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Towards a democratic approach to the issues of self-determination and secession

Information report[1]
Committee on Legal Affairs and Human Rights
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Summary

The question of self-determination or secession is as much a legal issue as it is a political one. Certain debates under way in Europe reveal how contentious this question can be. However, other European examples also show that such issues can be dealt with more calmly.

In the light of the complex and highly politicised nature of the legal issues at hand, and the very diverse nature of the relevant, practical situations, the Committee on Legal Affairs and Human Rights felt that it was impossible for it to assume the role of arbitrator and to define universally applicable, generic guidelines. The committee therefore decided to present an information report, outlining the applicable principles of public international law, without taking sides vis-à-vis the aspirations of the various parties involved for or against independence. Numerous representative (though not exhaustive) examples illustrate the report.

In this report, the committee underlines the need to settle these matters through peaceful and democratic dialogue that respects the rule of law and human rights (including the rights of national minorities) between the region concerned and the government of the State of which it forms part.

1. Reference to committee: Doc. 13895, Reference 4154 of 2 October 2015. Information report approved by the committee on 27 June 2017.

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1. Introduction

1.1. Procedure

1. On 2 October 2015, the Parliamentary Assembly transmitted the motion for a resolution "Towards a democratic approach to the issues of governance in European multinational States" to the Committee on Legal Affairs and Human Rights for report.[2] At its meeting on 8 December 2015, the committee appointed me as rapporteur. Having studied the introductory memorandum that was the basis of the present text, and after several exchanges of views, the committee accepted my proposal to draft an information report on this subject.

1.2. The issues at stake

2. The motion for a resolution behind this report states that "[s]elf-determination movements are active across the Council of Europe region; they base their legitimacy on the broad support of the populations in their territories and their own internal democratic standards, including a rejection of violence". The motion for a resolution refers to the right to self-determination, together with the rights of minorities, and calls on the Parliamentary Assembly to "examine the question of self-determination of European regions". It cites various examples, including the United Kingdom (Scotland) and Denmark (Faroe Islands and Greenland). The subject of this report raises tricky issues relating to the pro-independence debates under way in various Council of Europe member States. Whereas some examples, such as Scotland, show that such matters can be dealt with relatively calmly, others such as Catalonia have proven highly contentious. It is important to note that independence, or secession, is as much a legal issue as it is a political one.

3. There are a number of factors involved in these debates, not only history, culture, identity and language but also important territorial, financial and budgetary issues.

4. This information report will not claim, of course, to offer solutions or outcomes to the discussions currently under way in various Council of Europe member States. What it will do, however, is reiterate a few principles of public international law and emphasise the need to settle these matters through peaceful and democratic dialogue that respects the rule of law and human rights (including the rights of national minorities) between the relevant region and the government of the State of which it forms part.

2. Right to self-determination and secession in international law

5. For the purposes of this report, it is important to remind ourselves of the different ways in which new States can come about:

– **creation,** as part of the decolonisation process, of a new, independent State, which was already territorially defined (where a colonised State breaks away from the metropolitan State);

– **dissolution** of an existing State, whereby a State splits into one or more new States, none of which can claim to be the legal successor of the one from which they derived, unless otherwise agreed by the successor States (for example the break-up of the Union of Soviet Socialist Republics (USSR) or Yugoslavia);

– **secession** (namely where a State loses part of its territory, resulting in the emergence of States such as Montenegro or South Sudan, for example);

– **merger** (Yemen for example).[3]

6. Article 1.2 of the United Nations Charter of 1945 states that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Article 1 of the International Covenant on Civil and Political Rights of 1966 states that "[a]ll 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". This right to self-determination is conferred under international law on "peoples", without any formal clarification as to what is meant by

2. It is interesting to note that a motion for a resolution dealing with related issues entitled "The situation of nations without State in Europe" (Doc. 13846) was not followed through by the Bureau of the Assembly.
3. Nguyen Quoc Dinh, *Droit international public*, L.G.D.J., Paris 1999, pp. 512-524.

"peoples".[4] Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the Vienna Declaration of 1993 (among others) reaffirms the right to self-determination.[5]

7. Outside the decolonisation process, however, public international law does not recognise the right of peoples to secede, as secession conflicts with the fundamental principle of States' territorial integrity.[6] Our colleague Marina Schuster (Germany, ALDE) has already examined the right to secession for our committee when preparing her report on "National sovereignty and statehood in contemporary international law: the need for clarification".[7] In that report, she clearly describes the standard answer, namely that, because States' territorial integrity prevails, no (unilateral) right to secession can be said to exist. Except for unilateral declarations of independence as part of the decolonisation process, which have been considered legitimate.

