address questions of State succession (Article 73),<sup>5</sup> the *Vienna Convention on Succession of States in Respect of Treaties* (VCSST)<sup>6</sup> from 1978 defines State succession as “the replacement of one State by another in the responsibility for the international relations of territory” (Article 2 (1) lit. b). *Bühler* is correct in saying that this definition strongly emphasizes the territorial dimension while neglecting the question of status.<sup>7</sup> Furthermore, only 22 States have ratified the VCSST – in the EU only Croatia, the Czech Republic, Estonia, and Slovakia.<sup>8</sup> The reason for the other States’ hesitation: The Convention does not merely codify existing customary International Law but tries to further refine it (in favor of the developing “Newly Independent States”).<sup>9</sup> Thus the Convention does not provide any binding rules on how to treat succession in Europe – neither with respect to treaties nor regarding membership in

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1 Jürgen Habermas, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts - Ein Essay zur Verfassung Europas*, HJIL 72 (2012), 1–44, 2.

2 J. Barroso, Answer given by Mr Barroso on behalf of the Commission, OJ C 45, 16.2.2008 to the parliamentary question E-2886/2007 by Catherine Stihler (PSE).

3 See the scenario outlined in *Daniel Kenealy*, How Do You Solve a Problem Like Scotland? A Proposal Regarding ‘Internal Enlargement’, *Journal of European Integration* 36 (2014), 585–600, 585 et seq.

4 BGH, Ruling of 30 January 1991 – 2 BGs 38/91 –, NJW 1991, 929, 931; BVerfG, Ruling of 10 June 1997 – 2 BvR 1516/96, BVerfGE 96, 68, 79; *Andreas Zimmermann*, *Staatennachfolge in völkerrechtliche Verträge* (Heidelberg 2000), 1 et seqq. with further references.

5 ILM 8 (1969), 679 et seqq.; German Federal Law Gazette (BGBl.) 1985 II, 927 et seqq.

6 ILM 17 (1978), 1488 et seqq.; *Hans D. Treviranus*, *Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen*, HJIL 39 (1979), 259–300, 279 et seqq.; for the development of the text cf. *Karl Zemanek*, *Die Wiener Konvention über die Staatennachfolge in Verträge*, in: Herbert Miessler et al. (eds.), *Ius Humanitatis*, FS *Alfred Verdross* (Berlin 1980), 719 et seqq.

7 *Konrad G. Bühler*, *State Succession and Membership in International Organizations* (The Hague 2001), 5 et seqq. He argues, following ideas first expressed by *Rauschning*, that for the succession into International Organizations (IO) the notion of “status” would be more helpful, cf. *Dietrich Rauschning*, *Das Schicksal völkerrechtlicher Verträge bei der Änderung des Status ihrer Partner* (Hamburg 1963), 12 et seqq., 234 et seq.

8 UN Treaty Collection, Chapter XXIII, No. 2.

9 Cf. *Matthias Herdegen*, *Völkerrecht*, 13th ed. (Munich 2014), § 29 Recital No. 2, 8; in favor of the convention and outlining the advantages, cf. *Zidane Meriboute*, *La codification de la succession d’Etats aux traits* (Paris 1984), 218.

International Organizations (IO),<sup>10</sup> let alone EU membership. The Convention is only applicable insofar as it states customary law, and even these cases will have to be scrutinized to see whether they comply with European Law. Nevertheless, the Convention's definition of "succession", which enjoys broad acceptance,<sup>11</sup> is also suitable in cases of succession of EU Member States.<sup>12</sup>

How a State succession in Europe will affect the membership of that State in the EU depends on how the "breakup" is qualified in terms of Public International and EU Law. The first part of this inquiry will focus on the categories of State succession and the common rules governing this phenomenon, especially those for State succession in IOs and whether they are applicable in the case examined here (III.). The direct opposite to a solution treating the EU like any IO formed by sovereign States would be to categorize the EU as a federal entity resembling National States (IV. 2.), which would bring about a total different outcome. This leads to the decisive question: What is the nature of the EU (IV. 3.)? It is a question often avoided by politicians, courts, and scientists by using neologisms and *sui generis* approaches. Though it is highly doubtful that these workarounds were meant to have real judicial content and implications, they – together with the few precedents of the past decades (IV. 1.) – do indeed help us to understand this issue and offer an EU-specific approach that represents an appropriate answer to a puzzling question (IV. 4.–IV. 7.).

## II. *Classical Public International Law as yardstick*

Crucial for a legal solution to the problem of State succession is the distinction between the different forms of the succession of States, given that they lead to different legal interpretations of the ramifications of "the replacement of one State by another in the responsibility for the international relations of territory".<sup>13</sup> There are several forms of successions of States

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10 Another UN convention, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, ILM 25 (1986), 547 (UN Doc. A/CONF. 129/15) is not yet in force.

11 *Matthias Herdegen* (Fn. 9), § 29 Recital 1; *Andreas Zimmermann* (Fn. 4), 11 et seqq.

12 A deeper focus on the terms is fruitless because the expression "State succession" is used to describe a "wide number of different factual situation" and serves as an "omnibus expression" for them, *J. O'Brien*, *International Law*, 2001, 587.

13 Article 2(1) lit. b VCSSRT (Fn. 6).

that can be distinguished, though these categories should not be overestimated in their ability to allow conclusions with compelling legal effects to be drawn.<sup>14</sup>

### A. Possible Forms of State succession in the EU

#### 1. Dissolution

Dissolution (also “dismembratio” or dismemberment) describes the disintegration of a State and the birth of new subjects of International Law. Examples are the dissolution of the USSR, the breakup of the Socialist Federal Republic of Yugoslavia (SFRY), and the division of Czechoslovakia into the Czech Republic and Slovakia in 1992. All three cases show the legal difficulties that arise when a State breaks up. In all three cases the new-born States were not set totally free of pre-existing legal commitments, because such a vacuum in legal relations would have been unbearable for the legal system.<sup>15</sup>

In the case of the USSR, the Conference of the newly formed Commonwealth of Independent States in Alma Ata decided on 21 December 1991 that Russia would take the USSR’s place in the UN Security Council and Soviet embassies would become Russian embassies – just as if Russia were identical to the USSR.<sup>16</sup> The international community accepted this in the interest of a peaceful transition<sup>17</sup>.

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14 The assignment (or cession), incorporation, and merger are of no importance in the context of the succession of States in the EU at present (though not necessarily forever). The *assignment* (or cession) is the transition of public authority of one State to another with regard to a territory. An example for assignment is the transfer of sovereignty over Hong Kong from the UK to China, see Joint Declaration of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong with Annexes, UK Treaty Series No. 26 (1985), Cmnd. 9543; cf. *Georg Ress*, The Legal Status of Hong Kong after 1997, HJIL 46 (1986), 647–699, 648 et seqq. (with the text of the treaty, 682 et seqq.). The *incorporation* describes the absorbance of one State by another, or – connatural to the incorporation – the merger, meaning a fusion of two equitable States. A practical example for the incorporation was the reunification of West and East Germany in 1990, when the GDR joined the Federal Republic of Germany, with the former perishing and the latter continuing its existence. See also III. A. 2.; BGH, NJW 1991, 2498, 2500; *Konrad G. Bühler* (Fn. 7), 142; *Oliver Dörr*, Die Inkorporation als Tatbestand der Staatensukzession (Berlin 1995), 399 et seqq.; *Jochen A. Frowein*, Germany Reunited, HJIL 51 (1991), 333–348, 347; *Stefan Oeter*, German Unification and State Succession, HJIL 51 (1991), 349–383, 351; different: *Cornelius Thum*, Die Kontinuitätsfrage im völkerrechtlichen Rahmen der Einigung Deutschlands (Frankfurt on the Main 1993), 105 et seqq. (GDR had never been a sovereign State). An example of a merger was the formation of the Northern German Confederation by Prussia and her allies in 1866, which lead to a new Federal State. *Joseph L. Kunz*, Staatenverbindungen (Stuttgart 1929), 538 et seq. The German Unification of 1871 was an incorporation of the Southern German States into the Northern German Confederation, forming the German Empire *Oliver Dörr*, op. cit., 265–271; *Jochen A. Frowein*, Der Eingliederungsvertrag im Völkerrecht und im Staatsrecht, HJIL 30 (1970), 1–18, 1; *Georg Jellinek*, Die Lehre von den Staatenverbindungen (Vienna 1882 [1996]), 275; 538 et seq. Cf. *Konrad G. Bühler* (Fn. 7), 18, describing State succession as a “political phenomenon”.

