THE RIGHT TO DECIDE in the 21st Century: Scotland, Catalonia and beyond

Conference Report
November 2014
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The Unrepresented Nations and Peoples Organisation.

UNPO wishes to extend its thanks to all those who
made the conference possible,
in particular our co-organizers and co-sponsors.
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2 • Foreword

Over the past few months, with the recent referendum on Scottish independence on 18 September 2014, the right to decide has proliferated across media outlets and energized political debates. Despite the majority of voters deciding against Scottish independence, the referendum – with an unprecedented turnout of 85% of the electorate – has influenced and strengthened calls for the right to decide by other movements, such as in Catalonia and elsewhere.

While the right to self-determination is enshrined in several international law treaties, the right to decide is still not clearly specified or codified, and yet, it can be seen as a democratic tool to make the voices of various nations and peoples heard, thereby ensuring the fulfilment of other interrelated and interdependent human rights. Considering, in particular, the decision of the Constitutional Court of Spain deeming the independence referendum in Catalonia as illegal, we are reminded that the right to decide forms part of an international framework; the attitudes of other States, international bodies and the EU matter.

In an attempt to shed further light on these issues, the Unrepresented Nations and Peoples Organization and the European Free Alliance, in cooperation with Centre Maurits Coppieters convened this timely conference in European Parliament in Brussels on 25 September 2014 entitled ‘The Right to Decide in the 21st Century: Scotland, Catalonia and beyond’. The conference consisted of two panels: the first one focused on ‘The Right to Decide in Theory and Practice’, whereas the second panel looked into the question of ‘Looking Forward, Looking Outward’. An assorted panel of academic experts, politicians, policy makers and civil society gave an overview of the legal and political debates, case studies, as well as key future challenges and opportunities related to the right to decide.

The overall conclusion to be drawn from this conference is that with legal uncertainty surrounding the question of self-determination and the right to decide, the scale of such movements provokes international resistance to change. Nonetheless, there is room for optimism. The very fact that people of Scotland had been granted the opportunity to decide represents a beacon of hope and empowerment for stateless nation seeking peace and security. The conference represents a continued open engagement with the topic of self-determination by the UNPO, which it aims to develop further in the future.

Marino Busdachin
UNPO General-Secretary
3 • Conference Programme

25 September 2014

Moderator
Ms Johanna Green
UNPO Program Manager

9:30 Opening Remarks
Mr Joseph-Maria Terricabras (Member of the European Parliament)
Ms Johanna Green (UNPO Program Manager)

09:45 Panel I: The Right to Decide in Theory and Practice

Dr Koen De Feyter
Chair of International Law at the University of Antwerp

Dr Dirk Rochtus
Professor of International Relations at KU Leuven

Mr. Miquel Strubell
Expert in the field of regional and minority languages, education and multilingualism

Dr David McCrone
Emeritus Professor of Sociology at Edinburgh University

10:45 Panel II: Looking Forward, Looking Outward

Mr Ernest Maragall
Member of the European Parliament

Mr Günther Dauwen
The Secretary-General of Centre Maurits Coppeteters

Mr Roland Coste
Director of Cabinet at the Ministry of Foreign Affairs of Savoy

Mr Merijn Chamon
PhD researcher at Ghent University

11:45 Questions and Answers
4 • Speaker Biographies

Josep-Maria Terricabras i Nogueras
Member of the European Parliament, EFA Group President

Mr. Josep-Maria Terricabras i Nogueras holds the positions of President of the EFA Group, and Vice-chair of the Group of the Greens/European Free Alliance at the European Parliament. He is a member of the Committee on Constitutional Affairs, as well as the Delegation to the EU-Mexico Joint Parliamentary Committee and the Delegation to the Euro-Latin American Parliamentary Assembly. Mr. Terricabras is a member of the Catalan Society of Philosophy, and the majority of his publications are devoted to the topics of philosophy of language, logic, epistemology and ethics. He is also a member of the Catalan National Assembly.

Marino Busdachin
UNPO General Secretary

After serving as UNPO Executive Director from 2003-2005, Mr. Busdachin was elected as UNPO General Secretary in 2005. He was a member of the Extra-ordinary Executive Board of the Transnational Radical Party from 2000-2002, and is currently a member of the General Council of TRP. He led the TRP to recognition by the UN as an NGO of the first category, and led and coordinated the TRP in the former Yugoslavia (1991-1993) and in the Soviet Union (1989-1993). He founded the NGO “Non c’e’ Pace Senza Giustizia” in Italy (1994-1999), as well as founded and served as President of No Peace Without Justice USA from 1995 to 2000. Mr. Busdachin campaigned for the establishment of the International Criminal Court.

Koen De Feyter
Professor at University of Antwerp

Dr. Koen De Feyter is the Chair of International Law at the Law Faculty of the University of Antwerp, where he initiated the Law and Development Research Group. He currently serves as the Chair of Bureau of the Flemish Inter University Council for higher education development cooperation. He coordinates an international research network on localizing human rights that includes on-going socio-legal research in China, India and the DRC. He has published in the fields of the international law of sustainable development and of human rights. His most recent publications include The Common Interest in International Law (Intersentia, 2014), Globalization and Common Responsibilities of States (Ashgate, 2013) and The Local Relevance of Human Rights (Cambridge University Press, 2011).
Dr. Dirk Rohtus studied Germanic Philology and International Relations at the universities of Bonn and Antwerp, and in 1996 wrote his doctoral dissertation on “The Third Way in the German Democratic Republic 1989/90”. He lectured on International Relations and German History from 2000-2006 at the KU Leuven Campus Antwerp, and was during that time an external advisor on the federal system of Belgium and the external relations of Flanders at the Council of Europe. From 2005 to 2007 he was Vice-Chief of Cabinet for Flemish Foreign Policy and in 2007 he received the German Federal Cross of Merit. He publishes about the foreign policy of Germany and Turkey, Belgian federalism and issues related to nationalism. He regularly writes op-eds for Flemish daily newspapers and online magazines. He is a current member of the board of the ‘Archives and Research Centre for Flemish Nationalism’. His main research interests are the Nationalism in Belgium and Turkey and the foreign policy of Turkey.

Miquel Strubell
Universitat Oberta de Catalunya

Mr. Miquel Strubell is an expert in the field of regional and minority languages, education and multilingualism. He is the executive secretary of Linguxamón-U.O.C (Open University of Catalonia) Chair in Multilingualism (Barcelona). Mr. Strubell ran the Catalan government’s language promotion office and research department from 1980-1999. He was the coordinator for several EU projects, including Euromosaic I and II reports, over 15 language use surveys, Adum: a project offering information on EU programmes relevant for the funding of minority language promotion projects, and European Parliament reports: ‘Lesser-Used Languages in States Applying for EU Membership’ (2001) and ‘The EU and Minority Languages’ (2002).

