

EU LAW AND THE SEPARATION OF MEMBER STATES

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INTRODUCTION

The most profound contribution of Konrad Schiemann to the European Union may well have been his Mackenzie Stuart Lecture at the University of Cambridge on February 9, 2012.¹ Having been born in Germany of German parents but brought up and educated in England, followed by a long and distinguished career as barrister, Queen’s Counsel and judge, he set out the case for the EU as a source of inspiration—what one might call the moral case for Europe. His lecture deserves to be read and valued by the students of the current generation for whom the experiences of our generation are as remote as were the Franco–Prussian War of 1870–71 or the Bulgarian atrocities of 1876 for us.

As my contribution to this set of essays in honour of Konrad Schiemann, I would like to address a more limited topic which

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1. Sir Konrad Schiemann, European Court of Justice, Mackenzie Stewart Lecture: The EU as a Source of Inspiration, (Feb. 9, 2012), http://www.cels.law.cam.ac.uk/mackenzie_stuart_lectures/2012_mackenzie_stuart_lecture.php.

has its own moral dimension. This is the problem that would arise if one constituent part of a Member State were to decide to separate from the rest of that State. The problem arises today—at least potentially—in the cases of Scotland, Catalonia and Flanders vis-à-vis, respectively, the remainder of the United Kingdom, Spain and Belgium.

The moral dimension has been accentuated very recently by a contribution of Professor Joseph Weiler as editor of the *European Journal of International Law* on the subject of Catalanian independence.² According to Professor Weiler, “It is simply ethically demoralizing to see the likes of Catalonia reverting to an early 20th-century post-World War I mentality, when the notion that a single state could encompass more than one nationality seemed impossible”³ The Catalan claims of historic wrongs in the Franco era are “but a fig leaf for seriously misdirected social and economic egoism, cultural and national hubris and the naked ambition of local politicians.”⁴ He concludes:

Europe should not seem like a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union. The assumption of automatic membership in the Union should be decisively squelched by the countries from whom secession is threatened and if their leaders, for internal political reasons, lack the courage so to say, by other Member States of the Union, France in the lead.⁵

As regards the legal position, the President of the European Commission, José Manuel Barroso, in a letter to the Chairman of the House of Lords Economic Affairs Committee of the United Kingdom Parliament, has stated:

The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that state because it were to become a new

2. Joseph H.H. Weiler, *Slouching Towards The Cool War; Catalanian Independence and the European Union; Roll Of Honour; in this Issue; A Personal Statement*, 23 *EUR. J. INT'L L.* 909 (2012).

3. *Id.* at 910.

4. *Id.*

5. *Id.* at 911.

independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.

Under Article 49 of the Treaty on European Union, any European state which respects the principles set out in Article 2 of the Treaty on European Union may apply to become a member of the EU. If the application is accepted by the Council acting unanimously, an agreement is then negotiated 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.⁶

The purpose of this essay is to examine the legal correctness of Mr. Barroso's statement ('the Barroso theory'), and statements to the opposite effect. But I should first make my own position clear, since I am a Scot living in Scotland, and I will be one of those that will be asked next year (2014) to vote in a referendum on the issue of Scottish independence. The issue of Scotland's future within the EU is one that has profound implications for that debate.

I am personally a moderate unionist in the sense that I still believe in the United Kingdom but I respect the sincerely held views of moderate separatists, like the late Professor Sir Neil MacCormick, who believe in Scottish independence. I hope very much that the issue of an independent Scotland's place in the EU will not arise, but the issue is still important and concerns other countries as well.

It may be, as Professor Weiler suggests, that the issue *should* not arise, and that the pretensions of separatists in Scotland, Catalonia and Flanders should be dismissed as irredentist Euro-tribalism. The fact remains that a more than insignificant proportion of the people in those areas supports them. Article 2 of the Treaty on European Union ('TEU') affirms the belief that the Union is founded on certain core values, including respect

6. http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf

for human dignity, freedom and democracy.⁷ If the majority were to vote for independence, it is difficult to see why those core values should not be respected.

In any event, I can see nothing ignoble or tribalist in the belief that small countries are likely to be more in tune with the aspirations of their citizens than large ones. That, after all, is an aspect of subsidiarity, one of the Union's core principles set out in Article 5 TEU.⁸ And it is not obvious to me why the EU should hold its doors open to the small nations of Middle and Eastern Europe whose very existence as independent states is due to the break-up of greater entities, while slamming them shut against the aspirations of those who regard themselves as 'stateless nations' in Western Europe.