8. In effect, international law enshrines the principle of territorial integrity and the inviolability of borders and any attempt at secession may be considered a disruption of international relations. This view was confirmed *inter alia* in United Nations General Assembly Resolution 1514 (XV)[8] which states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". Resolution 2625 (XXV) makes it clear that the right of peoples to self-determination cannot be construed "as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".[9]

9. In addition. Article 27 of the Covenant on Civil and Political Rights, which refers explicitly to the rights of national minorities, makes no mention of their right to self-determination.[10] Within the context of the Council of Europe, the Framework Convention for the Protection of National Minorities (ETS No. 157) of 1994, the first legally binding, European multilateral instrument devoted to the protection of national minorities in general, seeks to protect the existence of national minorities "within the respective territories" of the Parties. In the preamble to this convention, it is also stated that "the realisation of a tolerant and prosperous Europe does not depend solely on co-operation between States but also requires transfrontier co-operation between local and regional authorities without prejudice to the constitution and territorial integrity of each State". Article 15 of the Framework Convention stipulates that "[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them".

10. A right to unilateral secession might be considered to exist outside the colonial context in the case of a people which was the victim of attacks on its physical existence or of a massive violation of its fundamental rights.[11] Canada's Supreme Court summarises the situation as follows: "The international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development."[12]

11. The Advisory Opinion issued by the International Court of Justice (hereafter the ICJ) on 22 July 2010 on accordance with international law of the unilateral declaration of independence in respect of Kosovo*[13] is worth mentioning here.[14]

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4. Reference re Secession of Quebec, [1998] 2 SCR 217, 1998 CanLII 793 (SCC), 20 August 1998, paragraphs 123 and 124.
5. www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_English.pdf.
6. Nguyen Quoc Dinh, *Droit international public*, op. cit., pp. 520-521.
7. Doc. 12689, 12 July 2011.
8. Adopted on 14 December 1960.
9. Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the United Nations General Assembly on 24 October 1970. The Vienna Declaration of 1993 states that this right "shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind".
10. This article stipulates that: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."
11. Reference re Secession of Quebec, op. cit., paragraph 135.
12. Ibid., paragraph 138.

12. The ICJ concluded that Kosovo's declaration of independence on 17 February 2008 did not violate general international law. It based this opinion on the fact that international law contained no rules prohibiting such declarations. Serbia disagreed. In its written comments submitted to the ICJ, it argued that the unilateral declaration of independence was "in violation of the principle of territorial integrity of States which is one of the fundamental principles of international law, as well as in violation of the international legal regime established by Security Council Resolution 1244 (1999). In that sense, the [unilateral declaration of independence] can be viewed both as an attempt to illegally secede territory from Serbia, the parent State, and an attempt to terminate the United Nations administration of Kosovo established by the Security Council pursuant to Chapter VII of the Charter".[15]

13. The view of the ICJ is not shared by everyone and the ICJ itself notes in its opinion that several participants in the proceedings contended that a prohibition of unilateral declarations of independence was implicit in the principle of territorial integrity.[16] This was particularly the case of Serbia, which argued that the principle of territorial integrity, which is an integral element of the international order, extends beyond States and binds non-State entities in situations of non-consensual attempts to violate the territorial integrity of independent States.[17] The Court, for its part, considers that "the scope of the principle of territorial integrity is confined to the sphere of relations between States".

14. In practice, the United Nations Security Council has condemned declarations of independence in cases where the ICJ has found that "the illegality attached to the declarations of independence … stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law".[18]

15. In its opinion, the ICJ does not answer the question about entitlement to break away from a State. It considers that issues relating to the extent of the right of self-determination and the existence of any right of "remedial secession" are beyond the scope of the question posed.[19]

16. In her report mentioned above (paragraph 7), Ms Schuster noted that "the right to self-determination is not seen by prevailing opinion as giving rise to a right for any regional minority group to secede from an existing State"[20] and that "[s]elf-determination of minority groups should be realised rather by way of participation in the government of the State as a whole and by the devolution of power through the development of regional autonomy, namely, self-government in matters such as education, culture, etc., falling short of independence".[21] States have a duty not to recognise the secessionist entity if it was created in violation of international law.[22] In its Resolution 1832 (2011) "National sovereignty and statehood in contemporary international law: the need for clarification", the Assembly "considers that even if international law were to recognise a right of national or ethnic minorities or even, in some cases, national majorities, to self-determination, such a right would not give rise to an automatic right to secession. The right to self-determination should first and foremost be implemented by way of the protection of minority rights as foreseen in the Council of Europe Framework Convention for the Protection of National Minorities (ETS No. 157) and Assembly Resolution 1334 (2003) on positive experiences of autonomous regions as a source of inspiration for conflict resolution in Europe, as well as in other relevant instruments of international law."