David McCrone
Emeritus Professor at University of Edinburgh

Mr. David McCrone is Emeritus Professor of Sociology, and co-founder of the University of Edinburgh’s Institute of Governance in 1999. He is a Fellow of the Royal Society of Edinburgh, and a Fellow of the British Academy. He coordinated the research programme funded by The Leverhulme Trust on Constitutional Change and National Identity (1999-2005), and on National Identity, Citizenship and Social Inclusion (2006-2012). He was co-director of the ESRC-funded Scottish Election Study (1997), a principal investigator in the Scottish Parliamentary Election Study (1999), and has held a number of research grants over the years from ESRC, Leverhulme, Rowntree, and Nuffield. He has written extensively on the sociology and politics of Scotland, and the comparative study of nationalism. He was a member of the Expert Panel which devised procedures and standing orders for the Scottish Parliament, and was advisor to its Procedures Committee which reviewed the Parliament’s founding principles. Currently, he is professorial research fellow on Heat and the City, a multi-disciplinary research programme funded by the Research Councils UK.
Ernest Maragall i Mira
Member of the European Parliament (Greens/EFA)

Mr. Ernest Maragall i Mira is currently a Member of the European Parliament, who belongs to the Group of the Greens/European Free Alliance. He is a Spanish politician and former Minister of Education of the Government of Catalonia. He was a member of the Executive Committee of the Catalan Socialist Party (PSC) and deputy in the Parliament of the same party until he left in October 2012. After this, Mr. Margall founded a new Social-Democrat party, ‘Nova Esquerra Catalana’ (NEC), which supports Catalonia’s right to self-determination and even independence, if a majority of Catalans chooses it. He is a member of the European Parliament’s Committee on Industry, Research and Energy, as well as the Delegation to the EU-Turkey Joint Parliamentary Committee.

Günter Dauwen
Secretary-General of Centre Maurits Coppieters

Since 2006, Mr. Günter Dauwen serves as Director of the European Free Alliance. Before that, he held the positions of Co-Director and Political Advisor of the European Free Alliance (2004-2006), and assistant to Member of the European Parliament, Nelly Maes (2000-2004). He is currently also the Secretary-General of Centre Maurits Coppieters (CMC). Mr. Dauwen holds a university degree in Political and Social Sciences (KU Leuven) and a university degree in Human Ecology (VU Brussels).

Roland Coste
Director of Cabinet at the Ministry of Foreign Affairs of Savoy

Mr. Roland Coste is Director of Cabinet at the Ministry of Foreign Affairs of Savoy. He holds degrees in literature and law from the University of Lyon, and diplomas in English (Abraham Moss Center College in Manchester) and education (Marseilles). He served as treasurer for the organisation AART (Aide Aux Réfugiés Tibétains) until 2010, and since 2012 he is the treasures for another pro-Tibetan organisation, Aide-ANDO. Besides this, since 2004 he is the Godfather of two Tibetans and several children in India.

Merijn Chamon
PhD researcher at Ghent University

Merijn Chamon holds a Master’s degree in EU-studies (Ghent University) and a Master’s degree in European Law (Ghent University). He is completing a PhD, the working title of which is “Transforming the EU Administration: Legal and Political Limits to Agencification”. His specific research interest therefore lies in the agencies of the European Union. Other than that, Merijn Chamon’s research interests encompass the institutional and constitutional law of the EU and parts of the law of the EU Internal Market.
5 • Opening Remarks

Speech by Mr Joseph-Maria Terricabras, Member of the European Parliament

Ladies and gentlemen, dear friends,

I am Joseph-Maria Terricabras. I am the President of the European Free Alliance Group and the Vice-Chair of the group of the Greens at the European Parliament. It is my pleasure and privilege to welcome you to this conference on “The Right to Decide in the 21st Century: Scotland, Catalonia and Beyond”.
The right to decide is a fundamental democratic right. Indeed, it is the origin and source of our democratic capacity. In this context, allow me to quote the German philosopher, Immanuel Kant. He wrote a very short brochure called “Antwort auf die Frage: Was ist Aufklärung?” (“Answer to the Question: What is Enlightenment?”). He starts the brochure with the following words: “Enlightenment is man's emergence from his self-incurred immaturity”.

230 years later, we can agree with Kant’s writings. However, our century is not an enlightened age, but simply an age of enlightenment. To be enlightened means to make use of one's own judgement.

Nevertheless, the content of the declaration seems to be important since it says that our free capacity of judgement, which allows us to make decisions freely, is the very basis of our democratic and political life. We will examine this not only referring to the examples of Scotland and Catalonia, but with arguments that go far beyond these nations, and apply to all communities and societies around the world.

The right to decide is the right to be – and to become – a civilised and democratic citizen. Consequently, to deny that right is a serious threat to democracy and peace.

This is the reason why I think that our conference can help enlighten our ideas and probably our practices. If it does, it will contribute also to democracy and peace.

I am very grateful to the organizers for this event; a service to the community, which has a very special meaning as it is held at the heart of Europe, namely the European Parliament.

Thank you very much.
Speech by Ms Johanna Green, Program Manager of UNPO

Distinguished Members of the European Parliament, ladies and gentlemen, dear guests,

First of all, thank you for joining us this morning here at the European Parliament – the symbol of modern European democracy. I’m Johanna Green from the Unrepresented Nations and Peoples Organization (UNPO). We are an international, democratic and nonviolent membership organization, founded in the Hague in 1991, and our members represent minorities, indigenous peoples and unrecognized or occupied territories worldwide. Unfortunately, our General Secretary could not make it here today, so I will be saying a few words instead. However, since we will have the opportunity to listen to 8 expert speakers during the next few hours, I will keep my introductory remarks very short, and just say a few words about the context in which we have gathered here today.

In April this year, UNPO together with Centre Maurits Coppieters and Ciemen (the international escarré centre for ethnic minorities and nations), organized a conference entitled Redefining Self-Determination in the 21st Century – also here at the European Parliament. That conference addressed the concept of self-determination in today’s increasingly interdependent world, and explored new models to make the minority dimension work within the framework of multinational states. Over the summer, as debates about the implications of independence of Scotland, Catalonia and others, intensified, we saw the need to again bring together politicians as well as academic and policy-oriented experts to openly engage in constructive dialogue – this time on the right to decide – in the 21st century.

A week ago we witnessed the engagement of millions of voters in the Scottish referendum. Although a yes vote in Scotland would certainly have made things easier for Catalonia and others, and actually obliged the EU to take an official position on issues such as internal enlargement, the takeaway message is not that much the outcome, but rather that a referendum actually took place. The Scots were able to vote and collectively exercise their right to decide on their future. And this is what matters. And moreover, perhaps this can also be seen as a lesson for governments who remain wary of granting the people the right to decide for themselves – as the Scottish experience has showed, letting people vote does not necessarily mean that they will vote for independence.

On this note, I will open our first panel entitled ‘The Right to Decide in Theory and Practice’. Our first speaker is Dr. Koen de Feyter.
I thank the organizers for giving me the opportunity to speak at this conference.

International law’s involvement with the right to decide can be seen mainly in the consequences of the decision to create a new State. Regarding the creation of States, international law is concerned with the aspects peace and security. The preferred solution for the creation of new states in international law is an agreement, which is reached by the mother State and the entity that wishes to secede. An agreement avoids conflict and it is very important from a legal-security point of view.