15 Cf. *Marcel Kau*, Der Staat und der Einzelne als Völkerrechtssubjekte, in: Wolfgang Graf Vitzthum/Alexander Proelß (eds.), Völkerrecht, 6. ed. (Berlin/Boston 2013), Recital 188 et seqq.

16 *Zhenis Kembayev*, Probleme der Rechtsnachfolge von der Sowjetunion auf die Russische Föderation, AVR 46 (2008), 106–129, 115 et seqq.; *Theodor Schweisfurth*, Das Recht der Staatensukzession [The law of state succession], in: Ulrich Fastenrath/Theodor Schweisfurth/Carsten T. Ebenroth (eds.), Berichte der Deutschen Gesellschaft für Völkerrecht 35 (1996), 64.

17 *Matthias Herdegen* (Fn. 9), § 29 Recital 3; Cf. *Zhenis Kembayev* (Fn. 16), 127, who interprets the end of the USSR as a *de iure* dismembratio and *de facto* secession. *Andreas Zimmermann* (Fn. 4), 97, argues for a continuation by Russia and a secession of the other States.

Though the Federal Republic of Yugoslavia (FRY, consisting of Serbia and Montenegro before the dissolution of the Union in 2006) claimed to continue the SFRY,<sup>18</sup> international opinion did not accept this.<sup>19</sup> The FRY's share of territory and people was deemed too small to allow it to identify as the "Continuator State".<sup>20</sup> Instead, international opinion was that all the different countries coming into being would take on the respective legal position of the former SFRY.

At first glance the dissolution of Czechoslovakia may look like a typical secession, in this case by Slovakia. The Czech Republic is much bigger in territory and population than Slovakia and the old capital remained in the Czech Republic. But both States took new names, gave themselves new constitutions, and the constitutional law of 25 November 1992 declared the old State would cease to exist on 31 December 1992.<sup>21</sup> Both States later ratified the VCSSRT and accepted – without being legally bound to do so at the time – the application of its *Article 34 – Succession of States in cases of separation of parts of a State*.<sup>22</sup>

In all these cases the legal situation after the breakup was not a legal limbo with no bindings, rights, or legal relations what so ever. The new States themselves and the international community wanted to continue several treaties and relations that already existed between the respective State and the dissolved subject of International Law.

The total dissolution of a State is rather unlikely in the EU. Even in the case of Belgium it is possible that the remaining part would still be considered as "Belgium". But there is a lesson to be learned from the Czechoslovak "velvet divorce": Both the Czech and the Slovak side seemed to have accepted the customary rule expressed in Article 34 VCSSRT of a *ipso facto* succession into the dissolved State's treaties – though both were new States they were also equal successor States.

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18 UN Doc. S/23877, 5 May 1992.

19 *Andreas Zimmermann* (Fn. 4), 104 et seq.; cf. ILM 31 (1992), 1488, 1523 et seqq.

20 The concept of the "Continuer State" is controversial; the VCSSRT does not use this term. It defines only successor States and predecessor States. The term "Continuer State" itself is somewhat precarious. The spelling varies from "Continuor State", "Continuator State", "Continuing State" and "Continuer State". The term was coined during the dissolution of the Soviet Union in 1991 as a self-reference of Russia towards its claim to continue the international identity of the USSR. For the problems when dealing with these concepts, cf. *Rein Mullerson*, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, ICLQ 42 (1993), 473–493, 473 et seqq.

21 *Mahulena Hosková*, *Die Selbstauflösung der ČSFR*, HJIL 53 (1993), 689–735, 693 et seqq.

22 "1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."

## 2. *Secession*

A secession describes the disengagement of a region or smaller part of a Federal State.<sup>23</sup> In this constellation the leftover parts form the remaining State, which is likely to continue its existence as a subject of International Law, while the separated region becomes a newly born subject of International Law (with certain adjustments). Normally the remaining State holds the bigger share of land and population and is culturally homogenous. It keeps its capital and national symbols. Examples after 1945 are the secession of Pakistan from (British) India (1947),<sup>24</sup> of Syria from the United Arab Republic (1961),<sup>25</sup> of Singapore from Malaysia (1965),<sup>26</sup> and the secession of Bangladesh from Pakistan (1972).<sup>27</sup> The secession of a region of an EU Member State is the most likely case in the underlying scenario discussed here.

## 3. *Who would decide?*

Who decides what kind of State succession, dissolution or secession, will be dealt with? The division of land, military power (*e.g.* nuclear weapons), population, and sites of cultural and historical preeminence, as well as the division of economic power, deposits of resources, and the location of the capital would indicate whether the case was one of separation or secession (objective factors). Also of importance would be the will of the emerging States either to continue as the former subject of International Law or to be considered newly born (subjective factors).<sup>28</sup> If these questions were controversial, the parties could submit to a decision of the International Court of Justice.<sup>29</sup> There is a precedent in the court's decision of 22 July 2010. It decided in a non-binding legal opinion that the independence of Kosovo did not violate any rules of International Law.<sup>30</sup> In any case, the final decision remains, as it did in the past, in the hands of the international community, *i.e.* the States themselves.<sup>31</sup> It is likely that the bigger State will claim to continue the predecessor's personality and that this will not be contested by the smaller seceding State – there would be no reason for the international community to reject this outcome.

23 Cf. Supreme Court of Canada, "Reference re Secession of Quebec", [1998] 2 S.C.R. 217, Margin No. 83: "Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one."

24 Succession of States and Governments: Document A/CN.4/149 and Add.1 (3.12.1962), in: YBILC 11 (1962), 101; Cf. UN Press Release PM/473, 12. August 1947, in: Daniel P. O'Connell, State succession in municipal law and international law, Vol. II (Cambridge 1967), 186.

25 Cf. Richard Young, The State of Syria: Old or New, AJIL 56 (1962), 482–488, 482 et seqq.

26 Cf. Daniel P. O'Connell (Fn. 24), 178.

27 Andreas Zimmermann (Fn. 4), 172; different opinion: Daniel P. O'Connell, Reflections on the State Succession Convention, HJIL 39 (1979), 725–739, 728.

28 Konrad G. Bühler (Fn. 7), 18; cf. James Crawford, The Creation of States in International Law, 2nd ed. (Oxford 2006), 667 et seqq.

29 Arabella Thorp/Gavin Thompson, Scotland, independence and the EU, House of Commons Library, Standard Note SN/LA/6110, 8 Nov. 2011, 4.

30 I.C.J., ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO. Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, 403.

31 Cf. Darren Harvey, Secession and Dissolution in European Union Member States: A Prospective Analysis of the Consequences for European Union Membership, ZEuS (2013), 403–447, 408, who states correctly that "a fair judgment of the continuity problem cannot content itself with leaving political factors out of consideration and with concentration on a supposedly 'pure' legal solution". In the same direction Supreme Court of Canada, "Reference re Secession of Quebec" (Fn. 23), Margin No. 155.

## B. “Newly independent State” – The clean slate rule

### 1. *Tabula rasa for new States*

Intuitively, the determination of a new State’s choices by decisions of the predecessor State seems inadequate, almost unfair. Following this idea, a newborn State should be free in its decision as to whether to be bound by pre-existing treaties and other international commitments. Article 16 VCSSRT (*Position in respect of the treaties of the predecessor State*) takes this into account: “A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.”

### 2. *Exceptions*

For the reasons stated above (especially the interest of the members of the international community to preserve the status quo), there have to be exceptions to this rule. Article 17 VCSSRT provides the most favorable position for a newly independent State: It “may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates” (Article 17(1)). There are only two exceptions to this rule: The application of the treaty in regard to the newly independent State would be incompatible with the purpose of the treaty or would lead to a radical change of the conditions for its operation (Article 17(2)), or when the participation of any other State in the treaty has to be considered by and requires the consent of all the parties to the treaty and not all members agree to admit the new State (Article 17(3)).

