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

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

Contemporary international law proposes a conceptual frame for the management of such conflicts through what is known as the "principle of equal rights and self-determination of peoples"[2], embedded in the first article of the UN Charter. As rightly underlined by the brilliant mind of Martti Koskenniemi, this principle is extremely difficult to implement in international law, since it constitutes both the foundation for the existing national sovereignty – in which sovereignty is justified because it is the expression of the will of the people of a given State, usually qualified as a Nation-state, or in other terms the ground for the legitimation of the "defending party" – while constituting at the same time the legitimate ground for a "people without a State" to claim its right to have its own sovereign State[3].

Thus, even if the principle should be uncontested[4], its materialization in international law is extremely arduous, due to the asymmetry of the legal situation of the parties to the conflict of sovereignties. One (the "defending State") is *de jure* a subject of the international legal order. From its side, accepting to settle the dispute under international law would pre-empt the outcome of the dispute, since by doing so, it would already recognize a measure of international subjectivity to the other party. Considering that under current international law, the only territorially based subjects of international law are sovereign

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

[2] UN Charter, art. 1 § 2.

[3] Koskenniemi, M. « National self-determination today: Problems of legal theory and practice », *ICLQ* 43.2 [1994], 241.See De Zayas, A. (UN Independent Expert on the promotion of a democratic and equitable international order from 2012 to 2018) 2014 Report to the UN General Assembly (doc. A/69/272) in which he proposes that "the realization of the right of self-determination is a vital conflict-prevention strategy" (https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/497/95/PDF/N1449795.pdf?OpenElement)

[4] This is in practice far from being the case. See for example Michael Keating et al. (eds), *Changing Borders in Europe: Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, Routledge, 2018, a book from which my contribution "The Right to National Self-determination within the EU: a Legal Investigation", (EUboders Working Paper Series, Sept. 2017, Available at http://euborders.com/working-papers/, 23 p.) has been kicked out, as the view defended by the editors was the non-application of the right to self-determination within the EU, except under the thesis of "remedial secession" (see Vidmar, J. (2018). "Secession and the limits of democratic decision making" constituting Chapter 12 of the Keating & al. 2018 edited book.

States, the "defending party" usually denies access to the international arena to the contending party. On the other hand, dealing with such conflict of sovereignties within a single national legal order is impossible, since according to the politico-legal frame of Nation-States, the sovereignty of the State cannot be challenged on the State territory[5].

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

Premises

The following pages are based on the four following premises:

The conflicts of sovereignties we're dealing with in the present chapter are non-violent conflicts. If violence – on either side – emerges, it is then another body of law that shall be mobilized and implemented, namely International Humanitarian Law (IHL). By the way, IHL recognizes, through the two 1977 Geneva Protocols to the 1949 Geneva Conventions, a specific international legal status to the "non-State" party to such violent conflicts of sovereignty[7].

Second, both parties to such sovereignty conflicts must base their respective claims of sovereignty on the outcome of genuine democratic processes.

Third, both parties have to respect democratic principles and human rights even during such conflicts, as expressly required within the EU[8].

Fourth, such conflicts of sovereignties are exclusively bilateral and only concern one State. Foreign State intervention in the conflict is forbidden under the principle of "territorial integrity of the State". This principle is to be found in art. 2 § 4 of the UN Charter. It was reaffirmed as regards Europe in the 1975

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[5] This is the position of international law, which qualifies this as "the principle of territoriality (or territorial sovereignty). According to this principle, States have to maintain their sovereignty effective, and therefore have to prevent any act of sovereignty from another actor on their own territory (see *the Island of Palmas case*, 4 April 1928, *Reports of International arbitral Awards*, vol. II, 829-871). Let us however draw attention to possible exceptions as explored in the very interesting contribution by Hugues Dumont and Mathias El Berhoumi "La reconnaissance constitutionnelle du droit de demander la sécession dans les états plurinationaux », in Gagnon A.-G. & Noreau, P. (eds), *Constitutionnalisme, droits et diversité : Mélanges en l'honneur de José Woehrling*, Montréal, Les éditions Thémis, 2017, 461-503.

[6] ECJ, 15 February 1963, *van Gend & Loos v. Fiscal administration of The Netherlands,* case 26/62.