The international community is mostly concerned with the international commitments of the mother State and what will happen to those international commitments when there is a dismantlement of their territory. The international community wants to ensure that there is an agreement between the two entities on how developments will impact international commitments that were undertaken by the mother state.

If there is an agreement, the international community will take a pragmatic approach to this. It will accept the new reality and various processes will ensue, including the recognition of the new entity by other States. This is primarily a political decision rather a legal one.

In addition, specific rules regulate how international governmental organizations deal with new membership; either the new entity – or both new and mother State – need to be confirmed for membership according to requirements of the intergovernmental organization.

If there is an agreement, international law is neutral and will except the outcome of the agreement. In fact, when the separation or the creation of new States is the result of (violent) conflicts, then I think international law is quite rational and will accept the reality on the ground as it occurred.

The protection of the ‘territorial integrity’ of the State means that if there is a conflict between one part of the territory and the Government, there is a prohibition for other States to intervene. It signifies that there is a prohibition of assisting the group that wants to secede in its potentially violent struggle against the Government. It is clear from the advisory opinion of the International Court of Justice on the declaration of independence by Kosovo that the protection of territorial integrity only applies in relationships between States.

The principle of territorial integrity does not protect the State from internal attempts to declare independence.

The protection of the principle of territorial integrity does not prohibit the group within
a country to declare its independence, as it happened in Kosovo. This is important because territorial integrity is protected in the sense that other States cannot intervene. However, the principle of territorial integrity does not protect the State from internal attempts to declare independence.

It also said that the declaration of independence in the case of Kosovo does not have any consequences on international law. It does not mean that, therefore, all States are now required to recognize independence claims. It does not mean that international organizations have to accept Kosovo as a Member State. Nevertheless, it is not prohibited for a group of people to come together and to declare their independence. What follows is uncertain. We come back to the pragmatism that we were talking about before.

Is there any support that is given by any instrument in international law that might support sub-national groups in their struggle towards autonomous decision-making or independence? Now, outside of the context of decolonisation (for which the principle of self-determination was originally created), I think that there are two ways in which the right to self-determination is relevant.

One way is to look at groups that have specific characteristics, which entitle them to self-determination. The other way is to say that there is a right to self-determination for sub-national groups in certain circumstances. In these cases, it is not their shared characteristics, but what is happening to the group, which entitles them to self-determination.

In the first avenue, the clearest example is the area of indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples says “indigenous peoples and only indigenous peoples have the rights to self-determination”, which does not mean independence according to the declaration, but the right of autonomy within a state.

There is also an important concept in the declaration called the ‘free, prior and informed consent’, which means (particularly in matters concerning land issues) that decisions can only be taken by the Government after the free prior and informed consent of the affected indigenous group. This is starting to become common practice. For instance, UN Development Agencies are moving towards recognizing this notion of free, prior and informed consent on essential issues like the access to land for indigenous people.

Of course, it becomes very important to prove what is an ‘indigenous group’ and the declaration does not offer a definition. Therefore, it is left to political manoeuvring and lobbying.

Similarly, the African Charter on Human and People’s Rights, and the decisions of the African Commission, show that peoples may, under certain circumstances, have the right to decide on certain issues, such as land. In the African Charter, there is no concept of ‘indigenous peoples’. It just talks about ‘peoples’. In some of the cases, for example in a case of Cameroon, a group claimed the right of autonomy, but it is not indigenous. In fact, people speak English, rather than French, and have no racial or other distinctions from the main group.

UN Development Agencies are moving towards recognizing this notion of free, prior and informed consent on essential issues, like the access to land for indigenous people.
Nevertheless, the African definition stipulates that “such a group, that has been ignored in the mainstream development policies of the central Government can, in certain circumstances, have the right to decide on a number of issues”. That is broader than that we have at the UN level.

The second way asks us to look at groups with the right to self-determination due to their circumstances. The term that is used in international law is ‘remedial secession’. In this case, secession is a remedy for violations that have been done to the group in the past. In the advisory opinion of the International Court of Justice on Kosovo, ‘remedial secession’ comes up because the States that intervened in the Kosovo case use it as an argument to say that the Kosovar population has a right to independence. The International Court of Justice ignored the question, because the advisory opinion is not about secession. It is only about the declaration of independence.

I do not think that this question of secession yet part of international law, but there are some precedences. There is the famous decision on Quebec. There is also the old case of the Aland Islands between Sweden and Finland. In both cases, the groups were denied the right to secede.

There are, nevertheless, certain conditions which had been put forward. If these conditions would have applied, these groups might have had the right to secede. Those conditions are domination and oppression.

Domination means no participation in Government structures and processes, and in the management of the country. It applies if the entity can show that they are completely excluded from Governmental decision-making. Oppression means that as a group you are a victim of systematic violations of human rights.

If these two conditions apply, the entity might be able to argue that they have the right to secede as a remedy for the massive violations that has been caused to their community by the Government from which they would like to secede.

There is a big fear in the international community that by incorporating this theory of legal secession into international law it might actually encourage conflicts.

This is a theory that has been put forward and I would argue is not yet part of positive international law, but a direction in which international law might develop in the future.

Remember that the overarching concern is international peace and security. There is a big fear in the international community that by incorporating this theory of legal secession into international law it might actually encourage conflicts.
Speech by Dr Dirk Rochtus, Professor of International Relations at KU Leuven

Dear Ladies and Gentlemen,

Do regions or federal entities have more autonomy? Do stateless regions have a right to autonomy in the form of a State? This question only makes sense if we recognize partial indigenous rights and the existence of corrective rights. The liberal society sees the political sphere of its citizens as determined by individual, which are transferred onto the right of self-determination of a nation. The principle of nationality appears as a natural right of the peoples and nations to self-determination.

I would like to refer to some German philosophers. Karl Marx and Friedrich Engels had reservations about thinking about self-determination as a category of natural law. But they defended the right of self-determination of the Germans and their fight over several States in the 19th Century; a functionalist thinking in terms of power. German nationalism went on to create a political and economic “Grossraum” (“big space”), and capitalism was a phase, which would make way for socialism.

The American President Woodrow Wilson was inspired in his belief in self-determination and the idea that peoples of central Europe are rightfully thriving for autonomy or even independence.

Nowadays, the international community may be more pragmatic concerning the interpretation of self-determination. But in the public mind, secession or separatism is still linked to nationalism of certain groups, which are homogenous in terms of culture or language; something which seems to be contradictory to the idea of a harmonious community of several peoples living together in solidarity.

Secession has also been seen in the public mind and by the international community as a threat to the stability of the international order composed of nation States, because of the fragmentation and the loss of efficiency in the political and economic field.

There is a tendency towards growth into ever bigger entities. We see this with the European Union – external enlargement rather than internal enlargement. Everything which contradicts this tendency towards growing entities is being rejected as “Kleinstaaterei” or micro-nationalism or is even seen as an expression of reactionary thinking.

The ambitions of dozens of peoples in Europe for more autonomy are seen as a fragmentation of the continent. The defenders of the European project (of external enlargement) often forget that it is the size of scale which causes coexistence on the cultural, as well as on the political field.