*Treviranus* is quite right when he says that the common expression “clean slate rule” is sort of misleading and that it should rather be referred to as the “free choice doctrine”.<sup>32</sup> However, this rule is not applicable to territorial boundaries established by a treaty, or obligations and rights established by a treaty and relating to the regime of a boundary. Furthermore, the rule is not applicable to other territorial regimes, meaning it is inapplicable to rights and obligations linked to the territory. This is expressed in Article 11 et seq. VCSSRT but it is also regarded as customary law.<sup>33</sup>

### 3. *Applicable in Europe?*

Article 16 et seqq. fall within “Part III: Newly independent States” of the VCSSRT. This refers to successor States whose territory immediately before the date of the succession of States was a dependent territory, the international relations for which the predecessor State was responsible (Article 2(1) lit. f). This definition covers States with a colonial past<sup>34</sup> but not seceding States.<sup>35</sup> Thus the clean slate rule would not be applicable in Europe. Instead, for the dissolution of an old State the outcome would be that all new States would be regarded as

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32 Hans D. Treviranus, Die Konvention der Vereinten Nationen über Staatensukzession bei Verträgen, HJIL 39 (1979), 259–300, 267 et seqq.

33 James Crawford, Brownlie’s Principles of Public International Law, 8th ed. (Oxford 2012), 424 et seqq., 439; Konrad G. Bühler (Fn. 7), 15.

34 Hans D. Treviranus (Fn. 32), 267.

35 *Ibid.*, 271.

successor States to the respective rights and obligations. In case of a secession the remaining State would continue the personality of the former State under International Law, while the new State would only succeed the rights and obligations of its former sovereign in regard to treaties linked to its territory and boundary regimes.

### C. Succession of States in IOs

#### 1. Principle

The VCSSRT applies to the succession of States in respect to any treaty that “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” (Article 4 lit. a). In the codifying process the International Law Commission (ICL) left aside the question of succession of States in IOs, while codifying the succession in regard to treaties and other rights and duties from different sources.<sup>36</sup> In general, it can be considered as customary law that in IOs there is no succession of States by new subjects of international law,<sup>37</sup> while Continuator States are not affected by the secession of a region – provided the constitution of the IO itself does not contain any specific rules stating otherwise. There is both a practice (*consuetudo*) and opinion (*opinio iuris*) underlying this principle. Some examples concerning dissolution (2.) and secession (3.) illustrate this.

#### 2. Dissolution

In anticipation of the *dismembratio* of Czechoslovakia (ČSFR) the foreign ministers of the Czech and the Slovak republic agreed on 12 December 1992 that both new States would have to apply anew to continue the ČSFR’s membership in any given IO – but as new States.<sup>38</sup> This was a consequence of the notion that both States were successor States of the ČSFR in respect to former treaties but were also new States and did not continue the international personality of the ČSFR. Both States agreed that in subsidiary bodies of the UN “membership *ad personam* would be respected without prejudice”.<sup>39</sup> These decisions concerned membership in about fifty IOs, the majority in which both States wanted continued participation. Most of the transitions went rather smoothly.<sup>40</sup> Only the admission process to membership in the European Council turned out to be difficult: The Member States of the European Council agreed that they would only admit both States together, but Hungary at first opposed Slovakia’s membership because of quarrels concerning the Hungarian minority in Slovakia. A Hungarian veto would also have blocked the Czech Republic’s admission, which resulted in some strain on Czech-Hungarian relations. Both States were, nonetheless, accepted to the European Council in 1993.<sup>41</sup> The association agreements with the European Community had to be negotiated anew. The old treaty negotiations with the ČSFR were not continued with the new States, despite that they would have preferred this approach.<sup>42</sup>

36 Konrad G. Bühler (Fn. 7), 1.; cf. Report by Manfred Lachs, UN-Doc. A/CN.4/160 and Corr. 1, reprinted in YBILC (1963 vol. II) at 261, para.13.

37 Marcel Kau (Fn. 15), 216.

38 Mahulena Hosková (Fn. 21), 720 et seq.

39 Quoted from Mahulena Hosková (Fn. 21), 721.

40 Cf. Theodor Schweisfurth (Fn.16), 120 et seqq.

41 Cf. Mahulena Hosková (Fn. 21), 722 et seq.

42 Cf. Mahulena Hosková (Fn. 21), 723.



While the dissolution of the SFRY may have been much more violent and chaotic, its legal nature was essentially the same. The major difference was that the FRY (Serbia and Montenegro) desired and claimed to continue the SFRY's personality, though this was rejected by the international community.<sup>43</sup> The so called *Badinter Arbitration Committee* declared that the membership of the SFRY in IOs "must be terminated according to their statutes and that none of the successor States may thereupon claim for itself alone the membership rights previously enjoyed by the Socialist Federal Republic of Yugoslavia".<sup>44</sup>

The dissolution of the USSR was different: Russia continued the USSR's membership in the UN, the Security Council, and the IOs of the UN system.<sup>45</sup> Practically all IOs accepted Russia as the continuer, not merely as the successor; the World Intellectual Property Organization (WIPO) was the only exception and chose to treat Russia as a successor State not a continuer.<sup>46</sup> Ukraine and Belarus were also allowed to continue their seats at the UN<sup>47</sup> (because they had been members before) while the other former Soviet republics, e.g. the Baltic States, had to be admitted as new States.<sup>48</sup>

As the "dissolution of a State means that it no longer has legal personality",<sup>49</sup> and because membership in an IO can be seen as a somewhat personal right of the personality of International Law, the rule is that after a dissolution the new States have to be accepted anew by the IO. Exceptions are possible though, as the Russian example shows. This is the deeper meaning of the *Badinter Arbitration Committee's* statement that a succession of a dissolved State has to be approached with "the greatest prudence".<sup>50</sup>

### 3. *Secession*

After Pakistan's secession from India it was the UN's view that the Republic of India was identical with British India, which was already a member of the UN. Thus it did not have to apply again for membership because it already was a Member State and its membership was not affected by Pakistan's secession,<sup>51</sup> although Pakistan had stated the opinion that it should become a member of the UN together with India.<sup>52</sup>

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43 See "Declaration on a new Yugoslavia" Belgrade, 27 April 1992, in: Snežana Trifunovska (ed.), *Yugoslavia Through Documents. From its creation to its dissolution* (Dordrecht 1994), 532; *Theodor Schweisfurth* (Fn. 16), 76 et seqq.

44 Opinion No. 9 (4 July 1992), in: UN Doc., S/1994/874, 18 February 1994, 5 (6), also in: *Danilo Türk*, *Recognition of States: A Comment*, EJIL 4 (1993), 66–71, Annex at 88 et seq.

45 *Theodor Schweisfurth* (Fn. 16), 111 et seqq.; *Yehuda Z. Blum*, *Russia Takes Over the Soviet Union's Seat at the United Nations*, EJIL 3 (1992), 354–361.

46 *Konrad G. Bühler* (Fn. 7), 156 et seq.

47 Cf. *Yehuda Z. Blum* (Fn. 45), 354 et seq.

48 German Federal Law Gazette (BGBl.) 1992 II, 174.

49 *Danilo Türk* (Fn. 44), 87.

50 Opinion No. 8, in: UN Doc (Fn. 44), 3, and in *Danilo Türk* (Fn. 44), 87, with a different wording "greatest caution".

51 U.N. Press Release, U.N. Doc. PM/473, 12 August 1947; *K. P. Misra*, *Succession of States: Pakistan's Membership in the United Nations*, CanYIL 3 (1965), 281–289.

52 U.N. Security Council Official Records No. 78, 2nd year 1947, 2027 et seq.

In 1960 the Federation of Mali was admitted to the UN. Nonetheless, before its acceptance Senegal declared its independence and sought UN membership of its own. This action demonstrated that it accepted that the Federation of Mali's application had no relevance to its own case.<sup>53</sup> Also in the cases of East-Timor<sup>54</sup> and South Sudan<sup>55</sup>, both new States had to apply anew for membership in IOs. Indonesia's and Sudan's membership were not affected. Like the incorporation of smaller States into bigger ones, this can be seen as a consequence of the principle of movable boundaries.

