



Self-Determination Working Group SDWG

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Introduction.

The concept of Self-determination is not unknown in the history of Europe.

Aiming for self-determination is a normal path that nations and stateless nations have often followed as an exercise of the expression of the will of their inhabitants, and as a clear manifestation of their aim to take responsibility over their own future.

One of the very normal and usual outcomes of the exercise of this right has been independence and it has generally been accepted in an evident way as the reflection of the will of the people. Most EU Member States are successor states of another State at some stage of their history. This shows that secession and state succession are no exceptional phenomena and that succession does not necessarily need to be violent, but can certainly be a peaceful process.

The right of self-determination does not necessarily imply independence as a result. The implementation of this right may be broad in its outcome, e.g. unionism, different degrees of autonomy, and of course, independence too.

1. A definition of the right to self-determination.

The right to self-determination of peoples is a peremptory norm of international law (*ius cogens*). It is embodied in the Charter of the United Nations, in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. Common Article 1, paragraph 1 of these Covenants provides that:

'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

1.a. Self-determination as an absolute democratic right and as a human right.

The right to self-determination has also been recognised in other international and human rights instruments such as Part VII of the Helsinki Final Act 1975 and Article 20 of the African Charter of Human and Peoples' Rights as well as the Declaration on the Granting of Independence to Colonial Territories and Peoples.

It has been endorsed by the International Court of Justice. Furthermore, the scope and content of the right to self-determination has been elaborated upon by the United Nations Human Rights Committee (now Council) and Committee on the Elimination of Racial Discrimination as well as by international lawyers and human rights experts.

The inclusion of the collective right to self-determination in those human rights instruments mentioned above and in the Vienna Declaration adopted by the World Conference on Human Rights, emphasises that **self-determination is an integral part of human rights law which has a universal application**. At the same time, it is recognised that **compliance with the right to self-determination is a fundamental condition for the enjoyment of other human rights and fundamental freedoms, be they civil, political, economic, social or cultural**.

Taking all of this into account, we could conclude that the right to self-determination is an absolute democratic right and that it completes and guarantees implementation of human rights.

Essentially, the right to self-determination is the right of a people to determine their own destiny. In particular, the principle allows a people to define themselves (to choose a name for the people and in such a case to choose the name of the new state cf. the Republic of Macedonia), choose their own political status, the form of the constitution and government and to determine their own form of economic, cultural and social development.

Exercise of this right can result in a variety of different outcomes ranging from political independence to full integration within a state. **The importance lies in the right of choice**, so that the outcome of a people's choice should not affect the existence of their right to make a choice.

In practice, however, the potential outcome of an exercise in self-determination will often determine the attitude of governments towards the actual claim by a **people or nation**. Thus, while states may more readily recognise claims to cultural autonomy, they are likely to be more reluctant to recognise claims to independence. Nevertheless, **the right to self-determination is recognised in the current state of international law as a right of process (not of outcome) belonging to peoples and not to states or governments**.

1.b. The need to define the right holder. Who has this right? What does 'peoples' or 'nations' mean?

'All peoples have the right of self-determination.(...)'

In the definition of the right and its explanation, we constantly find that the right holders are 'the peoples' or the 'nations'. But is this concept clear? Who are we talking about? Who are the peoples or nations? Who defines the 'peoples' or the 'nations' (States?, international institutions?,...)?

All references to this issue in the literature about the right of self-determination are vague. The prevailing view in the post World War II context was that only colonised peoples and territories¹ had the right to self-determination.

But coinciding with the modern political science definition of '**nation**' (which in the self-determination context is more often than not equal to 'the people'), and using both subjective and objective criteria, we propose the following definition:

People or nation is: A group of human beings which possesses the will to be identified as a nation or people and to determine its common destiny as a nation or people and is bound by a common heritage and territory.

This definition, together with many other accepted definitions, emphasises the element of self-identification, i.e. the requirement that a people or a nation regards itself, and wants to be regarded by others, as a people or a nation.

1.c. International instruments concerning self-determination:

- Charter of the United Nations.
- Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States.
- International Covenant on Civil and Political Rights.
- International Covenant on Economic, Social and Cultural Rights.
- African Charter of Human and Peoples' Rights.
- Helsinki Final Act 1975.
- Vienna Declaration.
- Vienna Convention of 1978
- CSCE Charter of Paris for a New Europe.

1.d. Examples of exercising the right to self determination.

Despite the seemingly clear definition of the right to self-determination, there is little agreement on its scope, applicability and implementation. Political debates at the United Nations and elsewhere, legal doctrine and the practice of states reflect deep divisions of views.

Today, self-determination has been successfully claimed by nations and peoples in the former Soviet Union, the former Yugoslavia, the former Czechoslovakia, Eritrea and Timor-Leste. None of these are cases of de-colonisation in the classical sense, but the international community has not yet come to grips with the need to re-examine the concept and content of self-determination in the globalising world of the 21st century.