The nation State of the 19th Century unfolded in the centre and has had an assimilating effect on the peripheries. What was the periphery in the 19th Century is the EU of the 21st Century. These regions feel
that they cannot determine their own destiny. This feeling can be of a cultural, political or socio-economic nature.

The answer has been found in the search for more autonomy. It is the argument that we have heard in nationalist circles. I would like to quote from the programme of the “Yes” in Scotland movement: “Being an independent member of the EU means that Scotland will have its own votes and voice at the top table, able to pursue its own needs and interests.”

It is the same argument that we used to hear when Flemish nationalists mentioned that they should have a right to raise their own voice. So, for autonomists sitting at the European table, the driving force for their calls for more autonomy or even independence goes hand in hand with a belief in Europe. The so-called nationalists or autonomists know that independence, like in the 19th Century, does not exist anymore and they know that a large part of legislation comes from Brussels. When you are in Europe, it is of course better to be as close and as direct as possible with the EU. It is, therefore, ironic that the EU, through high ranking politicians, threatened the Scottish people with a difficult accession process to the EU.

I would like to quote Mr Graham Avery, Honorary Director General of the European Commission, who criticised those high ranking politicians: “Scotland has been in the EU for 40 years and its people have acquired rights as European citizens. If they wish to remain in the EU, they could hardly be asked to leave and then reapply for membership in the same way as people of non-member countries such as Turkey.”

For autonomists sitting at the European table, the driving force for their calls for more autonomy or even independence goes hand in hand with a belief in Europe.

The nationalism of the 19th Century was a double-edged sword; the nation State has performed an assimilation process of minorities on its own soil. On the other hand, it created the space in which democracy could unfold. Within the nations of the 21st Century, the fear for the former is nearly eligible.

If democracies rely on communication, then the use of a common language seems to be a condition for the well-being and functioning of a democratic process. In this context, language must be understood as the soul of a cultural network. The Scots, the Catalans and many other nations and peoples in the EU are within their geographical space, sharing a certain political culture and discourses, which are different from the recognized States to which they belong. So, they not only have a right to more autonomy, but also the duty, because more autonomy signifies democracy by bringing it closer to its citizens.
My first point comes right down to the first case study, Catalonia. Each case is unique. No case should be taken as a recommendation for other cases.

First of all, I will outline a little bit about the history and background of the case. Catalan people had their own institutions of self-government until 1714. For several centuries they had shared the Head of State, not just with Mexico, Peru and Philippines, but with Flanders as well. Then, Catalonia came under the direct central control. Not many years later, formal complaints were already made about the high level of discrimination Catalans were subjective to.

Catalonia has for generations fought for a free Catalonia. Looking back now, for at least 150 years, Catalan politicians have done their best to try to transform Spain into a federal model, in which the Catalans would once again enjoy self-government. They found no partners for this federal dream in the rest of Spain and all their efforts failed. Perhaps it is for this reason that they have not been successful in Spanish politics. There has not been one Catalan Prime Minister in Spain for over 120 years – unlike Scotland. Two successful military coups in the 20th Century were mainly powered by the will to recentralize Spain and to eliminate even limited levels of self-government, particularly in Catalonia.

We know that we are experts in losing against Spain. This was a grassroots dream of most natives Catalans. In 2003, almost all Catalan political parties agreed that the 1979 regional Constitution/Statute of autonomy needed to be reformed to restore the level of autonomy more fairly.

This new draft regional Constitution of September 2005 was agreed upon after long negotiations by the Catalan parties – 89% of our MPs. It was nevertheless a limited exercise on the right to decide within the strict boundaries of the Spanish Constitution. However, it had to be adopted by the Spanish Parliament and voted by the Catalan electorates to become law.

As soon as it was clear that the text was likely to be slightly cut-down by the Spanish Parliament, we could stop talking about civic engagement. Early in 2006, a platform for wide ranging civic organization emerged: “A platform for the right to decide”. We are a nation – we have a right to decide. Big demonstrations were held out of the blue. The scale of the public response took the organizers by surprise in February 2006.

\[\text{We are a nation – we have a right to decide.}\]

New platforms popped up across the country, each with its own agenda. In 2009, three civic initiatives emerged. One was a pro-independence demonstration in Brussels with about 4000 Catalan participants, which is just a drop in the ocean. The second initiative was the first unofficial referendum on Catalan independence and over 1 million people voted. They voted overwhelmingly in favour for independence. The third initiative was the non-partisan, democratic, peaceful Catalan National Assembly - a grassroots organization with the single aim of achieving independence.
Last year, people created a human chain that stretched 400km with a million people dressed in yellow t-shirts. This year, we organized a demonstration in Barcelona with an 11km long Catalan flag in the shape of a ‘V’ with the slogan “We will vote!” Survey polls showed that the ‘Yes’ votes were 20 points ahead of the ‘No’ votes.

This assembly gathered civil service organizations working towards independence. Demonstrations are being conducted with a positive and peaceful attitude. The aim is to hold a non-binding referendum on 9 November 2014. This enjoys the full support of the Catalan National Assembly and affiliated organizations that jointly set up a campaign for the ‘Yes’ vote with the slogan “Now is the time!”

Tens of thousands of volunteers have been mobilized to start campaigning door to door, and millions of Euros have already been donated by private firms. We are radically democratic, transparent and peace-loving in our work. The meeting minutes of the secretariat are published and they have been quoted in smear campaigns attempting to suggest we are engaged in illegal activities with right-wing organizations.

Our members list was hacked in April 2014. Our website is under constant assault. Our phones have been receiving calls every second minute for 48 hours straight. We have been accused of having contacts to terrorists. This was a sophisticated and costly operation, which is now in the hands of the police.

The Catalanian bill on a non-binding referendum is supposed to be published. No
one has seen the draft so far. The Spanish Government keeps complaining that the referendum and the bill are not legal and brought it to Court. I hope that the Court will not get involved in this dispute, because it is not of a legal, but political nature.

All people have a right to self-determination written down in the international law as stipulated in the UN Charter.

Speech by Dr David McCrone, Emeritus Professor of Sociology at Edinburgh University

Thank you for inviting me.

I hope you will forgive me for still being in a ‘campaigning mood’.

85% of us voted. This is the highest participation since 1945. 45% voted ‘yes’.

We like the idea of voting. We got a taste of it and we shall do it again. It is said that this referendum was a once in a lifetime or once in a generation opportunity, but generations are becoming shorter.

I have ten quick points to make or lessons we can take away.

First of all, the issue of legitimacy and the right to decide: if you are certain that people do not have a right to decide then you are stocking the fires of discontent and unrest. ‘We are the people’ is a powerful claim. The legitimacy is a very precious thing to have, but it is ours to own.