#### D. Consequences

All in all, in an IO-like EU only the State continuing the predecessor's personality would retain its membership. The separated new State would have to apply for membership anew, following the procedure of Article 49 TEU. This outcome strengthens the position of the central governments of the Member States. It is likely to be the favored official position of the foreign ministries. First, it is in the interest of those States dealing with separatist movements. Second, it is consistent with classical international legal traditions. Third, the political pressure (at least before the secession) would force national governments (of the other EU Member States) to avoid annoying the government and public of the affected National State. In addition to its desire not to weaken any Member States, this logic is also the most likely explanation of the European Commission's statement from 2004:

"When a part of the territory of a Member State ceases to be a part of that State, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. [...] Under Article 49 of the Treaty on European Union, any European State which respects the principles set out in Article 6(1) of the Treaty on European Union may apply to become a member of the Union. An application of this type requires, if the application is accepted by the Council acting unanimously, a negotiation on an agreement between the Applicant State and the Member States on the conditions of admission and the adjustments to the treaties which such admission entails. This agreement is subject to ratification by all Member States and the Applicant State."<sup>56</sup>

Mr. Prodi's successor Mr. Barroso reaffirmed this opinion on 10 December 2012.<sup>57</sup> The idea behind the exclusion of new States from IOs (without special rules to deal with State successions) is to protect the interests of the other Member States in working together only with "like-minded" States.<sup>58</sup> This promotes traditional approaches that at first glance are formu-

53 *Konrad G. Bühler* (Fn. 7), 61 et seq.; *Daniel P. O'Connell* (Fn. 24), 170 et seqq.

54 UN Security Council Resolution 1414 (2002), S/RES/1414 (2012) 23 May 2002.

55 Application of the Republic of South Sudan for admission to membership in the United Nations, UN A/65/900-S/2011/418, 9 July 2011; see also United Nations Security Council Resolution 1999 (2011), 13 July 2011. Cf. *Géraldine Giraudeau*, *La naissance du Soudan du Sud: La paix impossible?*, *Annuaire Français De Droit International* LVIII (2012), 61–82.

56 *R. Prodi*, Answer given by Mr. Prodi on behalf of the Commission OJ C 84 E/422, 3.4.2004.

57 "[...] the European Commission has noted that scenarios such as the separation of one part of a Member State or the creation of a new state would not be neutral as regards the EU Treaties. The European Commission would express its opinion on the legal consequences under EU law upon request from a Member State detailing a precise scenario. [...] If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory." Answer of J. M. Barroso, President of the European Commission, to Lord Tugendhat, Acting Chairman. House of Lords, available: <http://www.parliament.uk>.

58 *Matthew Happold*, *Independence: In or out of Europe?*, *ICLQ* 49 (2000), 15–34, 27 et seq.

lated in strictly legal terms – ones that indeed radically reduce the nature of the present *Theatrum Europeum* to what it was sixty years ago (and has been for centuries before that): a world that is in its essence defined, inhabited, and ruled by National States who organize certain policies through inter-governmental IOs.

### III. EU-specific approach

#### A. Precedents for a change in sovereignty in Europe since 1958

##### 1. *The Algerian Case*

The majority of rules of the treaty regime established by the European Economic Community (EEC) in 1958 were for the most part applicable also to “Algeria and the French overseas departments” (Article 227(2) EEC Treaty).<sup>59</sup> When Algeria became independent, this led to the question of its membership in the EEC. If the EEC rules had still been applicable, France could have imported Algerian products without complying with the customs rules set out for trade with non-EEC countries. Although International Public Law would have suggested an easy answer to this question (with its independence Algeria ceased to be part of the EEC-territory and was to be regarded as a third country), the reality was much more difficult. The ECJ had to decide on a case in which an employee living in Algeria wanted to relocate to Germany and to take his pension with him. The ECJ stated that although Algeria gained its independence in 1962 it only had “ceased to be regarded as coming within the scope of Regulation No 3 by virtue of regulation 109/65/EEC<sup>60</sup> which deleted the reference to Algeria in the annexes to Regulation Nos 3 and 4 [of the Council, concerning social security for migrant workers] with effect from 19 January 1965”.<sup>61</sup> However, this decision addressed only the application of rules regarding social insurance and not the question in general. The European States continued to favor Algerian products, although the European Parliament expressed the opinion that no legal basis for these privileges could be found after Algerian independence.<sup>62</sup> This situation, created by an “informal consensus”, was finally resolved by the Cooperation Agreement between the European Economic Community and the People’s Democratic Republic of Algeria.<sup>63</sup> Algeria, however, continued to be mentioned in the Treaties up to 1992, when it was finally erased from the text.<sup>64</sup>

##### 2. *Greenland, German Reunification, and Mayotte*

Algeria is not the only precedent for a change in the status of a territory affecting its relation to the EU. Three other examples are instructive for this essay’s topic: Greenland’s withdrawal, Germany’s reunification, and Mayotte’s incorporation.

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59 German Federal Law Gazette (BGBl.) 1957 II, 894; for the supranational character of the EEC cf. *Günther Jaenicke*, *Der übernationale Charakter der Europäischen Wirtschaftsgemeinschaft*, HJIL 19 (1958), 153–196.

60 OJ EC, 9.7.65, 2124 et seqq.

61 ECJ, Judgment of 26 June 1975, C 6/75 (*Ulrich Horst vs. Bundesknappschaft*), 823, 830.

62 Cf. *Andreas Zimmermann* (Fn. 4), 676.

63 See *Council Regulation (EEC) No 2210/78 of 26 September 1978 concerning the conclusion of the Cooperation Agreement between the European Economic Community and the People’s Democratic Republic of Algeria*, OJ L 263, 27.9.1978, 1.

64 *Andreas Zimmermann* (Fn. 4), 677.

*Greenland's withdrawal*

As part of Denmark Greenland was part of EEC territory. However, in a 1982 referendum the population voted to exit from the EEC.<sup>65</sup> This led to a negotiation process and the subsequent adjustment of the Treaties.<sup>66</sup> The position of Denmark remained unchanged while Greenland received the status of an overseas territory (see Article 204 TFEU). This situation is totally different from the one this essay is addressing, yet there is a lesson to be learned: The referendum in Greenland itself had no direct outcome but rather led to negotiations. There are thus two steps of relevance: a will expressed by the people of a territory and further negotiations within the existing European framework.

*Germany's reunification*

It was common opinion that because of the moving treaty boundary principle the incorporation of the GDR into the Federal Republic of Germany on 3 October 1990<sup>67</sup> would result in the territory of the GDR becoming *ipso facto* a part of the ECC.<sup>68</sup> That meant not only that the Primary European Community Law of the ECC became immediately applicable in the former GDR but also the Secondary European Community Law.<sup>69</sup> But this opinion did not answer all the questions. How, for example, were the East German people to be represented in the European Parliament? How could Germany deal with the special challenges arising from incorporating the formerly East German centrally planned economy into the Western German market economy model? These questions were also dealt with by political means. From 1 February 1993 Germany's number of MEPs was raised from 81 to 99<sup>70</sup> and even before that the parliamentary rules of the European Parliament were changed so that 18 representatives nominated by the *Bundestag* were admitted as observers without the right to vote or stand for election.<sup>71</sup>

*Mayotte's incorporation*

On 31 March 2011 Mayotte, which had been an overseas collectivity, became an overseas département of France (the Republic's 101<sup>st</sup> département).<sup>72</sup> However, this evolution to a veritable part of the EU Member State of France did not make Mayotte automatically a part of the EU – a so-called outermost region. The event instead laid the ground for a process provided for in Article 355(6) TFEU. Following this provision the European Council may, on the initiative of the Member State concerned (here France), unanimously adopt a decision amending the status, with regard to the Union, of a *inter alia* French county or territory referred to in Article 355(2) TFEU. This process was applicable to Mayotte (as listed in Annex II of the Lisbon Treaty<sup>73</sup>). This situation was anticipated before the entry into force of the Lis-

65 Cf. *Frederik Harhoff*, Greenland's withdrawal from the European Communities, CMLR 20 (1983), 13–33.

66 *Matthew Happold* (Fn. 58), 32.