17. To take a broad view of the right to self-determination would pose a risk of fragmentation or "Balkanisation", which should not be underestimated. Various events which have taken place in recent years, however, such as the emergence, following a peaceful process, of new States such as Montenegro in 2006 or the separation of the Czech and Slovak Republics in 1993, can pave the way for a debate about peaceful secession, conducted in full accordance with democratic principles, the rule of law and human rights.

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13. * All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.
14. 22 July 2010, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, *I.C.J. Reports 2010*, p. 403.
15. www.icj-cij.org/docket/files/141/15686.pdf.
16. ICJ press release No. 2010/25, 22 July 2010.
17. www.icj-cij.org/docket/files/141/15686.pdf.
18. Concerning for example Southern Rhodesia (Resolutions 216 (1965) and 217 (1965)), northern Cyprus (Resolution 541 (1983)) and Republika Srpska (Resolution 787 (1992)).
19. In its opinion, the Court points out that it is "not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it".
20. Doc. 12689, paragraph 26.
21. Ibid.
22. Ibid, paragraph 32.

3. Examples of debates under way in Europe

18. Within the member States of the Council of Europe, various identity-based or indeed pro-independence movements can be observed, and there are a number of "frozen conflict" zones. The regions in question are looking for greater autonomy and, in some cases, independence. Their demands for recognition of their identity cannot be met through cultural, economic or even regional political autonomy which, in their view, is not enough.

19. I have chosen to illustrate this report with a few examples which, while representative, are not exhaustive. The examples cited are of pro-independence movements which operate peacefully and through democratic processes. Leaving aside the issue of "frozen conflicts", I will begin by looking south to Catalonia and then north to Scotland, before turning my attention to my native Belgium and the secessionist aspirations of Flanders. My intention is to take a strictly neutral stance and to try to describe the current situation in the most objective manner possible. The examples I have chosen are relevant not least because these regions are all home to sizeable pro-independence movements and because they have organised political structures and institutions and already enjoy extensive autonomous powers. The fact, too, that these examples are drawn from member States of the European Union, an international organisation *sui generis*, which is far more integrated than the Council of Europe, lends them added interest.

20. The following examples are based on generally accepted information.

– *Catalonia*

21. Since the early 2000s, the nationalist movement in Catalonia has been going from strength to strength. Under the new Statute of Autonomy, adopted in 2006, Catalans have "nationality" status within Spain. Following approval by the Catalan parliament, Spain's Congress of Deputies and the Senate, on 18 June 2006 this Statute was approved by more than 73% of voters in a Catalonia-wide referendum. Under the terms of the Statute, the Autonomous Community of Catalonia has its own political bodies known as the *Generalitat*, consisting of the Parliament, the Presidency of the *Generalitat* and the Government.

22. The Statute of Autonomy was subsequently challenged in the Spanish Constitutional Court which, four years later in a judgment delivered on 28 June 2010, annulled 14 articles of the Statute and amended a further 27. While recognising its historical and cultural value, the Constitutional Court held that enshrining the concept of a "Catalan nation" in the Statute of Autonomy was unconstitutional. It also ruled unconstitutional the preference given to the Catalan language in public administration and public media, while accepting its compulsory use in education, and other articles concerning, *inter alia*, various financial powers.

23. Following this decision, on 10 July 2010 a protest march in Barcelona drew over a million people, including representatives of the main institutions and most of the Catalan political parties. In the years that followed, similar large-scale demonstrations were held every 11 September (Catalonia's national day) to demand the right to decide and independence.

24. On 23 January 2013, the Catalan parliament approved the "Declaration on the Sovereignty and right to decide of the people of Catalonia". On 25 March 2014, Spain's Constitutional Court found that the principle of sovereignty, as articulated in the Declaration, was unconstitutional.