Secondly, at the heart of the matter is: ‘Who has the right to decide?’ Voting rules for the Scottish Parliament were established under the Scotland Act of 1988, which defines the Scottish Parliamentary elections as local and not State level. In State elections only citizens can vote. It was therefore easier to argue in favour of residential rights rather than being simply a citizen of the state. We had a debate on this issue, which very quickly underlined that people who consider themselves Scottish, born in Scotland, but living in England for example do not have the right to vote. This is a territorial definition of who is a Scott. No matter where you born, as long as you actually live in Scotland, than you have the right to vote. Territoriality is the key. Anything else would be judged as racist.

Third point: establish rules in advance and establish an electoral commission, which oversees the process and is able to lay out the rules that need to be observed. Do not allow the process to be simply the property of the elite political class, even less of the ruling Government.

Fourth point: ‘territoriality’ is a much more secure foundation for a referendum rather than other criteria such as place of birth or ethnicity or clans. Let us imagine a mythical country called Ruritania. It is enough to live in Ruritania to have the right to vote there. Instead of proving your grandparents were Ruritanians. It is enough to live there. This is a valuable lesson that we have learnt.
Fifth lesson: we must recognize that plebiscites and referendums – so called direct democracy – are double edged swords. They are not a substitute for other forms of democratic decision-making, such as electing Governments. Of course, there are many examples of plebiscites being used to circumvent the political process. I want to suggest that such devices might be used for reactionary and discriminatory purposes, not simply for progressive ones.

I do not need to remind you that Hitler’s occupation of the Rhineland in 1936 received 99% approval rates. Referendums and plebiscites are not to be taken as simple and technical substitute for democracy.

Sixth point: it is not enough to have a referendum. For example, in 1979, when we had our first referendum, a majority of people (52%) votes ‘Yes’, 48% of people voted ‘No’. It did not pass because the importance of this proposal was built into a law of the 40% rule, which says that 40% of people on the elective register had to vote ‘Yes’. However, people on the elective register also include dead people who are considered to be ‘No’ voters. This ‘Yes’ vote did not pass in the UK Parliament. This showed us that we had to find our own way and not to rely on the State instruments.

Seventh lesson: is 50% plus one vote enough? Well, if there had been a 50% plus one vote ‘Yes’ for the independence last week in Scotland, would that have been sufficient in order to establish democratic
legitimacy? For the moment, this has become an interesting academic question. Is a simple majority enough? I believe, in some circumstances yes, in other circumstances no. What is it a mandate for; or what is it a mandate against? A simple majority may not be in certain political circumstances enough, but this has to be decided in advanced.

Point eight: one of the difficulties with referendums is that it can easily be captured and appropriated by other issues. A referendum is prone to become about something else. It was the British politician, Mr Harold Wilson, who said that one should only have a referendum when one is sure about the outcome. Having a referendum is not in itself a simple message.

Ninth lesson: it can be argued as it was by the outgoing first Minister, Mr Alex Salmond, that simply winning a majority of Scottish Members of Parliament may be a mandate for a defence.

When, for example, Ireland became independent in 1921 no one, to my knowledge, argued then that there should be a referendum. It depends of course on the political circumstances. However, in reply to Alex Salmond, it is unthinkable for the referendum not to occur if there is a history of such votes. We had a referendum in 1979, another one in 1997, and we just had another in 2014. Consider the spacing between the votes; the referendum genie is out of the bottle.

My final point: be careful what you wish for. In the Scottish language, we have the word ‘guddle’. ‘Guddle’ signifies confusion. The 2014 Scottish Referendum has produced such a guddle in the United Kingdom. Not only does it leave Scotland unsure whether it will become part of the world powers as was promised by British politicians in the last days of the campaign. It has also raised the stakes on how the UK is generally governed. How to have for example English votes for English laws in the UK? The northern English regions and cities say they want more powers. However, behind all this is the possibility of the UK leaving the European Union.

Referendums may raise way more problems than they solve. Be careful what you wish for.

Thank you very much.
We are here not in the name of nations. We are here in the name of democracy. If our moral liberal European democracy does not recognize the principle of the right to decide or the right to self-determination, which defends the system, we will all be lost. Things will start to develop in a very dangerous direction.

The right to self-determination must be considered as a process and a dimension of a new order - politically, socially and democratically. It has to be built in a peaceful way. It is not only a matter of powers, institutions, constitutions, parties etc. It is a matter of societies.

Who can call for a referendum? It is a deep question: Who is the political subject? Who is defining it? When do we have these conditions?

We, the Catalans, are a political subject. But Spain says Catalonia is not a political subject. They try not to recognize us. It is very important not to lose our conviction, not only in the referendum process or in the process of self-determination, but also in the real life. It is important not to lose autonomy.

We cannot avoid recognizing the self-determination process in regional frames. The Scottish referendum has had consequences on the international level; for Catalonia and for the attitude of other States, as well as the European Union. It is better to accept it than to affront it.

Nevertheless, without this international frame, most new successful self-determination processes would have not been born, including Czech–Slovakia and Kosovo.

Do we speak here about self-determination processes that someone could defend? Or is it just to show how great powers are trying to maintain new spaces, new economies etc.

The Quebec Case (Reference re Secession of Quebec, [1998]) is a very good example of how this democratic and not only national question can be solved. Secession is not accepted because it is not considered to be within the Constitution, but it comes after a democratic right of people to be consulted. The result of this consultation - a democratic principle - builds upon the constitutional level. This is a very important principle.

A brief comment on the Scottish case: the Scots have already won, because of their opportunity to exercise their right to decide. They might get another opportunity in the future, and they may be successful, then.
These kinds of processes are a confrontation between democracies and economic powers. It is a scandal that economic powers are not accepting of democracy or democratic principles. This is a deep question for Europe’s state-building process.

The Scottish case is a horrible example in this sense. It is a resignation; we are not part of democracy, and it is against democracy.

Finally, we are building Europe by talking about Europe; how Europe should deal with the principle of the right to decide in our democratic constitutions. The real danger for Europe comes from State nationalism, not our nationalism. This is the real danger.
Speech by Mr Günther Dauwen, the Secretary-General of Centre Maurits Coppetieters

As Johanna already said I am director of the European Free Alliance and I am the Secretary-General of the Centre Maurits Coppetieters and what I would like to talk to you today is about para-diplomacy.

Before I start, I would like to congratulate the organizers of the conference and I would like to also congratulate the Scottish and Catalans for this democratic process that they are showing to Europe. I cannot agree more with what Mr. Maragall said: Why are we here? This is about democracy.

I want to present a study on para-diplomacy, which was recently published and a result of a conference, which we have organized last year in 2013. We are here because this is about democracy regardless of the result of the referendum in Scotland. The referendum signifies empowerment for stateless nations and for the rest of the world.

Why is there more interest in para-diplomacy and why are there more studies about it?

Because of globalization, national governments have a reduced ability to independently implement effective policies. Sub-national jurisdictions are certainly the ones thriving for more national autonomy or even independence. They are finding that sovereignty is no longer essential for the entrance of the global stage. They see para-diplomacy as a tool to gain sovereignty. Because of federalisation and internal democratization states can have more para-diplomatic activities together with sub-state level entities. We are living in interesting times, that is why I believe it is appropriate to put forward two cases regarding para-diplomatic activities by Linda Fabiani, former SNP Minister of the Minority Assembly 2007-2011 and Jordi Solé, current president of the foreign affairs committee of the Catalan parliament: I will take briefly a couple of elements out of their interventions.