In short, the moral arguments are ambivalent and it seems to me to be more fruitful to focus on the legal issues. Before doing so, however, it is necessary to highlight important differences between the three cases of Scotland, Flanders and Catalonia. In each case, there are complex and mutually incompatible arguments at the national level.

I. SCOTLAND

In the case of Scotland, the Government and the Parliament of the United Kingdom have accepted (not without opposition) that the devolved Government and Parliament of Scotland may call a referendum in 2014 on the issue of Scottish independence and that the result of that referendum will be 'definitive'—that is to say, that the United Kingdom as a whole will accept that, in the event of an affirmative vote, Scotland should become an independent State, separate from the rest of the United Kingdom ('RoUK'). The necessary legislation to give effect to the separation would be passed by the United Kingdom Parliament in the same manner as, in 1707, the Parliaments of

7. See Consolidated Version of the Treaty on European Union art. 2, 2010 O.J. C 83/17 [hereinafter TEU].

8. See *id.* art. 5(3); David Edward, *Subsidiarity as a Legal Concept*, in *CONSTITUTIONALIZING THE EU JUDICIAL SYSTEM: ESSAYS IN HONOUR OF PERNILLA LINDH* 93, 93-103 (Pascal Cardonnel et al. eds., 2012).

England and Scotland passed Acts to give effect to the Treaty (or Articles) of Union between the two countries.⁹

On this approach, the separation of Scotland from RoUK would be recognised as having been brought about by constitutional means and would therefore be entitled to international recognition. Lawyers and politicians differ, however, as to the effect in international law. The government of the United Kingdom, supported by public international lawyers, contend that RoUK would be the ‘successor’ or ‘continuator’ State, and that Scotland would be a ‘new’ State, which would inherit neither the rights nor the obligations of the former State from which it had seceded.¹⁰

There is statistical support for the view that RoUK would be the successor State. The land area of Scotland as compared with RoUK is about 78,400 as against 165,000 square kilometers (about 50%), while the population is about 5.25 million as against 57.87 million (about 10%). There is thus a considerable difference in population, though less in terms of land area. The centre of government for the United Kingdom is in London which is also the capital of England.

There are dissentient voices, particularly amongst Scottish historians and constitutionalists. They contend that the United Kingdom is, by its very name and nature, the union of Great Britain and Northern Ireland. Great Britain is the entity created in 1603 by the union of the crowns of England (and Wales) and Scotland and fortified by the Union of the Parliaments in 1707. Article 1 of the Treaty of Union (1706) provided:

“That the Two Kingdoms of Scotland and England shall upon the 1st May next ensuing the date hereof, and forever after, be United into One Kingdom by the name of GREAT BRITAIN.”¹¹

Therefore, so the argument goes, the separation of Scotland from England and Wales would dissolve the entity known as Great Britain and thus dissolve the essence of the

9. Both Acts contain the text of the Treaty with some additional provisions. For the full texts see <http://www.rps.ac.uk/trans/1706/10/257> (Scottish) and <http://www.rahbarnes.demon.co.uk/Union/UnionWithScotlandAct.htm> (English).

10. *Scotland Analysis: Devolution and the implications of Scottish Independence*, Cm 8554, Ch. 2, <http://www.official-documents.gov.uk/document/cm85/8554/8554.pdf>.

11. *See supra*, note 10.

United Kingdom of Great Britain and Northern Ireland. (Incidentally, the words “and forever after” have not been invoked as excluding separation in the 21st century.)

According to this argument, a continuing union between England, Wales and Northern Ireland (erroneously referred to as RoUK) would be a ‘new’ State, as would Scotland. Neither could claim to be the successor State, or perhaps both could do so. The result would be akin to the situation that arose on the dissolution of the former Czechoslovakia into two new States, the Czech Republic and Slovakia (the so-called ‘velvet divorce’). In that case, both States were recognised as successor States.

There is yet a further argument—that, even if separation were to result in the existence of two States (in the sense understood by international law), the “United *Kingdom*” would not disappear because Scotland and RoUK would continue to share the same monarch. (A comparable distinction between monarchy and legislature was advanced by some of the American colonists who wished to maintain the link with the British Crown, but disputed the right of the British Parliament to make laws for the self-governing colonies.)¹²

Whichever of these views is correct, the question remains whether public international law would determine the correct approach under EU law to the issue of separation of an existing Member State.