67 See also Fn. 14.

68 *Thomas Giegerich*, The European Dimension of German Reunification, HJIL 51 (1991), 384–450, 418 et seqq; *Stefan Oeter* (Fn. 14), 371.

69 *Thomas Giegerich* (Fn. 68), 422; *Andreas Zimmermann* (Fn. 4), 690 et seqq.

70 Decision amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSD, EEC, Euratom of 20 September 1976 (93/81/Euratom, ECSC, EEC), OJ L 33, 9.2.93, 15.

71 By the new Article 136a of the Rules of Procedure of the European Parliament, OJ C 295, 26.11.90, 78.

72 Recital 3 of the European Council Decision of 11 July 2012 amending the status of Mayotte with regard to the European Union (2012/419/EU), OJ L 204, 31.7.2012, 131.

73 OJ C 83, 30.3.2010, 334.

bon Treaty and addressed in Declaration 43 of that treaty.<sup>74</sup> The procedure following from these provisions led to Mayotte becoming an outermost region of the EU on 1 January 2014 through the unanimous decision of the European Council based on the provisions of the treaty.<sup>75</sup> Again, the change in the territorial scope of EU territory did not come into force automatically but by unanimous decision of the Member States.

### 3. *Consequences*

None of the above discussed precedents match perfectly with the scenario examined in this article. Most likely, the EU would deal with a secession of a region from an existing Member State. Greenland continued to be affiliated with Denmark, the Federal Republic of Germany just broadened its territory but remained unchanged in its personality, and the same goes for France and Mayotte. Only Algeria's situation was similar to that of a would-be-seceding region in today's EU. Although this took place at the very beginning of the entity that would later become the EU and the degree of interdependence and supranational authority was much smaller, politicians and lawyers at the time faced considerable difficulties in dealing with this process. Algeria was considered a part of the common market – a limbo that lasted for years. But all the aforementioned examples demonstrate a principle inherent to the EU's way of addressing changes in the legal status of the territory of a Member State. All were conducted with a process of inter-European and intra-governmental negotiations and dialogues in order to find a compromise acceptable to all parties involved.

#### ***B. A parallel situation? The breakup of a federated State***

In cases of dissolving federated States the situation is different. Imagine the breakup of a federated State within a National State, for example, the breakup of the German Land Baden-Wuerttemberg into Baden and Wuerttemberg, or the split up of Tuscany into two smaller regions, with both new federated States still remaining part of the Federal State. Such a rearrangement within a National State would have no influence on the State itself. This is the logical consequence of the nature of a (Federal) State: While its federated States might have been free in a former point of time to join, they are typically not free to quit the Federal State. Changes in their territory happen within the Federal State and do not mean a secession from but rather a realignment of the State. The German Basic Law, for example, provides a procedure for delimitation of the federal territory (not for the withdrawal from the federal state) in its Article 29, the Italian constitution in its Article 132. The newly formed regions or federated States remain part of the National State and are never excluded, not even for a moment. Generally, it can be stated that the formation of new federated States by fusion, secession of a region from a bigger region within a State, or comparable situations have no influence on the territory of the Federal State or the citizenship of the population etc. A secession of a feder-

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74 OJ C 83, 30.3.2010, 351: "The High Contracting Parties agree that the European Council, pursuant to Article 355(6), will take a decision leading to the modification of the status of Mayotte with regard to the Union in order to make this territory an outermost region within the meaning of Article 355(1) and Article 349, when the French authorities notify the European Council and the Commission that the evolution currently under way in the internal status of the island so allows".

75 Article 1 of the European Council Decision of 11 July 2012 (Fn. 72), 131.

ated State is just not compatible with the idea of a Federal State, except as otherwise provided or permitted by the constitution.<sup>76</sup>

If one interprets the EU as a quasi-State, the outcome of the outlined scenario would be totally different from the outcome following from Public International Law. In this scenario, no territory would leave the EU. Fusions, secessions, dissolutions, and so on would all merely be realignments of EU Member States. New States could leave the EU by applying Article 50 TEU. They might even do so in the process of becoming independent, so that their withdrawal would become legally valid simultaneously to their independence from their former National State. But this process would have to comply with European Primary Law.

In a “State-like scenario” the new State, for example Scotland, Catalonia, Flanders, would automatically be a Member State of the EU. The will of the other Member States, especially the residual of the former State would be irrelevant. Certainly, specific adjustments to the Treaties would be needed, but that would be the same as with any other constitutional order within one Member State after a rearrangement among its regions or federated States. The only difference is that most National States provide rules in their constitution for this eventuality and the EU does not.<sup>77</sup>

### C. *The nature of the EU*

#### 1. *The necessity of a decision*

In the end it comes down to one decisive question: Is the EU an IO formed by States or does it resemble a State-like entity? In the first case a secession could automatically lead to the exclusion of the new State while the remaining State would continue the former Member State’s membership, even though there may be certain modifications to cope with the rump State’s loss in power, territory, population etc. In the second case, a secession or dissolution would have no repercussions on the affiliation of a territory and its population with the EU but only on the division of power within the European framework. If the EU is to be treated as a State, there would be a different outcome than in an IO-like EU. Thus the nature of the EU is not merely an academic question but an essential practical one.

On the one hand, the EU has several interesting characteristics going beyond those of ordinary IOs, for example direct application of EU regulations, the primacy of European Union Law,<sup>78</sup> the citizenship of the Union (Article 20(1) TFEU), the interconnection of the national judiciaries and the EU Courts,<sup>79</sup> the fact that – following the Lisbon Treaty – most of

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76 See also *Karl Doehring*, *Die Wiedervereinigung Deutschlands und die europäische Integration*, NJW (1982), 2209–2214, 2210 et seq. See also the ruling “Reference re Secession of Quebec” of the Supreme Court of Canada (Fn. 23), Margin No 83 et seq.: “[...] the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. [...] The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. [...] The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.”

77 The following explanations will show that the “State-like scenario” is not (yet) applicable in the context of the EU.

78 ECJ, Judgment of 15.7.1964 – C-6/64 (*Costa/ENEL*), 587; BVerfG, Judgment of 6.7.2010, 2 BvR 2661/06, BVerfGE 126, 286, 301 – Mangold; cf. *Walter Pauly/Hannes Beutel*, *Der EuGH als sechstes Fachgericht*, DÖV (2014), 160–163, 163.

79 Cf. *Armin von Bogdandy/Stephan Schill*, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, CMLR 48 (2011), 1417–1454, 1447 et seqq.

the decisions taken in the Council do not need unanimity,<sup>80</sup> and the fact that the EU has its own resources (e.g. the European Union value added tax<sup>81</sup>). On the other hand, the EU has no empowerment to seize power (*Kompetenz-Kompetenz*).<sup>82</sup> Only the Member States can transfer sovereignty to the European level. They keep doing so only because pan-European problems need European solutions, not because the States accept an obligation to do so. They can choose the EU as a designated actor, but they can also use different measures, as seen with the European Stability Mechanism.<sup>83</sup> Though well-provided with power and competences and having the (albeit slowing) tendency to accumulate even more (sometimes even by its own organs such as the ECJ) the EU has no State power. The mere fact that Article 50 TEU offers the possibility to quit the Union reveals that the EU is not a State, because in a Federal State the constituent States have no or only limited sovereignty and are typically not allowed to leave the Federal State.<sup>84</sup> Their legal relation is part of Constitutional Law, not International Public Law.<sup>85</sup> Article 50 TEU is an equivalent of Article 60–62 VCSSRT.<sup>86</sup> Like EU citizenship, the EU “government” is of secondary nature and dependent on the Member States.

## 2. *So, that's it? The EU is an ordinary IO?*

As an interim conclusion, it can be stated that the EU is nothing other than an IO. Under normal circumstances this would lead to a definite answer with regard to the consequences of a secession in an EU Member State. The remaining State would continue the Member State's membership in the EU, while the new State would not be a Member State and would have to apply (anew) for membership.<sup>87</sup> In this outcome the special constitution of the EU is put aside and it is stripped down to an ordinary IO similar to the OECD, the Council of Europe, or the UN. The strain on the new State could be decreased by a quick application process, retaining the staff from the dissolved country in the European institutions etc.