25. On 9 November 2014, an informal poll on the independence of Catalonia showed that 80% of the 2 million-plus voters backed independence. The result was non-binding, however, since the Constitutional Court, in its decision of 25 March 2014, had ruled out holding a formal referendum. Those opposed to independence, furthermore, had urged voters to abstain.

26. On 27 September 2015, for the first time, pro-independence parties[23] won an absolute majority in the Catalan parliamentary elections, securing 72 seats out of 135. The Catalan parliament and government formed after the election vowed to implement a roadmap to Catalan independence.

27. On 9 November 2015, the Catalan parliament passed a resolution proclaiming the start of the process of creating an independent Catalan State in the form of a republic.[24] On 2 December 2015, the resolution was declared void by Spain's Constitutional Court[25] but the Catalan parliament had anticipated this move and

23. The "Together for yes" and "Popular Unity Candidacy" lists.
24. En Catalogne, le Parlement vote en faveur de la rupture avec l'Espagne, *Le Monde*, 9 November 2015.
25. www.justice-en-ligne.be/article804.html.

made it clear in the resolution that "the Parliament and the process of democratic uncoupling from the Spanish State shall not be subject to the decisions of the institutions of the Spanish State, in particular the Constitutional Court".[26]

28. The Constitutional Court bases its decisions on Article 1.2 of the Spanish Constitution which states that national sovereignty is vested in the Spanish people, and on Article 2 which proclaims the indivisibility of the Spanish nation. It is interesting to note, however, that, in its 2014 decision, the Constitutional Court pointed out that the Spanish Constitution could be revised under existing procedures and emphasised the importance of dialogue.

29. On 6 October 2016, the Catalan parliament approved a roadmap which included the holding of an independence referendum in 2017. On 14 December 2016, the Constitutional Court, to which the matter had been referred by the Spanish Government, suspended the roadmap and stated that it would rule on the merits within five months.[27] The President of the Generalitat announced that the referendum would be held on 1 October 2017. Madrid contests the holding of any such referendum.

30. It is interesting to note that an exchange of letters took place between the President of the Generalitat and the President of the European Commission for Democracy through Law (Venice Commission). Replying to a letter from the former, the latter reiterated the Venice Commission's consistently held position that any referendum must be carried out in full compliance with the Constitution and the applicable legislation.

– *Scotland*

31. Scotland's experience is remarkable for the way in which the United Kingdom Government responded to the rise of Scottish nationalism in the 1990s through devolution. Since the Scotland Act of 1998, Scotland has enjoyed a large measure of self-government, within the limits of the sovereignty of the United Kingdom. It has its own government and the restored Scottish Parliament votes on Scottish affairs.

32. In 2012, furthermore, the Scottish and United Kingdom governments agreed in the Edinburgh Agreement to establish the legal framework for a possible referendum on Scottish independence. Under the terms of this agreement, the referendum should have a clear legal base, be legislated for by the Scottish Parliament, be conducted so as to command the confidence of parliaments, government and people and deliver a fair test and decisive expression of the views of people in Scotland and a result that everyone would respect.[28] A referendum was duly held on 18 September 2014. It resulted in a victory for the "no" camp, which won 55.3% of the votes cast. Following the referendum, the process of devolving powers to Scotland (notably in fiscal matters, but also in the constitutional sphere) continued with the passing of the Scotland Act 2016.[29]

33. What makes this process remarkable is the fact that it took place against a backdrop of calm, democratic dialogue and prior agreement between the regional institutions and central government on the arrangements for holding the referendum.

34. Following the victory of the "Leave" camp in the United Kingdom referendum on "Brexit" on 23 June 2016, the Scottish Government announced its intention to hold another referendum on Scottish independence. Unlike England, Scotland predominantly voted to remain in the European Union (62% in favour). Holding a second referendum may require the consent of the United Kingdom Government, unless the 2012 Edinburgh Agreement applies *mutatis mutandis*. It will be observed, however, that the Scottish Nationalist Party's suggestion that under the Scotland Act 2016, the Scottish Parliament should be able to decide when to hold another referendum on independence, was rejected by the United Kingdom Parliament.[30] In October 2016, the Scottish Government published a bill on a second independence referendum.[31] In March 2017, the Scottish Parliament voted in favour of formally requesting that the United Kingdom grant it the necessary powers to hold another independence referendum in spring 2019 to coincide with the United Kingdom's exit from the European Union.[32]

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26. En Catalogne, le Parlement vote en faveur de la rupture avec l'Espagne, *Le Monde*, 9 November 2015.
27. Catalogne: La présidente du parlement devant la justice, *La Tribune*, 16 December 2016.
28. Text of the "Edinburgh Agreement".
29. Scotland Act 2016, 24 March 2016.
30. Scotland Bill: Four things you need to know about the new devolution powers, *The Independent*, 10 November 2015.
31. Scottish independence: draft bill published on second referendum, *The Guardian*, 20 October 2016.
32. Scottish parliament votes for second independence referendum, *The Guardian*, 28 March 2017.