II. *FLANDERS*

Flanders is part of the Kingdom of Belgium which separated from the Kingdom of the Netherlands in 1830. Belgium consists of three Regions: the Flemish (Dutch-speaking) Region (Flanders); the Walloon (French-speaking) Region (Wallonia); and the multilingual Brussels-Capital Region where most of the EU institutions are based.¹³ The German-speaking communities round Eupen, Malmedy and Sankt Vith were administered by Belgium after the First World War and

12. See Charles H. McIlwain in Pound, McIlwain, Nichols, *FEDERALISM AS A DEMOCRATIC PROCESS* (1942), page 34, and Jack P. Greene, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011), page 91 ff.

13. Geographically, the Brussels-Capital Region is an ‘island’ within the territory of the Flemish Region.

became fully part of Belgium in 1925. They form part of the Walloon Region but constitute a separate linguistic Community.¹⁴

The Walloon Region has a larger land area than the Flemish Region (11,500 as against 8,000 square kilometers), but the Flemish has the larger population (about 6.25 as against 3.5 million). Brussels-Capital has a population of about 1 million, and the German-speaking Community about 75,000.

Currently, the pressure for separation comes from the people of Flanders, which is economically stronger, the people of Wallonia being by and large content to remain in union with Flanders (and, the Flemish would say, dependent on Flemish subsidy). While it might be possible for Flanders to force separation, Flanders could not be said to 'secede', since the two entities are of roughly comparable size and population and together form the Kingdom of Belgium. Neither Flanders nor Wallonia has previously existed as a State or Kingdom separate from the other.¹⁵

It would be natural for an outsider to assume that the separation of Flanders and Wallonia would result in the emergence of two new States and that the Kingdom of Belgium would in consequence cease to exist. Some Flemish nationalists argue, however, that this is not their aim, but rather to create a Belgian Confederation of separate States under a single monarch (similar to one version of the Scottish argument).

Whatever the outcome, it can probably be assumed that separation would be achieved by constitutional means and would consequently be entitled to international recognition.

14. Belgium is a federal State, with powers distributed between the Regions, the linguistic Communities and the federation.

15. The Prince-Bishopric of Liège was autonomous until it was annexed by Napoleon. The Belgian Province of Luxembourg was part of the Grand Duchy of Luxembourg, of which the King of the Netherlands was Grand Duke, until 1839, when the primarily French-speaking parts were annexed to Belgium under the Treaty of London 1839.

III. CATALONIA¹⁶

Having been ruled as an autonomous entity by the Counts of Barcelona, Catalonia became a principality of the Kingdom of Aragon in 1137, which in turn united with the Kingdom of Castile to form the Kingdom of Spain. It enjoyed its own laws, taxes and privileges until they were removed after the War of the Spanish Succession in the eighteenth century. With the Basque Country and Galicia, Catalonia lost such autonomy as remained at the end of the Spanish Civil War of 1936-39. It has now become an Autonomous Community of the Kingdom of Spain.

Article 2 of the Spanish Constitution of 1978 provides: “The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed, and the solidarity amongst them all.”¹⁷

Catalonia is one of the ‘nationalities’ so recognised. The Preamble of its Statute of Autonomy of 2006, like the previous Statute of 1979, was drawn up by the Parliament of Catalonia, approved and sanctioned by the Parliament of Spain and ratified by a referendum in Catalonia. The Preamble states that “Reflect[ing] the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality.”¹⁸

The constitutionality of the statement that Catalonia is a ‘nation’ was contested before the Spanish Constitutional Court (*Tribunal Constitucional*). In its judgment of 28 June 2010, the Court held that:

It is indeed possible to speak of nation as a cultural, historic, linguistic, sociological and even religious reality. But the nation of importance here is solely and exclusively the nation in its legal and constitutional sense. And in that specific sense, the Constitution does not recognize anything

16. I am grateful to Professor Miquel Strubell i Trueta of the Universitat Oberta de Catalunya for help with this section.