This approach is, however, too formalistic for the EU. Article 50 TEU allows a Member State to leave the EU if it chooses to do so. The new State was, as part of the former whole Member State, also a part of the EU and doesn't necessarily want to leave the EU. It wants to withdraw from the former State. Treating the EU as an ordinary IO and the subsequent application of classical Public International Law would lead to a forced exit from the EU against the new State's possible/probable wishes. All the citizens of the new State (Scots, Catalans,

80 See Article 238 TFEU.

81 Cf. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, 1.

82 *Stephan Breitenmoser*, Die Europäische Union zwischen Völkerrecht und Staatsrecht, HJIL 55 (1995), 951–992, 990; *Claus Grupp*, Kompetenz-Kompetenz, in: Jan Bergmann (ed.), Handlexikon der Europäischen Union, 4. ed. (Baden-Baden 2012); *Natalia A. Jaekel*, Das Recht des Austritts aus der Europäischen Union, Jura 32 (2010), 87–90, 90.

83 But Article 136 TFEU had to be changed to make the ESM possible; the ESM was created as an inter-governmental treaty, see: Gesetz zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist, vom 13. September 2012, German Federal Law Gazette (BGBl.) 2012 II, 978; and: Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus vom 13. September 2012, German Federal Law Gazette (BGBl.) 2012 II, 981.

84 *Peter M. Huber*, Das institutionelle Gleichgewicht zwischen Rat und Europäischem Parlament in der künftigen Verfassung für Europa, EuR 38 (2003), 574–599, 591; see also above III. B.

85 *Walter Rudolf*, Bundesstaat und Völkerrecht, AVR 27 (1989), 1–30, 3.

86 UNTS Vol. 1155, 331.

87 After a dissolution, both new States would have to apply anew for membership.

Flemings etc.) would lose their Union citizenship; the new State's legal system would suddenly lack all the European rules (especially the regulations) that were previously directly applicable. On the one hand, the fact that the Treaties do not provide for this situation could mean that a State succession in the EU should be dealt with following Public International Law.<sup>88</sup> On the other hand, it could also be interpreted that Article 50 TEU is conclusive and as the new State's secession is not regulated in the Treaties a mere secession (or dissolution) alone does not need to mean a final exit from the EU.

### 3. *The association of sovereign States (Staatenverbund) concept*

Though Article 50 TEU grants States the right to leave the EU, the nature of the Union is that of a lasting commitment between the European States. It is a supranational entity with its own legal sphere, an "independent source of law"<sup>89</sup>: "the law stemming from the treaty could not [...] be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question".<sup>90</sup> It is equally difficult to grasp the nature of the EU by classical notions of sovereignty, federation, confederation etc. The Member States remain sovereign, the citizens of the Member States remain the subjects of democratic legitimation; the fundamental order of the EU is subject to the decision-making power of the Member States. The German Federal Constitutional Court coined the notion of the EU being a treaty-based association of sovereign States (*Staatenverbund*).<sup>91</sup>

The fact that the Treaties are not specific on the question of State succession and continuity in the EU offers the Member States wide discretion on how to deal with such an event. They do not have to treat the EU like any other IO, though they can if they so choose. The EU is a special organization and has to be treated that way. Continuance of membership is of vital interest for every person involved. Just a few months or even weeks of exclusion would mean a disturbance in the economy of the State concerned. Thus the most appropriate solution would be if the Member States were to interpret the Treaties and try to find an EU-specific way to deal with a State succession in the EU. The general rules of Public International Law would not be needed if the Member States – as "Masters of the Treaties"<sup>92</sup> – decided to stick to special EU-rules. This is not even unique to the EU; the Member States of any IO can choose to have special rules regarding how to enter or to leave the organization.<sup>93</sup>

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88 On basis of the legal situation before the Lisbon Treaty, *Matthew Happold* (Fn. 58), 29 et seq.

89 ECJ (Fn. 78), 594.

90 ECJ (Fn. 78), 594.

91 BVerfG, Judgment of 12.10.1993 – 2 BvR 2134/92 etc. – NJW 1993, 3047 et seq., English translation in: *Gerhard Wegen/Christopher Kuner*, Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty, ILM 33 (1994), 388–444, 396 Headnote 8, with – from today's perspective poor – translation "inter-governmental community". Cf. also *Christian Tomuschat*, Das Endziel der Europäischen Integration Maastricht ad infinitum?, DVBl. 111 (1996), 1073–1082, 1075 et seqq.

92 For the use of this term ("Herren der Verträge") in German jurisprudence cf. *Adelheid Puttler*, Sind die Mitgliedstaaten noch „Herren“ der EU?, EuR (2004), 669–690, 671; *Matthias Ruffert*, in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4. ed. (Munich 2011), Article 341 TFEU Recital 3.

93 *Konrad G. Bühler* (Fn. 7), 295 et seq. This practice of the Member States can become an "Established Practice", but such a practice does not yet exist for the breakup of an EU Member State, see. Fn. 96. The community of States and international bodies as creators of International Public Law and their (common) position towards a State succession can define the nature of the succession and how it should be dealt with, see *Rein Mullerson* (Fn. 20), 492 et seq.



#### 4. Consequences

It would not serve the interests of the EU if a seceding region of a Member State that wants to stay in the EU was automatically excluded at first and then had to be re-affiliated. The other Member States can choose to allow such a scenario, but they are not obliged to treat this situation in that way.<sup>94</sup> If they choose not to use their power to treat this case with a special approach, it will be exactly that: a decision. There is no automatism in the solution of this problem – only the decision-making power of the associated sovereign Member States.<sup>95</sup> If they do not want, *e.g.* Scotland, Catalonia, Flanders etc., to be a Member at once, it will be their decision and not the binding legal consequence of any alleged rule of Public International Law. Whatever the Member States decide: it would be an EU-specific approach considering all the interests involved and inspired by the Treaties themselves.<sup>96</sup>

#### D. The process of negotiation (by analogy to Article 50 TEU)

##### 1. Principles

For Treaty changes normally Article 48 TEU is applicable. For the change of members Article 49 and 50 TEU are *leges speciales*.<sup>97</sup> Normally there would be a referendum on the independence of the seceding region of the Member State.<sup>98</sup> Such a change in sovereignty is – in analogy with Article 50(1) TEU – in accordance with European Law. The secession will take place in line with the constitutional requirements of the Member State (Article 50(1) TEU).

In our scenario this would mean that the regional government of the seceding region and the national government of the Member State would have to notify the European Council of their intentions.<sup>99</sup> Then the European Council would have to address the resulting questions. The notification has to be given to the European Council in sufficient time before the actual secession, so that the European leaders can form a common opinion. If the given time is too short and the situation so requires, the President of the European Council should convene a

94 Cf. *James Crawford* (Fn. 33), 442 et seq. for the UN: “However, the member states by general tacit agreement or acquiescence may treat particular cases in a special way”.

95 In the same direction: *James Crawford/Alan Boyle*, Scotland analysis: Devolution and the implications of Scottish independence, February 2013, Cm 8554, available at: [www.official-documents.gov.uk](http://www.official-documents.gov.uk).

96 Cf. *Konrad G. Bühler* (Fn. 7), 292 et seqq. outlines the importance of the concept of the “Established Practice of the Organization”. Of course, there is no EU-practice concerning the breakup of a Member State. But the Member States created the EU in order “to deepen the solidarity between their peoples” and “to continue the process of creating an ever closer union among the peoples of Europe” (Preamble of the TEU). This justifies the idea that an event of State succession in the EU must be dealt with in light of European solidarity as expressed in European Primary Law. In the same direction, *Daniel Kenealy* (Fn. 3), 585 et seqq.

97 Intriguingly, *Daniel Kenealy* (Fn. 3), 595 et seqq., who comes to a similar solution as the authors of this paper, uses an analogy to Article 48 to construct a treaty change towards an “Internal Enlargement”. It is a charming idea, but we think that Article 49, 50 TEU offer a more elaborate way to realize this “Internal Enlargement”.