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

[8] Art. 2 of the Treaty on the European Union (TEU) states: "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."((TEU, art. 2, *OJEU*, C 202/17 of 7 June 2016)

Helsinki decalogue[9], and is also – since the entry into force of the Lisbon Treaty (December 2009) – embedded in art. 4 § 2 TEU[10]. However, the ICJ had the opportunity to explicit that "the scope of the principle of territorial integrity is confined to the sphere of relations between States"[11] and does in no way impede the realization of the right of peoples to self-determination. Further, European practice since 1975 amply confirms such interpretation and new European States were allowed to emerge, despite the continuing relevance of the principle if territorial integrity of States[11].

Structure of the chapter:

The aim of this contribution is to propose concrete steps for using the EU as a politico-legal framework for settling conflicts of sovereignties (under the conditions set above) on its own territory. In order to do so, we shall first attentively frame the issue at stake (1), before explaining why the EU constitutes a proper framework for dealing with such issue(2). In a more normative second part, we shall explore proposals on how to launch a process for conflict resolution at EU level (3) and briefly explore possible outcomes, within the EU politico-institutional framework, of such conflicts of sovereignties (4).

1. Framing the issue

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

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[9] Principle IV of the Helsinki Decalogue concerns "territorial integrity of States" and reads as follows: "The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force."

[10] "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." (TEU, art. 4 § 2, *loc. cit.*, 18).

[11] ICJ, Opinion of 22 July 2010, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports* 2010,p.403, § 80.

[11] Have emerged in Europe since 1975 new States, such as Bosnia and Herzegovina, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Montenegro, Serbia, Slovakia, Slovenia; seven of these new States have even been admitted as EU member States. See on that issue, Levrat (2017), quoted above note 5.

Second, as I indicated in the introduction, the issue shall be framed as a materialization of the equal right of all peoples to self-determination. If the right of peoples to self-determination is not expressly mentioned in EU law, the ECJ has recognized in its case-law, that this right is a right *erga omnes* – as the ICJ had acknowledged in its 1995 *East Timor* decision[12] – and as such, imposes itself to EU institutions and member States[14]. Many authors still consider that the right of peoples to self-determination only applies to colonial situations. This argument has been clearly set aside in recent case-law of the ICJ[1314], and all EU member States have accepted this right to self-determination as a provision of positive law by ratifying the UN Charter and the 1966 Human Rights International Covenants[15], whose article 1 – common to both 1966 Covenants – recognizes that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. " As the UN Human Right Committee had the occasion to state in its General Comment n° 12: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants."[16]

Not only do the States who accepted these 1966 Covenants – this is the case of all 27 EU member States – recognize this right to all peoples, but they further take the commitment to "promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[17] Let us further note that according to art 2 TEU, the EU is "founded on the value of the respect of human rights"[18], and, as rightly pointed out by the UN Independent expert on the promotion of a democratic and equitable international order" in its 2014 report to the UNGA[19], it is this right to self-determination of peoples which constitutes the foundation of the democratic legitimacy of State sovereignty. Once again, let us emphasize that as regards the EU, democracy as well as the respect for human rights are some of the values on which the EU is founded and that "are common to the Member States"[20].

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[12] ICJ, 30 June 1995, *East Timor* (Portugal v. Australia), Judgment, *I. C.J. Reports* 1995, p. 90 [14] ECJ, 21 December 2016, *Council vs Front Polisario*, C-104/16 P, ECLI:EU:C:2016:973.

[13] ICJ, Opinion of 22 July 2010*, loc. cit.*, § 79. Also ICJ, Opinion of 25 February 2019*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, *I.C.J. Reports* 2019, p.

[14] , § 144.

[15] The International Covenant on Cultural, Social and Economic Rights, and the International Covenant on Civil and Political Rights, both adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

[16] UN Human Right Committee, "General comment No. 12: Article 1 (Right to self-determination)", adopted at its Twenty first session (1984).

[17] Art. 1 § 3, common to both 1966 UN Human Rights Covenants.

[18] Quoted above, note 8.

[19] Quoted above, note 3.

[20] Art. 2 TEU, quoted above note 8.

For all these reasons, EU and its member States are in several clear legal ways bound by the international law principle of the equal right of all peoples to self-determination, and internationally, as well as by EU law[21], committed to promote and respect that right.