17. C.E., B.O.E. art. 2, Dec. 27, 1978 (Spain).

18. Statute of Autonomy of Catalonia, Preamble (2006, 6) (Spain).

other than the Spanish Nation, the mention of which opens its preamble, on which the Constitution is based (Article 2 CE) and with which it expressly qualifies the sovereignty that, when exercised by the Spanish people as its sole acknowledged holder (Article 1.2), has been manifested as the wish to constitute the State in the positive provisions of the Spanish Constitution

Under no circumstances can any nationality be claimed other than the one specified in the Constitution proclaimed by the will of that Nation, nor through an ambiguity that is completely irrelevant in the judicial/constitutional context, the only guide that this Court can follow, by referring the term ‘nation’ to any other subject that is not the people holding that sovereignty.¹⁹

The government of Spain contends that it would be constitutionally impossible for Catalonia to separate from the Kingdom of Spain. In addition to Article 2 of the Constitution, it relies on Articles 8 and 92.²⁰

Catalans who argue for separation maintain that the Constitution of 1978 cannot be set up against Article 1.1 of the International Covenant on Civil and Political Rights which was ratified by Spain in 1977: “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.”²¹

Some Catalans also argue that Article 95 of the Constitution provides a ‘toe in the door’.²²

19. S.T.C., June 28, 2010 (S.T.C., No. 31, § II ¶ 12) (Spain).

20. C.E., B.O.E. art. 2, 8(1) Dec. 29, 1978 (Spain). (providing “The mission of the Armed Forces, comprising the Army, the Navy and the Air Force, is to guarantee the sovereignty and independence of Spain and to defend its territorial integrity and the constitutional order”); C.E., B.O.E. art. 92 (1-2), Dec. 29, 1978 (Spain) (Article 92(1) providing “Political decisions of special importance may be submitted to all citizens in a consultative referendum[.]” Article 92(2) providing “The referendum shall be called by the King on the President of the Government’s proposal after previous authorization by the Congress[.]” and Article 92(3) providing “An organic act shall lay down the terms and procedures for the different kinds of referendum provided for in this Constitution.”).

21. International Covenant on Civil and Political Rights art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 14668.

22. C.E., B.O.E. art. 95, Dec. 29, 1978 (Spain) (providing. « 1. The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment. 2. The Government or either House may

On 23 January 2013, the Parliament of Catalonia passed, by a two-thirds majority, a Declaration of Sovereignty and of the Right to Decide of the People of Catalonia.²³ This sets out a number of principles, of which the first is “The people of Catalonia, for reasons of democratic legitimacy, has the character of a sovereign political and juridical subject [of law]”. The Spanish government, following an opinion of the Council of State (*Consejo de Estado*),²⁴ has contested the constitutionality of the Declaration before the Constitutional Court which has provisionally suspended its validity and application.²⁵ Judge Santiago Vidal of the *Audiencia Provincial de Barcelona* has cited the Advisory Opinion of the International Court of Justice in the *Kosovo Case*,²⁶ as supporting the lawfulness of the Declaration.²⁷

For present purposes, it would be safer to assume that a unilateral declaration of independence by Catalonia would be declared unconstitutional. In that event, it is not clear by what mechanism, even after a vote in favour of separation in Catalonia, separation could be negotiated at the national level, nor how or when Catalonia could achieve international recognition as a sovereign State.

IV. ANALYSIS

At least three quite different scenarios can therefore be envisaged for purposes of discussion.

In two cases (Scotland and Flanders) we can assume that separation would be accepted as constitutionally admissible under national law. In the other case (Catalonia) separation

request the Constitutional Court to declare whether or not such a contradiction exists.”).

23. For the original text, see http://www.parlament.cat/web/actualitat/noticies?p_id=129656021, and for a translation, see <http://www.vilaweb.cat/noticia/4076896/20130124/declaration-of-sovereignty-and-of-the-right-to-decide-of-the-catalan-nation.html>.

24. For the text of the advice and dissenting opinion, see <http://www.aelpa.org/actualidad/201303/ConsejoCatalunya.pdf>

25. <http://www.boe.es/boe/dias/2013/05/10/pdfs/BOE-A-2013-4859.pdf>.

26. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 79, 84 (July 22).

27. See Report of Interview with Judge Santiago Vidal and video link at <http://www.directe.cat/noticia/276141/el-jutge-santiago-vidal-mostra-la-clau-de-volta-de-la-independencia-de-catalunya>.

would be contested, not simply as unconstitutional but as constitutionally impossible.

The cases of Scotland and Flanders can then be distinguished from each other as far as public international law is concerned. It would be difficult, if not impossible, to identify Flanders or Wallonia as the successor State. In that event, on the analogy of Czechoslovakia, Flanders and Wallonia would each succeed to the international rights and obligations of Belgium.

On the other hand, in the case of the United Kingdom, it is argued with some degree of plausibility that RoUK would be recognised as the successor State and Scotland as a 'new' State. In that event, RoUK would succeed to all the international rights and obligations of the former United Kingdom. Scotland would not do so but would correspondingly be able to choose the treaty obligations by which it would continue to be bound.