What Linda said regarding para-diplomacy activities in Scotland is important: Although there had been Scotland for couple of centuries under the union, they managed throughout these hundreds of years to put forward para-diplomatic activities but mainly done through the institutions of the union itself. Scotland developed in the recent period, after the referendum 1997, more powers that have put them into the position to develop a network of consuls in Edinburg, making relations with the rest in the world and developing a network of representatives of Scotland in the rest of the world. They opened the Scottish house in 1999, using the Catalan model, focusing

Sovereignty is no longer essential for the entrance of the global stage. They see para-diplomacy as a tool to gain sovereignty.

One definition: Para-diplomacy by sub-national jurisdictions considers how sub-national jurisdictions, like stateless nations or regions, and other non-state actors use diplomacy, often parallel to state diplomacy, to seek influence beyond their own borders.
very much on Europe. The Scottish house is very active here in Brussels and established a para-diplomatic network. Since 2002, the Scottish para-diplomacy worked on the following key issues: promotion of Scottish involved in the EU and the world, building a network of mutual interests between countries and regions and promoting a possible image of Scotland. These are just a couple of elements that Linda has highlighted in her intervention on para-diplomacy when it concerns Scotland.

Jordi Solé has a different approach. He mentioned the existence of proto-diplomacy on the example of Catalan. He defines that as diplomacy of a sub-state level entity, like Catalonia, seeking recognition and independence, often conflicting with state diplomacy (Spanish state). How does he define the key elements of this proto-diplomacy?

As promoting their own cultural and linguistic identity, promoting their cultural and economic policies, promoting their national specificity and national aspirations, seeking to build an international network, seeking to support the achievements of their independence.

To conclude, I would like to say something about the growing need having para-diplomatic activities to build a network of sub-state level entities and stateless nations on the one hand and the European Union on the other hand. The juridical concept that covers the enlargement of the European Union from within in the case of internal secession is in the centre of attention, certainly after the Scottish referendum. I believe that the EU will have to have a pragmatic approach to this; although, nothing is foreseen in the treaties. The case of East Germany is a precedent case. I hope that the Junker Commission will have a clearer view on this matter than the Barroso Commission. I call it the Barroso Doctrine, where they condemn a new state formed in the case I described would have to undergo negotiations with the accession process and a possible veto from the member states.

The importance of para-diplomacy cannot be underestimated.

Thank you.
Speech by Mr Roland Coste, Director of Cabinet at the Ministry of Foreign Affairs of Savoy

Ladies and Gentlemen, Members of the European Parliament, representatives of the UNPO, and representatives of the Maurits Coppieters Centre,

I am neither an orator, nor a politician and I feel honoured and grateful to you for giving me the opportunity to speak here in the European Parliament in Brussels on behalf of the Provisional Government of the State of Savoy. We highly respect your position and role within the European and international institutions.

I am addressing you as a representative of a nation, which has shared its destiny with Europe for close to 1000 years prior to its annexation to France.

Savoy, a small country of 10,000 square kilometres, bordering Italy in the north-west, France in the east, and Switzerland in the west, was the last colony to be annexed to France in 1860. The Times correspondent in Geneva wrote the following on 28 April 1860, subsequently reprinted in the 'Journal de Genève' on 3 May 1860:

'Yesterday was the important day when Savoy was to vote on the Treaty of Cession and I came to wonder whether I should cross the Swiss border to dirty your newspaper's columns with the tale of the most abject farce that was ever played in a nation's history'.

Whereas the people of Savoy had enjoyed decent living conditions under the Empire of Napoleon III, they began to rise against the newly installed Third Republic in 1871. The unity called for by the new French Constitution meant the end of the rights acquired by vote of 22 and 23 April 1860.

Even the free and neutral zones, which were not dismantled in 1871 ended up being so later.

The claim of the Savoy people to have their rights respected dates back to more than 140 years ago. The abolition of nationality followed by the disappearance of a great number of Savoisiens during the First World War meant that there were few acts for the recognition of our people despite the condemnation in 1932 by the International Court of Justice in The Hague for the non-respect of the free zones of Savoy dating from 1815.

Self-determination is more often used as a bargaining tool by some powers while they leave out the people who have been aspiring for years to achieve their own recognition.

In 1945, in the aftermath of the Second World War, with a high number of casualties in Savoy once again, the rebirth of the Savoisian identity came from Austria. Paradoxically, deported Savoisiens learnt from Austrians about the rights of Savoy which resulted in the 'Free Savoy' movement, while France never respected the most important Savoisian right: their neutrality.

For more than 65 years, Savoisiens have demanded their recognition, a demand which has grown even stronger since 1966 with the creation of the 'Savoisian Ligue'.
This claim for recognition as a separate people has been ongoing for several generations.

Every nation and people, with the assistance of the UNPO and others, can ask for the recognition/acknowledgement of its history and its future ambitions as long as no foreign nation is an obstacle to the process.

But what happens when a people does so without outside help? How can it demand self-determination when it cannot be heard in order to be recognised? Many people aspire to recognition, autonomy, even independence. In what way can this be achieved?

In recent history, did those peoples who gained recognition manage to do so by a rights-based argument alone or did they gain formal recognition because powers recognised them to counter other powers? Do powers like France exist because of what they are or because of what they once were?

In the 21st century, the right to decide should therefore not be limited to the blessing of powers but should be established as a real power to treat each other as equals with mutual trust.

Are not the characteristics of a people the fundamental elements on which a nation is built?

Should the Tatars in Crimea, torn between Ukraine and Russia - a minority as Savoisians in Savoy - not have their say on their survival?
Self-determination is the process by which a person controls their own life. Is self-determination really achieved by the people who demand it?

It would seem that, in recent years, self-determination is more often used as a bargaining tool by some powers while they leave out the people who have been aspiring for years to achieve their own recognition.

The ‘formatting’ of citizens according to the history taught in schools, drives people towards a programmed uniformity, little by little and day by day. And yet, belonging to a group of individuals does not stem from schooling alone. It stems from one’s roots, education, and life experience - a bit like when an adopted child feels the need to know his or her origins even without being sure he or she is adopted. Adoption makes the child feel accepted in the environment where he or she lives, but not deep inside himself or herself.

It is not by forcing people together that we can build a constructive future, but it is by respecting each other, and accepting peoples’ differences, that we can create a better world where each can find their place. Self-determination in the 21st Century also means respect, because independence and autonomy are about opening up towards others. Work and trade could only be beneficial to getting people together - but only if real equality between these people exists and if the term ‘self-determination’ recovers its original meaning.

Self-determination is depicted in the media as populism in its negative sense when, on the contrary, it brings people closer to their roots and allows us to keep our bearings while opening up to the outside. We do not
build houses to shut ourselves in but to invite friends and neighbours in; we build our ideal without alienating ourselves from the outside.