Thirdly, it is important to emphasize that the issue in EU law, as in any other legal setting, cannot be framed as a "claim right", that is a right whose implementation may be obtained by a Court ruling. Seized on 30 September 1996 by "a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada", the Supreme Court of Canada came to the conclusion that Quebec (through a majoritarian vote of its population on the issue) would not have a right to unilateral secession from Canada. However, if such eventuality was to occur, the Canadian government would, under Canadian constitutional law, be in no position to impose to the Quebec authorities a denial of the democratic choice of Quebecers[22]. Actually, as says in rather eloquent terms the Supreme Court, such unilateral vote for secession on the part of Quebec would necessarily lead to a "negotiation process [which] would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole."[23] And, specify the judges as regards the outcome of this negotiation process, "[t]here would be no conclusions predetermined by law on any issue"[24]. In other terms, "[t]he reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role."[25]

The important point there is this clear understanding that the conflict of sovereignties may not be settled as a legal issue of national law – because it would from the onset deny the *de facto* situation that there is a conflict of sovereignties on the State territory, which has built its legal order on the principle of the State sovereignty, exerted through its citizens constituting a single people. This is the "nation-State" model, which is dominant in practice and academic literature. Some authors are nevertheless trying to work on concepts of pluri-national democracies, either in a federal context[26], or as "*demoïcracies*"[27]. Despite these solid academic efforts, the ultra-dominant constitutional models are still based on the concept of a single sovereignty (thus based on a single nation) national-legal order. And as we have

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[21] According to art. 3 § 5 TEU, the EU "shall contribute […] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

[22] Canadian Supreme Court Judgement of 20 August 1998 in "Reference re Secession of Quebec", *Supreme Court Judgements Report* [1998] 2 SCR 217, case number 25506, § 151.

[23] *Ibid*. § 152.

[24] *Ibid.*, § 151.

[25] *Ibid.*, § 153.

[26] See Gagnon, A. G. (2020), "Multinational federalism: challenges, shortcomings and promises", *Regional & Federal Studies*, 1-16.

[27] Nicolaïdis, K. (2004), « The new constitution as european 'demoi-cracy'? », *Critical review of international social and political philosophy*, *7*(1), 76-93. Cheneval, F. (2011), *The government of the peoples: On the idea and principles of multilateral democracy*. Springer.

seen in the introduction, the Sovereign State should not accept to settle the issue under international law, because it would imply from the onset that the contending party already enjoys a degree of international subjectivity. This is why, as the Canadian Supreme Court clearly understands, it is a political conflict that requires a negotiated political solution, outside of the national constitutional framework, but neither under international law. The same would be true within the EU.

Thus, and it is **our fourth "framing parameter", EU should consider intervening in such a conflict of sovereignties on its territory as a political process, not a judicial one**. Naturally, that does not preclude some European institutions, such as the European Court of Human rights for example, to be competent to settle through a judicial due process violations during such conflicts of individual rights guaranteed by European legal instruments, *in casu* the European Convention on Human Rights. But such legal ruling would redress torts committed by one of the parties to such dispute[28], but not bring a solution to the conflict of sovereignties – such for example as it apparently[29] exists between Catalonia and Spain.

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

2. EU as a framework for seeking solutions

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

The reason for this singular position of the Right of Peoples to Self-determination within Human rights law is, according to us – and that is also the Canadian Supreme Court conclusion in its 1998 decision –

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[28] Such is more than likely to be the case as regards the jail sentences that were inflicted by Spanish Supreme Court to some Catalan independentists, with substantial disregard by Spanish national Courts for the provision of the ECHR.

[29] The Spanish State having, through the use of force (physical violence) prevented the holding of a proper referendum on independence in Catalonia in October 2017, it is impossible to assert that "a clear majority" of Catalans have expressed their will for independence. Naturally, the behaviour of the Spanish government in that case was in total contradiction with its international commitments, but the result is that the claim of the Catalan government of Puigdemont was not properly democratically backed. However, the "*ex*

that the implementation of this right cannot be achieved through a comparable process than other Human rights. If a non-controversial implementation of this right could and should be carried through democratic processes within the State, guaranteeing that the exercise of the State sovereignty properly reflects the will of its constituent people(s), in case of controversial claims between different groups asserting concurrent sovereign claims, it inevitably leads to a conflict of sovereignties that can neither be settled by a judicial process, nor within the existing

iniuria ius non oritur" principle does nonetheless prevent the Spanish government from claiming any right from such situation it illegally provoked.

[31] See https://indicators.ohchr.org/ for the State of acceptance (signatures, ratifications) of these Conventions.

limits of the national constitutional order[30]. Then, the implementation of such a right needs to be materialized through a negotiation process between legitimately contesting claimants.