35. There is no doubt that developments in Scotland in the aftermath of Brexit are being closely followed in Europe. Also highly relevant is the question of under what conditions, and how quickly, an independent Scotland would re-join the European Union.

– *Flanders*

36. I come now to my third example, namely the emancipatory aspirations that can be observed in Flanders and occasionally also in Wallonia. Historically, the movement began with demands for the protection of linguistic rights. In 1970, following an initial revision of the Belgian Constitution (the first State reform), the country saw the establishment of cultural communities: the Flemish Cultural Community, the French Cultural Community and the German Cultural Community. Tensions between the French-speaking and Flemish communities prompted the Belgian State to continue restructuring and reforming itself on several occasions (1980, second State reform; 1988/1989, third State reform). For many years a unitary State, Belgium has, since the constitutional revision in 1993 (fourth State reform), been a federal State made up of three communities and three regions. The State reforms are continuing and, with them, the transfer of powers and responsibilities from the federal authority to the regions and communities (2001, fifth State reform).

37. In 2010, the Flemish separatist party N-VA won the largest share of the vote in the early parliamentary elections in Flanders. In the wake of its victory, N-VA demanded institutional reform with a view to securing greater autonomy for Flanders in economic and social matters. After a record period without a federal government, an agreement was reached on constitutional reform which paved the way for further devolution (2012/2014, sixth State reform). Following the 2014 elections, the NV-A entered the federal government. However, it was decided to put the community issue to one side during this legislature (until 2019), even though community tensions can be seen in a number of spheres.

38. Belgium federalism is highly advanced in that the federal State does not take precedence over the federated entities. The federated entities, furthermore, have numerous exclusive powers, which cannot, therefore, be wielded by the federal State. The Flemish Community and the Flemish Region have their own government and parliament. Among their many exclusive powers is the management of international relations in the areas concerned.

4. What is at stake in this debate?

39. Staying with the examples mentioned above, I would like to highlight certain issues which are currently being discussed around the subject of independence.

40. Demands for independence primarily have their roots in historical, cultural and linguistic issues. The territories or regions concerned are determined to defend and protect their identity, language and specific cultural features. These are obviously legitimate interests but they need to be defended in a way that respects the rights and freedoms of minorities living in these same territories (very often people from the majority population of the central State).

41. The financial issue is undoubtedly a key factor in these discussions. Catalonia is a prosperous region, accounting for nearly 20% of the country's wealth,[33] and a major contributor to the Spanish economy. Catalonia regularly complains that it contributes more than its fair share to the repayment of Spanish debt and receives less back from central government than other regions.

42. Likewise Flanders, with 60% of the Belgian population and also approximately 60% of the country's gross domestic product (GDP)[34] is a far more prosperous region than Wallonia. Here too, the disproportionate contribution made by Flanders in favour of Wallonia is at the heart of the independence debate.[35]

43. While the situation is different in the case of Scotland, which is not more prosperous than the rest of the country, the region's oil revenues are nevertheless a topic of debate.

44. The climate and tone adopted in the debates in the various cases mentioned above are crucial.

45. In Spain, the lack of constructive dialogue has served to exacerbate separatist sentiment. Until just a few years ago, most Catalans might have been happy with greater autonomy for Catalonia (including in fiscal matters) but Madrid's refusal to engage in dialogue and its dismissal of these demands has served to crystallise the disagreements and hardened opinions in favour of independence.

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33. Catalogne: l'indépendance est-elle viable économiquement?, *Le Figaro*, 28 September 2015.
34. www.iweps.be/pib-en-volume.
35. For further details, see "State Reform induced 'schizony' in Belgian public finance", Rick Daems, May 2015.

46. By contrast, the United Kingdom and Scotland were able to agree, through calm political dialogue, on the procedure for holding a Scottish referendum on independence. The question was asked and voters opted to remain in the United Kingdom. This position is not immutable, however, and in the wake of the Brexit vote the issue has once again come to the fore.