98 Cf. Supreme Court of Canada, “Reference re Secession of Quebec” (Fn. 23), Margin No. 87: “Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.” Thus, even if a secession were illegal under constitutional law, the National State would have no right to deny the secession. In the same ruling the court expressed its view that negotiations between the parties were essential to the democratic and federal character of the State.

99 Following from Article 50(2)(1) TEU analog.

meeting of the European Council.<sup>100</sup> Part of the European Council would also be the head of government of the remaining Member State (assuming the EU treats the case as one of secession and not dissolution).<sup>101</sup> The European Council will have to provide the necessary guidelines for the forthcoming negotiations.<sup>102</sup> The negotiations with the new State would follow the framework set forth in Article 218(3) TFEU. The Commission should submit recommendations to the Council, which should adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.<sup>103</sup>

In this situation, the new State would be treated as another Member State potentially leaving the Union. Negotiations could only start after the (positive) referendum. The negotiations are to be concluded on behalf of the Union by the Council, after obtaining the consent of the European Parliament.<sup>104</sup> The outcome would be a "succession and continuation" agreement.<sup>105</sup> If the part of the old member State leaves the EU, it can rejoin by applying the procedure referred to in Article 49 TEU (Article 50(5) TEU analog). These two agreements would be combined – insofar it would be like leaving the EU (at the time they simultaneously leave the Member State) and rejoining in the same moment. The new State would never have left the EU.

## 2. *Adjustment of the majority*

In the question of the majority quorum, regulated in Article 50(4)(2) TEU, is a change to be made. The application of Article 50 TEU is the logical consequence of any country's sovereign choice to leave the Union, if it wishes to do so.<sup>106</sup> The other Member States cannot force it to stay in the Union. The procedure makes clear, however, that the withdrawing country has to accept the other State's interests in a well-arranged withdrawal.<sup>107</sup> Under normal circumstances unanimity is not necessary.<sup>108</sup> Therefore the Member States can act by a qualified majority, after obtaining the consent of the European Parliament. A qualified majority from 1 November 2014 on is defined in Article 238(3)(b) TFEU, as is declared in Article 50(4)(2) TEU. If a country wants to leave the Union, the sovereignty and the interests of the other States are not affected. But in the scenario outlined here a new Member State is about to join the Union.

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100 Following from Article 15(3)(3) TEU analog.

101 If not, neither of the two governments could be a part of the European Council or the Council during the negotiating process, cf. Article 50(4)(1) TEU.

102 Following from Article 50(2)(2) TEU analog.

103 Article 218(3) TFEU. The Commission seems more appropriate than the High Representative of the Union for Foreign Affairs and Security Policy to submit the recommendations to the Council because the Union should treat the whole case as an intra-Union affair – not as a case of relations to a third country.

104 Following from Article 50(2)(3) TEU analog.

105 This is developed out of the rules of Article 49(2) and Article 50(3) TEU (analog). The first demands an "agreement between the Member States and the applicant State" while the second defines the "withdrawal agreement". Both are not appropriate individually but can be used together and redefined in the context of this essay as the "succession and continuation" agreement.

106 BVerfG (Fn. 91), 3056 et seq.; *Thomas Oppermann*, Eine Verfassung für die Europäische Union, DVBl. 118 (2003), 1234–1246, 1242; *Thomas Bruha/Carsten Nowak*, Recht auf Austritt aus der Europäischen Union, AVR 42 (2004), 1–25, 1 (arguing against a similar rule in the failed European constitution); *Natalia A. Jaekel*, (Fn. 82), 90 (even denying the EU's quality as an everlasting alliance); *Juli Zeh*, Recht auf Austritt, ZEuS (2004), 173–210, 210, seeing a contradiction between this right and the nature of the EU as an eternal Union.

107 *Oliver Dörr*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der Europäischen Union*, 53. ed. 2014, Article 50 EUV [=TEU], Recital 3–5.

108 See Article 16(3) TEU.

Of course, it is not a “new” Member State in the classical sense of the word because it was, as part of the former whole Member State that it left, already a part of the Union. But from the moment of acceptance of the new State as a Member State the other countries will have to deal with the new State in its position as a Member State in its own right. There will be no way of excluding this new State ever again. It could only be stripped of its membership rights (cf. Article 7(3)(1) TEU). It makes sense to combine the negotiations with the parallel rules of Article 49 TEU, which is possible, as Article 50(5) TEU points out that withdrawal from the Union is not an impediment to readmission.

### 3. *Status of the seceding country during the negotiations*

During the process of negotiation the new State and the rump-State would still be part of the EU. Article 50(3) TEU (applied analogously) offers a hint on how to deal with the Member State’s legal status in the EU during the negotiation process. The Treaties would apply to the new State and the “rest-Member State” until the “succession and continuation agreement” comes into force. They would never cease to apply as their enduring applicability would be the subject matter of the agreement. The 2-years-rule of the provision in Article 50(3) TEU would be of no consequence, as the negotiations are unlikely to last that long. Furthermore, there is no reason for the European Council not to extend that period if needed. This solution takes into sufficient account the different interests dealt with in Article 50 TEU.

The purpose of Article 50 TEU is to guarantee stability during a period of uncertainty.<sup>109</sup> The *status quo ante* is to be secured until the Member States can agree on a new balance. While this is true in the case of a secession from the Union, it is the same situation in the case of secession from a Member State. Thus, after secession from a Member State the *status quo ante* should be preserved for as long as the negotiations last.<sup>110</sup>

In this scenario this would mean that the former Member State would still be a Member of the EU even if, on a national level, the breakup is completed. Such changes in its sovereignty and the question of the applicability of EU law to a territory are not of concern only to the affected State. Article 50 TEU proves that every change of the composition of the EU has to take place with the endorsement of all the other Member States. That means that the former Member State as a whole must remain a part of the EU for this time. The remainder of this Member State and the seceding region will have to represent the former Member State

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109 *Oliver Dörr*, in: Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der europäischen Union*, 53. ed. 2014, Article 50 EUV [=TFEU], Recital 48.

110 This is also suggested by the idea that a population should not be punished for executing its democratic right to national self-determination, cf. *Daniel Keane* (Fn. 3), 586. While it is true that the two States (predecessor and new State) should not be rewarded for their breakup, it would also be wrong to unduly discriminate against the concerned people.

together in the European Institutions.<sup>111</sup> The principle of Public International Law that sees the Continuator State as the only representative of the former State is not applicable in the European context.

Thus, the remainder of the former whole Member State might continue its existence in other IOs, like the UN, while the new State would have to apply anew, but in the EU the former whole Member State would still exist provisionally.<sup>112</sup> It is likely that the seceding region that forms the new State would leave the representation of the former Member State as a whole to the remainder of the former Member State and only demand participation in questions of vital self-interest.<sup>113</sup> In those questions the new State and the remainder of the former Member State would have to agree on a common position. If they could not agree, it would be as if the whole Member State abstained from voting. Even a “devolution agreement” between the predecessor State and the seceding State with different content would be of no relevance here because this agreement would only be applicable *inter partes*.<sup>114</sup>

#### *E. The renewed affiliation (by analogy to Article 49 TEU)*

The new State would have to be a European State – this would be the case in any scenario imaginable. If Mayotte for example were to become independent from France, it could not apply for Membership in the EU. It would leave the EU. Whether there would be a transition period would depend on the will of the Member States. Furthermore, the new State would have to accept and be willing to promote the values expressed in Article 2 TEU. Otherwise it has to leave the EU.

Following Article 49(1)(2) TEU analog, the notification of the secession of the new State from the Member State and the desire to stay in the EU (which is to be brought forward to the European Council in accordance with Article 50(2)(1) TEU) should also be announced to the European Parliament and the national parliaments. The seceding region would address its secession and desire to stay in the Union to the European Council, which has to act unanimously after consulting the Commission and after receiving the consent of the European Par-

111 At first glance, this seems odd, especially as there are no binding rules dictating this outcome. However, it is the logical consequence of combining Article 49 and Article 50 TEU in order to deal with the breakup of a Member State. The withdrawal on a European scale can only be achieved by mutual negotiation. There is no suggestion in the Treaties of an *ipso facto* change. Rather any change can only be achieved by negotiation. If a Member State splits up and the seceding State is still considered a part of the EU, then both parts together share the rights and obligations of the predecessor State towards the other Member States on an European level.