As the Canadian Supreme Court stated, "[t]he Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework." This assertion is in my view the weak point of the "solution" proposed by the Canadian Supreme Court. As the Court writes, the secession could not take place "under the Constitution", but the negotiation has to take place "within the existing constitutional framework"[31]. As the Canadian judges write "[n]o one suggests that it would be an easy set of negotiations"[32]; and I would add, no one even knows the framework within which such negotiations shall take place. Even though the Canadian judges bravely affirm that it should be "within the constitutional framework", they derive this conclusion from "the constitutional right of each participant in the federation to initiate constitutional change"[33]. It is easy to understand that if the right to initiate – and obviously eventually obtain – constitutional changes exists, the effective implementation of this right may not be bound by the existing constitutional framework.

This is where, in the European context, the EU appears as an interesting and potentially promising framework for conducting such negotiations. As we have mentioned in the introductory paragraphs, the EU has structural characteristics that are different from the international order (only composed of States and their joint creations such as IO or international tribunals) which is grounded on "the principle of the sovereign equality of all its Members"[34]. The EU, and before it the European Communities, are not based

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[30] See for the same order of thoughts, the European Commission for democracy through Law (Venice Commission of the Council of Europe), *Self-determination and secession in constitutional Law*, CDLINF(2000)002-e.

[31] Canadian Supreme Court (1998), *loc. cit.,* § 149.

[32] *Ibid.*, § 151.

[33] *Ibid.* § 150.

[34] Article 1 § 1 of the UN Charter. UN members are, according to art. 4 of the UN Charter, States under international Law.

on a respect for equal sovereignty of its constitutive members[35], but on a pooling of their sovereignties within a novel institutional polity that is "a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common."[38] Thus the EU constitutes a proper framework, both as regards the principles on which it is grounded and which should be enforced during the political process of negotiations, aiming at resolving the conflict of sovereignties, as well as an institutional framework for conducting the negotiations and even, potentially, for devising a solution.

In this respect, I would like to emphasize that the outcome of such negotiation within the framework of the EU is not left entirely open. It is here important to underline that in all the existing or potential conflicts of sovereignties within the EU, the claimants for their own national solution never called for a solution outside of the EU. Scots – as they demonstrated by the clear result that was recorded in Scotland on the 23 June 2016 Brexit referendum[39] – or Catalans, always expressed their wish to separate from the State in which they are incorporated, while remaining within the EU.

Thus the EU is not only the frame for the negotiation process, but it will also constitute the institutional framework in which the outcome of the conflict should take place. As art. 1 TEU states, the EU is only "the process of creating an ever closer union among the peoples of Europe"[40], not the purpose in itself. And the quest for peoples (or nations) without a State in Europe is nothing more than a quest for a proper participation in this process of an ever closer union among the peoples of Europe. As we shall see in the fourth part of this Chapter, such a quest does not necessarily equate with becoming a new State in Europe, which could then join the EU according to the process laid out in art. 49 TEU. Actually, seriously considering the proper participation to the process of an ever closer union among the peoples of Europe as the outcome of an existing conflict of sovereignties within the EU offers quite a diversity of possible outcomes to the political negotiation, always within the EU, and possibly outside or inside the institutional framework of the existing State party to that conflict of sovereignties.

national identities, […]". This late adjunction to the Treaties at the foundation of the EU does however not modify the fundamental dynamic and structure of the EU.

38 TEU, art. 1 § 1.

39 On that vote, 1'661'191 voters, representing 62% of the total votes in Scotland, expressed their will to remain within the EU.

40 *OJEU*, C 202/16 of 7 June 2016

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

35 Even though, as we've underlined in note 11 above, the Lisbon Treaty introduced a new art. 4 § 2 which reads: "The Union shall respect the equality of Member States before the Treaties as well as their

3. How to launch the European process?

This is obviously the most complex and delicate issue. And as a legal scholar, I am in no good position to offer a solution to this difficult question. However, as any legal scholar, I properly appreciate the value of precedents. As regards such puzzle, it seems to me that at least once, the European Council[36] did adopt "conclusions" enclosing both conditions for joining the EU as a new member State, and the Commitment by EU Member States of the time – they were 12 – to admit as new member States any "European State" meeting the conditions set forth in these Conclusions of the Presidency"[37]. Such commitment and conditionality are nowadays found in art. 49 TEU, which states: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

We learn from these conclusions that in June 1993, "[t]he European Council held a thorough discussion on the relations between the Community and the countries of Central and Eastern Europe with which the Community has concluded or plans to conclude European agreements ("associated countries"), on the basis of the Commission's communication prepared at the invitation of the Edinburgh European Council."[43] The discussion had been thorough and tough, because EEC member States were not in agreement on the strategy for the future development of European integration, some wishing to privilege the "deepening" of European integration and strengthening of EEC institutions, while other pushed for a rapid enlargement to Eastern European Countries, in order to stabilize the potentially unstable geopolitical situation.