Out of 43 peoples registered in the UNPO, how many wish for self-determination in order to withdraw within themselves? We have had the opportunity to meet some, to talk to others and none would define self-determination as exclusion but as a will to work for the whole world with the whole world respecting the characteristics of each and every one.

We say 'yes' to the right to decide, but the right to decide by and for one in order to better serve the interest of our People and better integrate oneself in the world.

The importance of a nation is not its size; and yet, the Europe of people has become the Europe of nations. Without recognising the people who make it, how can Europe hope for a peaceful future? Respect must be mutual, trust must be earned. But Europe does not respect its promises, gaining favour from governments but also the mistrust, not to say the rejection of, minorities.

In recent weeks, a lot has been said about Scotland and Catalonia. Yet, as far as the right to decide is concerned, we see that the colonial powers rule the roost. England accepted a referendum but not a plebiscite which allowed a high percentage of English people to express themselves and refusing the vote to Scots living outside of Scotland. Spain is categorically refusing that the Catalan people vote. Yet, one People seem to have completely understood the meaning of the Right to Decide: the Icelandic people. They peacefully managed to regain their place and, as can be seen despite very little media coverage, this people have not withdrawn within themselves.

In the 21st century, the right to decide should therefore not be limited to the blessing of powers but should be established as a real power to treat each other as equals with mutual trust. There is not such a thing as a little people in the same way as there is no little nation – a kind of ideological racism in which some see themselves as superior to others because they are different.

I would like to finish with a thought from the report on the union of Savoy to France, on behalf of the diplomatic and constitution Committees, by citizen Grégoire, Member of the Departement of Loir et Cher.

On 27 November 1793, the people of Savoy became a sovereign people like the people of France, because sovereignty cannot become greater or lesser; it cannot increase nor decrease. The gradual increase of population and wealth increases power, but not sovereignty: Geneva and San Marino have it to the same degree as France or Russia, and when a nation of few people is joined with one of many, it must relate to it on an equal footing; otherwise it is a slave.

I thank all of you, supporters of the freedom of all oppressed people, for the opportunity to speak today.
Before setting out some observations on the topic which was assigned to me, I would like to start with a general disclaimer: the problem which we are discussing today is, ultimately, a fundamentally political issue. Discussing the legal challenges which an EU region vying for independence will encounter inevitably draws one into political questions. However, in my intervention, I will try to keep a clear legal focus, leaving the political issues to the political actors.

Turning to the assigned topic, it is worth pointing out the assumptions which underlie the question on ‘internal enlargement’. Thus, should a region of an EU Member State become independent, it would indeed be in the economic and political interest of that region to try and secure its own EU membership as fast and smoothly as possible, as a matter of self-preservation. Secondly, the notion of enlargement already hints at the hurdles which such a region would have to overcome, similarly to the challenges faced by a third country when it applies for membership of the EU under Article 49 TEU.

**Internal enlargement of fragmentation?**

That said, it is also worthwhile to further ponder on the notion of internal enlargement and whether it is an apt term to qualify the process at issue, given that there is no real ‘enlargement’ of the EU involved. Indeed, ‘internal enlargement’ rather seems to be a euphemism for ‘fragmentation’. The territorial scope of the EU would remain the same, but with a greater number of constituent entities (i.e. Member States), seems better captured by the notion of fragmentation.

Fundamentally, fragmentation also sits uneasily with the EU’s basic tenet of ‘ever closer union’. Ultimately, a secessionist region would reject a close bilateral union within its mother state, only to subscribe to an ever closer multilateral union involving that same (ex-)mother state.

The basic legal challenge for regions such as Scotland, Catalonia, and Flanders then is that the EU Treaties do not formally allow (or foresee) a scenario of fragmentation. Post-Lisbon, the only scenarios legally provided for under EU primary law are those of (genuine) enlargement and contraction under Articles 49 and 50 TEU. Fragmentation then is a combination of these two, whereby a part of an EU Member State secedes from the EU only to adhere to the EU as a Member State in its own right.

‘Internal enlargement’ rather seems to be a euphemism for ‘fragmentation’.

Given that the EU Treaties are silent on fragmentation, it is interesting to verify how the problem at hand should be looked at from an international law perspective. I will be brief on this, since it has largely been covered by Professor De Feyter. With regards to the right to self-determination, it should be pointed out that, assuming that citizens living in Scotland, Flanders, or Catalonia may be qualified as ‘peoples’, this right does not automatically entail a right to a State.
Under international law, a people should first exercise its right to self-determination within its State. The devolution processes in the UK, Belgium and Catalonia already show that these States accommodate the wish for self-determination of its citizens living in Scotland, Flanders or Catalonia. A remedial right of secession from the mother state then only exists for colonised peoples or for those peoples that are being collectively denied their civil and political rights, being subject to egregious abuses by their mother State. However, the EU membership of the UK, Belgium and Spain, and the conditions related thereto, almost *ipso facto* means that groups living in those Member States do not come under this scenario.

Regardless of legal principles and rules which may apply, politics may trump law. This was as such also recognised by the Canadian Supreme Court when it was asked to analyse the possibility of Quebec leaving the Canadian federation. While the Court found no such right for the Quebeois, neither under Canadian nor under international law, it still remarked that a clear expression of the Quebeois for independence could not be ignored by the other entities in the Canadian federation, and in the event of a unilateral non-negotiated secession its success “would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.”

As Sir David Edward has stressed in his observations on the secessionist movements within the EU Member States, a negotiated settlement between the region in question and its mother State indeed amounts to a condition *sine qua non* for a successful secession.

**Back to square one: fragmentation under EU law**

International law therefore, is not very helpful to solve the question of fragmentation in the EU. Ultimately, international law also refers back to the law of the international organisation in question when it is confronted with a problem of State succession in treaty law. This means we are back to square one: international law refers back to the EU Treaties themselves, but these Treaties are silent on the possibility and procedures for fragmentation.

As already noted, fragmentation seems a combination of contraction (Article 50 TEU) and enlargement (Article 49 TEU), which may have led top EU politicians such as Barroso and Van Rompuy to state (in their personal capacity) that a secessionist region would fall outside the EU on the moment of its independence and that it would have to (re-) apply to become an EU Member State. Bourgeois rightly notes that the region in question would not fall outside the EU from one day to the next, but that it would have to negotiate its withdrawal under Article 50 TEU, since EU regions only form part of the EU by virtue of their link with the actual EU Member States.

Here one of the fundamental tenets in EU law should be recalled: the EU is simply composed of Member States whereby the internal organisation of those states is a matter exclusive to them. The EU will then not interfere in domestic affairs, but neither will it accord special importance to the internal statute of entities within their Member State, regardless of their internal autonomy or independence. Seceding from a Member State then also involves seceding from the EU, but in order to secede from the EU, the Treaty of Lisbon now provides in a pre-defined procedure which, as a
result, would have to be followed by the region in question.