The continued existence of the former Member State as a whole is a kind of fiction on the European level and the consequence of the application of Articles 49 and 50 TEU. Such fiction of a State or rather a subject of International law is strange but not without precedent. The *German Reich* for example did not perish after World War II and two States emerged within the former Reich, of which only the Federal Republic of Germany claimed to be the continuator. A similar situation is the USA's One-China-Policy, despite the fact that two States (People's Republic of China and Taiwan) exist. The concept of a government-in-exile (sometimes of States) that has de facto perished has to a certain degree a fictional character, but is justified especially in the case of an unjust *occupatio in bello*.

112 See *Jochen Herbst*, Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?, GLJ 6 (2005), 1755–1760, 1756 et seqq.; dissenting and against such a clause before the failing of the European constitution *Thomas Bruha/Carsten Nowak* (Fn. 106), 21 et seqq.

113 This could be one object of the “devolution agreement” between the remainder of the Member State and the seceding State. Such “devolution agreements” were used in the past, e.g. in Germany and between the Czech and Slovak Republics, see *Konrad G. Bühler* (Fn. 7), 286 et seq.

114 *Konrad G. Bühler* (Fn. 7), 286 et seq.

liament (which shall act through a majority vote). This is a change from Article 49(1)(3) TEU. According to that regulation, the new State shall address the Council and not the European Council. That would be unnecessary, because its notification of secession would be sent to the European Council as outlined in the analogy to Article 50 TEU. Then the negotiation process between the new State, the rest of the Member State, and the EU can start.

## *E. Consequences*

### *1. Negotiations successful*

The possible outcomes of these negotiations are not directly described in the Treaties, but they could be found in analogy of Article 49(2) TEU. The outcome of the negotiations would be an adjustment of the Treaties. The new State must be added to the list of Member States. This would require a change in the clauses concerning the Member States, *e.g.* Article 52(1) TEU. Most likely, the remainder-State would refer to itself with the same name already used for the entire former State,<sup>115</sup> which the other Member States could accept – explicitly or implicitly.

The EU's power structure would have to be rebalanced. The role of the Member State remains unchanged. The affected Continuator State's influence in the Council might be reduced, as would its numbers of MEPs.<sup>116</sup> This same number of votes in the Council and number of MEPs would be transferred to the newborn State. Normally – because of degressive proportionality – the two countries “rest-Member State” and “new State” would get more votes in the Council and more MEPs than the combined Member State had before.<sup>117</sup> The other States might allow this, as the “new State” and “rest-Member State” could claim they are entitled to be treated like any other Member States of comparable size. However, the other States could object because by allowing this the new State and remainder of the former Member State would be rewarded for breaking up. It would seem inappropriate to reward the political castes of a Member State with more MEPs and influence even though they were not capable of compromising and getting along.

Whatever the outcome of the negotiations might be, because of Article 49(2)(2) TEU every Member State would have to ratify the decision in accordance with its own respective constitutional requirements. That would mean that in several States there could be national referenda on whether the new-born State could become a new Member State. Whether the membership only of the “new State” or of both “new State” and “rest-Member State” would be in question would depend on the specific constellation. If it is generally accepted that the remainder of the former Member State continues its personality, the acceptance of “rest-Member State” by the other EU Member States would not be necessary because of the movable boundaries principle. Certainly, this continuation of the fractured Member State by “rest-Member State” alone would only become valid on an European level after the negotiation process has come to an end and the new State joins the EU as a new State.

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115 Spain would want to remain “Spain”, the UK would stay the “UK”, Italy “Italy” etc.

116 Differing is *Harvey* (Fn. 31), 418: “At present there is nothing in the EU treaties or secondary legislation which would provide a concrete answer to this particular problem and from a broader perspective it is unclear how the only directly elected institution of the EU would deal with an instance of secession or dissolution in one of its member states.” In the end, *Harvey* favors – stressing the idea of continuity – that the UK might retain the same number of MEPs even after a Scottish secession (*ibid.*).

117 See Article 14(2)(2) TEU.

## 2. *Negotiations failed*

There are two reasons why the negotiations could come to an unsuccessful end. First, the negotiating process itself could flatline because either the seceding region or the remaining central government or one of the 27 other EU Member States rejects further talks. This is the consequence of the analogy to Article 49(1)(3) TEU. Unanimity is needed. That would also mean that the remainder of the former Member State and the new State would have to continue to work together at least for the sake of keeping the new State in the EU. If the remaining National State wants to punish its seceding region, it is entitled to do so. This sounds harsh and counter to solidarity, but it is the consequence of the fact that the EU membership of the new subject of International Law can obtrude on no other Member State.

Second, after a successful negotiation process adaption of the Treaties could fail because at least one Member State does not allow the new State to become a Member State. The reason could be anything in the particular constitutional setting that prevents the ratification of the change to the Treaties.

In both cases the analogy to Article 49 TEU would lead to an unsuccessful process. The whole Member State would have to be dissolved at once on the European level the moment the failure is definitive. Subsequently, with the Treaties offering no further rules, the common rules of Public International Law would have to be applied. The remainder of the Member State would declare itself the Continuator State of the Member State. The other Member States would in most cases accept this.<sup>118</sup> The “rest-Member State” would continue the former whole Member State’s position in the EU (with an adapted number of seats), following the movable boundary principle. If the other states do not accept this, this would mean that the Member States qualify the breakup of the Member State as a dissolution. In this case both parts of the former Member State would be in the same situation. They would both be treated as “new States”. If further Treaty changes were needed this would be a political question for later. The new State, now also on the European level no longer a part of the former Member State, would also cease to be a part of the EU. As the Treaties are not applicable, no withdrawal agreement (Article 50 TEU) would be needed. If no further arrangements were to be concluded, the Treaties and European Law would cease to be applicable in the new State from that moment on.

### *G. Political pragmatism or law?*

The Member States would, as “Masters of the Treaties”, always remain in control. If everything goes smoothly, the breakup of the Member State would have no effect on the common market. But if a State does not want to cooperate with the new State, it will be free to stop the negotiations. If the Member States want the EU to be like an ordinary IO, then that will be what they get. The process outlined in this essay could cope with all the different challenges and interests. It is developed following from the ideas of the Treaties, even though there are not any specific rules to deal with this situation. In this sense, the scholars who have

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118 There would regularly be no reason why the other States should reject this. On the contrary, this step is normally a way to guarantee stability, as could be seen in the case of Russia’s continuation of the USSR. Such acceptance is a free choice and could be rejected (as showed the example of Yugoslavia).

examined this question are absolutely right in stating that “any study on this topic will necessarily include a degree of speculation”.<sup>119</sup>

Thus, even if one thinks the outlined EU-specific approach is appropriate, sensible, and possible, one decisive question remains. Is this law or merely political pragmatism? In the categories this article is examining these two dimensions cannot be separated. There is no doubt that if a scenario is provided for in Primary (or on a lower level of importance, in the Secondary) Law, then the rules specified in European Law are binding. But in a situation not provided for by the Treaties and of such importance, the will of the Member States themselves, expressed in their agreements, becomes the binding law. The law of the EU is *lex specialis* to the rules of Public International Law; it forms a consistent set of rules and one has first to look for solutions to new problems in the existing EU Law. But its essence and the way it is formed is that of Public International Law – created by the concerned States. Certainly these States are influenced by their interpretation of political pragmatism and they would not choose a solution to any problem that does not yield the best political result for them. But this political pragmatism becomes law once States have agreed upon it, taken it into consideration, and have expressed that they are, from that point on, legally bound. Which result the negotiations have depends on the will of the States which they want to see enshrined in law.

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119 Darren Harvey (Fn. 31), 405; see also: James Crawford/Alan Boyle (Fn. 95), 68; Matthew Happold (Fn. 58), 34; H. Hofmeister, Was bedeutet Schottlands Unabhängigkeit für die Mitgliedschaft in der EU?, EuR 48 (2013), 711–720, 719 et seq.