It should, however, be kept in mind that there is no doctrine of public international law that *requires* either result. The treatment of 'separating States' is to be deduced from State practice, which is not wholly uniform and may, in contemporary conditions, depend as much on political as on legal considerations.

Against that background, we can consider how EU law would treat each of these cases.

It can be seen at once that the Barroso theory cannot provide a sufficient answer. It is suggested that "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."²⁸ Plainly that could not apply if Flanders and Wallonia were to become separate States and the Kingdom of Belgium ceased to exist. The same would arguably be true if the true effect of separation of Scotland and England were held to be that the United Kingdom ceased to exist.

The first question to consider is therefore whether and to what extent EU law, as opposed to conventional public international law, provides a legal solution.

28. Barroso Letter, *supra* note 6.

A. The Scope of Application of EU Law

In its judgment in *Van Gend en Loos*,²⁹ the Court of Justice declared:

To ascertain whether the provisions of an international Treaty extend so far in their effects, it is necessary to consider the spirit, the general scheme and the wording of those provisions

The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.

Thus, while the EU is certainly a creature of public international law, the Treaties create a “new legal order” of international law” which differs from conventional international law in that its subjects are not only the Member States, but also their nationals (now also citizens). The autonomy of the EU legal order has repeatedly been affirmed by the Court of Justice.³⁰

The relationship between a Member State, the EU institutions and the other Member States is governed by the Treaties. The solution to any problem for which the Treaties do not expressly provide must be sought first within the system of the Treaties, including their spirit and general scheme. Only if the Treaties can provide no answer may one resort to conventional public international law (including doctrines of state succession).

29. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case 26/62, [1963] E.C.R. 1, § II(B).

30. *See Kadi v. Council of the European Union*, Joined Cases C-402/05P & C-415/05P, [2008], E.C.R. 1225, ¶¶ 21-25.

The EU Treaties, as amended by the Treaty of Lisbon—the TEU and the Treaty on the Functioning of the European Union (‘TFEU’)—contain no provision dealing with the case of separation of a Member State. So we must look to the spirit and general scheme of the Treaties. A few citations will suffice.

Article 2 TEU (already cited in part) provides (emphasis added):

The Union is founded on the values of respect for human dignity, freedom, *democracy*, equality, the rule of law and respect for human rights, including *the rights of persons belonging to minorities*. These values are common to the Member States in a society in which pluralism, *non-discrimination*, tolerance, justice, *solidarity* and equality between women and men prevail.³¹

Article 4 TEU provides (emphasis added):

2. *The Union shall respect* the equality of Member States before the Treaties as well as their national identities, *inherent in their fundamental structures, political and constitutional*, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the *principle of sincere cooperation*, the Union and the Member States shall, *in full mutual respect*, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.³²

Article 20 TFEU establishes citizenship of the Union:

31. TEU, *supra* note 7, art. 2.

32. TEU, *supra* note 7, art. 4.

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

(a) the right to move and reside freely within the territory of the Member States

Article 50 TEU provides for the case of a Member State's withdrawal from the EU (a situation for which the Treaties did not previously provide):

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.³³

The reason why Article 50 requires a period of negotiation is that withdrawal from the Union would involve the unraveling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations. These relationships, liabilities and obligations are multilateral and, in general, reciprocal. The nationals of the withdrawing Member State have acquired rights of citizenship

33. TEU, *supra* note 7, art. 50.

and free movement of goods, persons, services and capital vis-à-vis the rest of the EU. But so too have the nationals of other Member States vis-à-vis the withdrawing State, its territory, its institutions and its people. They include (to take only four out of hundreds of possible examples) investors in the corporate sector, Erasmus and other students, migrant workers, and fishermen operating in the waters of other Member States.

In order to overcome these difficulties in the event of withdrawal, the Treaties provide for an extended period of negotiation. Would the same apply to the less drastic situation where an existing Member State separates into two parts and both wish to continue membership? Or must we despair of finding the solution in the spirit and scheme of the Treaties and resort to conventional public international law as the Barroso theory suggests?

B. *Application of EU law to the case of separation*

It is useful to begin by considering the legal and practical implications of the ‘Barroso theory’.

First, at the level of principle, the theory seems to assume that, contrary to the principles asserted in Articles 2 and 4 TEU (as well as the Preamble of the Treaty), EU law does not recognise the democratic right of the inhabitants of one part of a Member State to dissolve their constitutional union with those of the other part(s) other than at the cost of *automatic* loss of their acquired rights as citizens of the EU.