The precedent of East-Germany and recourse to Article 48 TEU

While the repercussions of such a scenario would be hard for the secessionist regions, it is difficult to find another legal solution to the problem. The fact that the regions in question have formed part of the EU for decades, or were even part of the founding States, is legally irrelevant since the only relevant constituent elements of the EU are the Member States. Furthermore, the scenario applied to East-Germany's 'accession' to the EU cannot serve as a precedent since it resulted from a process that is the opposite of a fragmentation: the territorial scope of the EU widened, but the number of constituent entities remained the same. It further resulted, for a brief period, in the underrepresentation of Germany in the EU institutions. Of course, the other Member States would be more willing to accept the underrepresentation of a Member State than its overrepresentation, which would happen in case of fragmentation.

The Scottish Government itself proposes to solve the legal conundrum through a Treaty based on Article 48 TEU, i.e. an amendment to the EU Treaties themselves rather than an accession agreement. Through a Treaty amendment, the post-independence EU membership of a region could be secured.

However, in the EU legal order, it is impossible for the EU to accommodate a greater number of Member States. The Scottish solution, relying on Article 48 TEU, would mean that the UK would introduce an amendment on behalf of the to-be-independent Scots (whether this is politically realistic is another question) and following a unanimity vote with the other 27 Member States (again whether this is politically realistic is another issue) that Scotland would become a Member of the EU without having signed and ratified an accession treaty. The EU would be composed of 29 Member States while only being established by 28 States.

In absence of a clear legal solution it should again be pointed out that fragmentation may be made legally possible, as long as there is a political agreement between the relevant actors.

Invoking Article 2 TEU

The Scottish Government has also invoked Article 2 TEU on the values of the EU, i.e. human rights, freedom and democracy, thereby suggesting that the EU somehow should respect the result of Scottish independence, given that the process towards Scottish independence would be wholly consistent with these values. While the latter may be true, it suffices to note that even if the EU were required to recognise Scottish independence this is no way amounts to having to accept an independent Scottish State as a member of the EU. If democracy could serve as such a trump card, what would prevent EU Member States to unilaterally declare opt-outs from the EU Treaties through plebiscites, irrespective of any procedure foreseen in the Treaties?

Fragmentation - in whose interest?

In absence of a clear legal solution, it should again be pointed out that fragmentation may be made legally possible, as long as there is a political agreement between the relevant actors.
Yet, the political merits of fragmentation are also uncertain. Looking at the EU, it not clear why fragmentation would be in its interest: it would not enlarge (broadening the internal market), but its internal functioning would be more difficult since it would i.a. bring at least one new Commissioner to the table and one new veto player in the (European) Council (under unanimity rules).

However, as the Scottish Government points out, it would not be in the EU’s interest either to shut out secessionist regions. After all, this would also make the internal market shrink, but this still means that the EU’s interest in fragmentation is mixed at best and far from unequivocally positive.

The other Member States would have the same mixed reasons for supporting or frustrating a smooth process to EU membership for the regions in question. For some Member States the principles of territorial integrity and State sovereignty and the fear of setting a precedent might weigh so heavily that they would set a high price for the region in question to secure EU membership. This price would then presumably have to be paid, since every existing Member State (including the Member State from which a region secedes) would have a veto right. Of course, it is difficult to imagine that regions such as Scotland, Flanders and Catalonia could be kept out of the EU indefinitely as this would be politically untenable. However, the fact remains that these regions would be in a weak position to make any demands since their EU membership depends on unanimity and the remaining Member State can (ab)use this rule to secure their own interests. Here it would seem crucial that the regions in question engage in para-diplomatic efforts well before actually deciding on independence.

Without commenting too much on this political issue, it may be noted that some supporters and sympathizers of the ‘YES-campaign’ systemically dismiss these observations as ‘scare-mongering’ by the other side. While some ‘NO-campaingners’ will undoubtedly (have) resort(ed) to this tactic, such a riposte is an all too easy way to ignore some fundamental challenges which an independent Scotland, Flanders, Catalonia, etc. will have to overcome. This is not to say that the Scottish Government should be berated for not providing clear answers to these challenges.

The basic legal challenge for internal enlargement / fragmentation is that it is not foreseen under the EU Treaties and instead seems a combination of the two categories that are foreseen, i.e. enlargement and withdrawal.

Indeed, as discussed here and elsewhere, the problem is that no one can deliver precisely such answers. Supporters of both sides should then have the intellectual honesty to admit that some issues do not have a pre-defined outcome. Fully conscious of the existence of these uncertainties and risks (on a number of fundamental issues for the region’s future), it would then be up to the citizens to decide whether they are willing to take them or not.

Perhaps surprisingly, it should also be verified whether fragmentation would be in the interest of the newly independent states themselves. One often heard reason is that EU Membership in their own right would
allow those regions to have a say at the EU table.

While this would indeed be the case, such a say would be rather small. If a *de facto* rather than a *de iure* say is the most important, it could be more interesting to work out certain arrangements for EU participation within the region’s Member State, as has been done in Belgium.

discriminating against its own nationals. Again, because to the EU only the Member State is relevant, the rule of reverse discrimination also applies to a situation whereby part of a Member State (e.g. Scotland or Flanders) discriminates against those State’s nationals from another part of that Member State (e.g. England or Wallonia). Such discriminations are internal affairs, which are not caught by EU law as also confirmed by the Court of Justice in the Flemish Care Insurance case.

Secondly, there is the legal concept of reverse discrimination in EU law. Simply put: EU law does not permit a Member State to discriminate against nationals from other Member States. However EU law does not stand in the way of a Member State Flanders for instance, in order to preserve its Dutch-speaking character, has elaborated different policies that discriminate (in a legal sense) against (Belgian) French speakers. As long as Flanders remains part of Belgium, these
policies are (partially) saved by the concept of reverse discrimination. However, should Flanders become an EU Member State in its own right, these policies will be scrutinised for their effects on the EU’s fundamental freedoms and any restrictions found will have to be justified. Ironically, from a legal perspective, it would appear easier for Flanders to preserve its Dutch-speaking character as an integral part of Belgium than it would be as an independent EU Member State.

Lastly, although this is more linked to the strategy for independence and EU membership, rather than to these objectives, the Scottish Government’s self-imposed goal of securing EU membership within a period of 18 months would seem ill-advised given the political context in which EU membership would have to be secured. A secessionist region already being in a weak position vis-à-vis its mother State and the other Member States, claiming not only EU membership, but EU membership within 18 months from an independence referendum only drives up the price which other Member States may demand.

Concluding remarks

In political discourse, semantics is important and this is why pro-independence campaigners resort to the concept of internal enlargement when discussing future EU membership. The actual scenario, should it materialise, would however be better described by fragmentation since the EU would not enlarge and would simply be composed of more entities.

The basic legal challenge for internal enlargement/fragmentation is that it is not foreseen under the EU Treaties and instead seems a combination of the two categories that are foreseen, i.e. enlargement and withdrawal. With legal uncertainty rampant, at least one thing is clear: fragmentation is subject to unanimity between the Member States. While allowing for fragmentation is not in the interest of the EU, it might be politically impossible to disallow fragmentation when the citizens living in a specific EU region have expressed strong support for independence (which threshold indicates ‘strong support’ is a wholly different question). The legally soundest solution would then be a combination of Articles 49 and 50 TEU, if possible simultaneously applied.