47. It is worth pointing out that in the examples mentioned above the demands for independence have all been expressed peacefully.

48. It is important to bear in mind that however legitimate calls for independence or secession from the majority population in a particular territory may be, the interests and rights of minorities within the pro-independence majority must also be taken into account and respected. Any attempt to impose independence without negotiation would be liable to conflict with the rule of law, democratic principles and human rights, or even violate the rights of minorities.

49. One last area of concern relates to the costs and/or benefits of secession. To my mind, this is a legitimate issue, and one worth raising. Cost-benefit estimates are difficult to come by in this area, however. It is essential to have accurate figures. The recent Brexit campaign showed the extent to which financial arguments, whether or not they are well-founded, have an influence on shaping citizens' views. It is essential, therefore, to have figures based on sound, incontrovertible data in order to prevent economic and budgetary arguments from being misused to support this or that position.

5. Examples of peaceful independence processes outside the colonial context

50. While examples of peaceful independence processes leading to the creation of one or more new States, other than in the context of decolonisation, are few and far between, they do exist, including in Europe. It would be interesting to identify some criteria that contributed to peaceful, negotiated independence processes in accordance with the principles of democratic dialogue and without infringing human rights.

– Czechoslovakia's "velvet divorce"

51. One example of a negotiated solution which led to the peaceful emergence of new States (following the break-up of an existing State) was the "velvet divorce" that split Czechoslovakia. At the time of the collapse of the iron curtain, the Slovak National Council declared independence on 17 July 1993 and on 1 September adopted a Constitution. The dissolution of the Czech and Slovak Federative Republic was approved by the Federal Assembly on 25 November 1993. On 16 December 1993, the Czech National Council in turn approved the Constitution of the Czech Republic. From start to finish, the process of formally establishing the two States' independence took just six months.

52. In the case of Czechoslovakia, a combination of factors helped to make the split easier. These included: a recently established, not very centralised State, separate justice systems (apart from the Supreme Court), a low level of public debt (10% of GDP), the fact that there was no single powerful political party operating across the country as a whole – the Communist Party was largely discredited and unpopular at the time – and lack of tension over the redrawing of borders. Furthermore, the Czechs were able to come to terms with Slovak aspirations for independence, as the Slovaks were fewer in number and less wealthy than the Czechs and the latter did not suffer economically from the break-up of the Czechoslovak State.[36] The fact, too, that both new State entities were anxious to maintain mutual relations through numerous bilateral agreements and to quickly join the international institutions greatly contributed to a peaceful, negotiated solution.

53. It is interesting to note that neither of the two new States claimed, or was considered by the international community, to be the successor of the former Czechoslovakia. The political agreement between the two parties resulted in a joint break-up. Another interesting point to note is that no referendum was held to seek the views of the people.

– Serbia and Montenegro

54. Montenegro, the latest State to join the Council of Europe, likewise came about after peacefully seceding from Serbia.[37] On 21 May 2006, Montenegro held a referendum on independence (55.5% of the votes cast were in favour).[38] On 3 June 2006, the Montenegrin Parliament adopted a declaration of independence. This

36. État de la question – Quelques éléments sur les scissions contemporaines d'Etats, Philippe Hubert and Thomas Carlier, September 2010, IEV.

was followed by a declaration by the Serbian Parliament on 5 June 2006, declaring Serbia the successor to the State Union of Serbia and Montenegro and recognising the independence of Serbia and consequently Montenegro.

55. Under Article 60 of the 2003 Constitution of Serbia and Montenegro, indeed, the two constituent republics had the right to seek full independence three years after the adoption of the new Constitution.[39] The article in question dealt in advance with numerous practical matters relating to independence and succession, thereby paving the way for peaceful separation.

56. Under Article 5 of the special law on the referendum on State legal status (LRSLS), a condition was inserted, to the effect that 55% of the votes cast in the referendum must be in favour of independence in order for it to be recognised.

57. It is important to emphasise that Montenegro is an exception as in the vast majority of countries, the Constitution does not authorise secession.[40]

– *Quebec*

58. Another case worth mentioning here is that of Quebec. The issue of Quebec's independence from Canada is not a new one and there have already been two referendums on the subject (one in 1980 and another in 1995, which produced a very close result with 49.42% in favour of independence and 50.58% against).[41] Since then, various legal aspects have been clarified.