The outcome was that "[t]he European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."[38] This paragraph is often referred to as the "Copenhagen criteria" for joining the EU.

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[36] The composition of the European Council is set forth in art. 15 § 2 TEU: "The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work."

[37] The Conclusions of the Danish Presidency of the Communities (at that time, the Maastricht Treaty – which will create the EU – was not yet into force) of the European Council held in Copenhagen on 21st and 22nd of June 1993 can be found on the European Council website: https://www.consilium.europa.eu/media/21225/72921.pdf . [43] Point 7.A.i of the Copenhagen conclusions, *loc. cit.*

[38] *Ibid.*, point 7.A.iii.

The point I want to underline with this reference to the 1993 Copenhagen conclusions is that the European Council took the initiative to offer policy guidelines, both to the EEC/EC/EU itself, recognizing the right of associated Countries of Central and Eastern Europe to access to membership[39], but under specific conditions, set forth in the same paragraph. If the right to apply for accession did exist under the Treaties, the major geopolitical changes of 1989-91 made its implementation a debated political issue. By taking the initiative to clearly reassert that right as regards countries of Central and Eastern Europe, and by indicating clear conditions to be met by candidate member States for accessing what was to become EU, took a political initiative going beyond Treaty implementation, it was playing the role it was instituted for. As is stated in art. 15 § 1 TEU, "[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof." This is what it did in 1993, and this is what it should be doing as regards conflicts of sovereignties on its own territory in the second decade of the 21st century.

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

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

4. Possible outcomes of the process

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

[39] This Right at the time of the 1993 Copenhagen Summit was regulated by art. 237 of the Treaty of Rome instituting the EEC, and was, with the entry into force of the Maastricht Treaty (already signed for more than a year, but not yet into force) to be settled in art. O of the new Treaty on European Union. (*OJEC*, C 191/164 of 29 July 1992). The right was recognized to "all European States", but no specific conditions were set forth, only procedural indications being found in these articles.

sketch, very summarily, **the three most likely possible outcomes** I can imagine to such conflicts of sovereignties within the EU.

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

Second, substantial reforms of EU institutions and decision-making processes could be envisaged in order to accommodate the claim for self-determination by European peoples without a State within the EU. In other words an institutional solution could be envisaged, short from requiring this people of Europe to have its own State to fully participate to this "ever closer Union among the peoples of Europe". Naturally, such a reform should go well beyond a reboot of the Committee of the Regions, or the creation of a specific "second class" status in some newly created chamber of an existing institution. Some of the peoples of Europe without a State live in regional authorities which, demographically, would compare to the top-tier of "middle-sized European countries". The EU citizens belonging to such a people of Europe should then – even without necessarily having the status of citizens of a European State member of the EU – have a proper say in EU decision-making processes, compatible with the principles of democratic representation, as requested by the Treaties[40].

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

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

European Commission in 2017, Jean-Claude Juncker, stated a few days after the aborted

[40] Article 10 § 1 TEU states : « The functioning of the Union shall be founded on representative democracy." Further, art. 9 TEU guarantees that "in all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies." This would certainly also cover the right to equally just representation in the EU decision-making processes.

Catalan referendum, that he could not envisage the functioning of an EU with 90-member States[41]. M. Juncker was certainly right about that. This then implies that this third potential outcome would necessarily bring us back to the second potential outcome, that is a major overhaul of EU institutions, in order to allow all peoples of Europe an equal participation to that process of an ever closer Union among the peoples of Europe, as stated in article 1 § 2 TEU. A long overdue overhaul[42], that would greatly benefit, not only the peoples of Europe currently without a State, but the European integration process itself.

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

[41] Speaking at a student forum in Luxembourg on Friday 13 October 2017, Jean-Claude Juncker said: "If we allow, but it's not our business, that Catalonia becomes independent, others will do the same and I wouldn't like that. I wouldn't like a European Union in 15 years that consists of some 90 states." (https://www.bbc.com/news/world-europe-41610863).

[42] That debate was already ongoing at the time of the 1993 Copenhagen Council we referred to above. Readers have to remember that most of the EU institutional framework has been conceived for a European Coal and Steel Community with six member States…