Second, it seems to be assumed that—at the moment of separation or on some other unspecified date—the ‘separating State’, its citizens and its land and sea area would find themselves in some form of legal limbo vis-à-vis the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated. Until the moment of separation, they would remain an integral part of the EU; all EU citizens living in the separating State would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with that State. Then, at the midnight hour, all these relationships would come abruptly to an end.

The logical consequence in law would be that the *acquis communautaire* would no longer, as such, be part of the law of the separating State, which would cease, for example, to be constrained by the Treaty rules in relation to the rates of VAT and corporation tax. Erasmus students studying there would become ‘foreign students’ without rights. Migrant workers would lose their rights to social security. And the whole land and sea territory of the separating State would cease to be within the jurisdiction of the EU—in the case of Scotland which probably has the largest sea area in the EU, an important security consideration quite apart from other considerations.

In addition, if the Barroso theory is correct, the same must apply in relation to the European Convention on Human Rights and other international instruments for the protection of human rights, to which the United Kingdom and other Member States of the EU are parties.

Third—apparently—there would be no legal obligation upon the ‘successor State’, the EU institutions or the other Member States to enter into any negotiations before separation took effect in order to avoid such a remarkable, and potentially uncontrollable, situation coming to pass.

On closer examination, it can be seen that the Barroso theory is workable only in a situation, like Scotland and RoUK, where one entity is significantly larger than the other, and it can plausibly be said that one of them is the successor State and the other the seceding or separating State. In the case of Flanders and Wallonia (assuming the extinction of the Kingdom of Belgium), the logic of the Barroso theory suggests that both must be classified as ‘new’ States, so that the political institutions of the EU (including Mr Barroso’s own office) would find themselves in a ‘third country’!

It might be suggested that this would produce such absurd and unacceptable results that the EU would accept both Flanders and Wallonia as successor States which would then be entitled automatically to the status of Member States in their own right. The case of Scotland and RoUK would, by contrast, be treated according to the Barroso theory. That might be a political solution, but hardly adequate as a legal one, nor for that matter consistent with the principle of non-discrimination.

Moreover, such a solution would ignore the necessity to settle matters such as the number of members of the European Parliament and the contribution to the EU budget to mention only two. On these and other issues, there would be scope for substantial disagreement, not only between Flanders and Wallonia, but also between them and the other Member States. In short, even in that case, pre-separation negotiation would be essential.

Looking to the presumed intention of the Treaty-makers, they cannot reasonably be supposed to have intended that there must be prior negotiation in the case of withdrawal but none in the case of separation. They cannot have intended the paradoxical legal consequences of automatic exclusion suggested by the Barroso theory nor, at a more practical level, that the complex skein of relationships, liabilities and obligations created by EU law should be allowed to unravel without measures being taken to prevent it.

In order to avoid the disruption that would otherwise ensue, negotiation would be necessary *before* separation took place—precisely as the Treaty requires in the case of withdrawal.

The purpose of pre-separation negotiation would be to agree the necessary amendments to the existing Treaties to accommodate the new situation and not, as the Barroso theory suggests, one or more Accession Treaties. It may be objected that such negotiations might fail and that Treaty amendment would in any event require ratification by the Member States.

However, the fact that the outcome of negotiations cannot be predicted does not alter the obligation of all parties, *including the Member State in the process of separation*, to negotiate in good faith in accordance with principles of sincere cooperation, full mutual respect and solidarity. Maintaining the territorial and political integrity of the EU and the vested rights of its citizens is surely of greater importance than blind acceptance of the contestable doctrines of public international law.

That is as far as the Treaties can take us, but it is at least a solution more rational and consistent with the spirit of the Treaties than the Barroso theory. It does not resolve the case of Catalonia since, as noted above, it is to be assumed that Spain would regard the separation of Catalonia as constitutionally impossible. Even in that case, however, it is difficult to see how

an acceptable solution could be found without negotiation in which the EU might reasonably claim to have a part to play.

Lastly, the three cases discussed all involve Member States in Western Europe. Winston Churchill observed that the Balkans produce more history than they can consume.³⁴ As the EU enlarges to embrace more countries in Middle and Eastern Europe, it cannot be excluded that further separations may occur. There should be at least the beginnings of a rational legal understanding of their consequences.

34. Margaret MacMillan, *PEACEMAKERS: THE PARIS PEACE CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR*, 122 (2001).