59. First, clarification was provided through the Reference re Secession of Quebec delivered by Canada's Supreme Court on 20 August 1998[42] at the request of the government.[43] In its opinion, the Supreme Court emphasised Canada's duty to negotiate with the province expressing through a referendum the desire to secede. The Supreme Court laid down two conditions: a clear referendum question and a clear result.

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37. It should be pointed out that this secession took place in the particular circumstances that prevailed after the break-up of Yugoslavia in the 1990s.
38. Consequences of the referendum in Montenegro, report of the Political Affairs Committee, Doc. 10890 (rapporteur: Lord Russell-Johnston, United Kingdom, ALDE).
39. www.worldstatesmen.org/SerbMont_Const_2003.pdf.
"Breaking away from the State Union of Serbia and Montenegro
Article 60
Upon the expiry of a 3-year period, member States shall have the right to initiate the proceedings for the change in its state status or for breaking away from the State union of Serbia and Montenegro.
The decision on breaking away from the State union of Serbia and Montenegro shall be taken following a referendum.
The law on referendum shall be passed by a member State bearing in mind the internationally recognized democratic standards.
Should Montenegro break away from the State union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor.
A member State that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor State and the newly independent State.
Should both member States vote for a change in their respective State status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia."
40. "La théorie de la sécession remède (remedial secession): avatar contemporain du droit des peuples à disposer d'eux-mêmes?" Dubuy Mélanie, Lecturer, University of Nancy 2, published in *Les Cahiers de l'Association Française des Auditeurs de l'Académie Internationale de Droit Constitutionnel*, No. 22, 2012.
41. www.electionsquebec.qc.ca/documents/pdf/dge_6350.3_v.f.pdf, p. 56.
42. Reference re Secession of Quebec, op. cit.
43. Three questions were put to the Supreme Court:
"1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"

60. In this reference, the Supreme Court states that the right to self-determination cannot be said to ground a right to unilateral secession in the context of Quebec. It further explains that "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".

61. The other important point made by the Supreme Court lies in the fact that even a clear referendum result would not entitle Quebec to invoke a right to self-determination to dictate the terms of a proposed secession to the other parties to the federation. The Supreme Court accordingly stipulates that "[t]he democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole".

62. "Democratic rights under the Constitution cannot be divorced from constitutional obligations." The Supreme Court nevertheless points out that the Canadian constitutional order would not allow the other provinces and the federal government to ignore a clear expression of a clear majority of Quebecers that they no longer wished to remain in Canada. There would therefore have to be a process of negotiation, with no predetermined outcome. The Supreme Court also emphasises that the negotiations would need to specifically address the rights of minorities.

63. Next, the Clarity Act,[44] adopted in 2000, elaborated on the arrangements in the event that one of Canada's provinces should secede. In line with the opinion expressed by the Supreme Court, the Act states that a clear referendum question and a clear majority are essential conditions for secession.

64. The question of what constitutes a "clear" majority still remains to be answered. The Supreme Court has studiously avoided the issue, stating that "it will be for the political actors to determine what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken".

6. Conclusions

65. The issues raised in this report are complex and controversial, touching upon two principles of public international law that cannot be easily reconciled: the right of peoples to self-determination and the principle of the territorial integrity of States.

66. The examples mentioned can be inspirational and have certainly fuelled the pro-independence debate in some European States. While it is possible to identify various criteria which contributed to a peaceful, negotiated solution, it is important to emphasise that the processes followed are never completely transposable, as each State's circumstances are complex and unique.

67. Issues relating to self-determination and independence are obviously highly politicised. It would seem that individual States decide whether or not to recognise new declarations of independence having regard to any pressure there might be within their own borders for independence or even just self-government. Many States would be against redrawing existing State borders for fear it would open a Pandora's box, with each new declaration of independence and each newly created and recognised State effectively setting a precedent that might give succour to other separatist demands.

68. In the light of the complex and highly politicised nature of the legal issues at hand, as well as the very diverse nature of the relevant, concrete situations, it would be impossible for the committee to assume the role of arbitrator and to define universally applicable, generic guidelines. That is why it has decided to present only an information report, outlining the relevant principles of public international law without proposing any general recommendations. The importance of reaching agreement on contentious issues relating to independence and secession by means of peaceful and democratic dialogue that respects the rule of law and human rights cannot be overstated.

44. An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26, Assented to 2000-06-29.