The case of Kosova, late in 2008, has been the last example of the implementation of the right to self-determination ending with the creation of a new state. The Republic of Kosova is internationally

¹ ICJ declared that the right to self-determination is applicable also to East Timor and Palestine –i.e.beyond the context of European colonization.

recognised by 75 states, including 22 EU Member States (situation on 4 February 2011), but still to be recognised by many more, including the UN. The International Court of Justice pronounced itself in July 2010 on the legality of the unilateral decision of Kosova to break with Serbia, after the Kosovar people voted with 58% of the votes in favour of independence by exercising its right to self-determination. The Court's conclusion was, that it was not in breach of international law.

Serbia and many other states have so far not recognised Kosova, and Serbia claims the territory as its own. But the argument of maintaining a state's territorial integrity within its present borders as a response to a claim to self-determination needs to be seriously questioned.

2. The path towards independence and internal enlargement.

2.a Implementation of the right of self-determination and a positive result for independence.

As said before, exercising the right to self-determination can result in a broad variety of results: from full independence to full integration within a state. So, contrary to what many state governments say (in order to make people fearful and encourage rejection of allowing the exercise of the right of self-determination to a certain group within its borders), the exercise of this right **does not** mean that the majority of the population of a nation/people will vote for independence. It gives the option, though, and many times the outcome goes in this direction.

That has been the case for Kosova and for some current EU member states: Czech Republic, Slovakia and Slovenia. So the implementation of this right and the respecting of its result in favour of independence is not alien to Europe.

Current European heads of state and other political representatives at European level do not tend to criticise the decision taken by these EU countries that voted for independence before acceding to the EU. Independence is evaluated as a positive thing for these countries. It brought prosperity, democracy and stability to the countries themselves and to Europe as a whole.

But, surprisingly enough, the issue of independence and even the one of exercising the right to self-determination, is considered negatively if a nation/people within a current EU state requests it. This is the double standard used by governments of Member States and the European institutions.

2.b. Independence is normal.

EFA parties believe that the democratically expressed will of a people or a nation concerning its future including the kind or degree of relationship it wants to have with the State it currently belongs to, should be respected.

Why independence:

- Sovereignty (or shared sovereignty) and decision making power: No intermediaries, no patronage. The state retains all competences (monetary policy, social security, health, foreign policy, etc.); all powers are in the hands of the state authorities and the state has the power to devolve some of these to sub-state entities (depending on the degree of decentralisation it seeks) and/or to transfer some of these to supranational organisations (depending on the degree of European or global integration it seeks), thus pursuing a satisfactory implementation of the principle of subsidiarity.

- Foreign policy and international legislation: The only external limits to state powers are the fundamental principles of international law which are accepted by the international community of states as norms from which no derogation is ever permitted (*ius cogens*) and the international treaties and organisations to which the state has decided to adhere. By deciding on its foreign policy the state government defines the kind of relationship it wants to have with other states and/or sub-state entities, and the actions it undertakes as a consequence of this interaction (security and peace policy).

- Direct voice and representation in Europe, UN and other international organisations. In the current system only states are able to be members of these supra-national entities. It is of a huge importance to be present and participate in the debates and decision making processes of these international bodies.

- Equal rights and duties (defined by the specific socio-political, economic and historic nature of the state) should apply to all residents of the state.

- Most of the nations of the world have never renounced their full sovereignty. Apart from some very few exceptions, when a country achieves the status of state it never goes back to being, for example, a self-governing region belonging to another state.

Independence and the creation of new states does not undermine at all the need for interdependence with other nations in the EU and on a global scale. On the contrary, it strengthens the feeling of solidarity and cooperation with the other peoples and nations in the world.

2.c. Internal enlargement. How to achieve it.

If exercising the right to self-determination favours independence and results in the creation of a new state, further steps concerning the international sphere are to be taken .

EFA is involved in the development of the concept of internal enlargement, which is the application of the rules on state succession within the context of the EU.

In the absence of specific rules on succession and creation of states in the treaties of the European Union, the rules of general international law should be applied (in particular, the Vienna Convention on Succession of States in respect of Treaties). Newly independent states should be treated as successors in respect of EU membership.

Taking into account individual rights already acquired by the citizens of the European Union, to deny a satisfactory solution to a process of internal enlargement would represent a loss of fundamental rights, not only for the citizens belonging to the new states but also for those of the rest of the Union.

How to achieve it:

The singularity of the European integration process is fundamental for determining the reply that the EU must give to a process of internal enlargement derived from the secession or dissolution of a member state of the Union. The internal enlargement of the EU resulting from a process of secession or dissolution of a member state should be considered in the light of international law as state succession.

The cases of succession provided in the above-mentioned convention are the following:

- A part of the territory of a state becomes part of the territory of another state.
- The creation of a newly independent state as a result of decolonisation.
- The unification of two or more states or territories, giving rise to a new state.

- The separation of one or several parts of the territory of a state, regardless of whether the predecessor remains.
- Dissolution when a previous state no longer exists, and two or more successor states are created.

In the absence of specific rules in the EU Treaties on the succession of an EU Member State, the secession or dissolution of a member state of the European Union could give rise, for the new state or states arising from this process, to continued membership, to succession in membership or to *ex novo* admission as a member.

The **automatic continuity** and the succession of the new state as a member of the European Union would not suppose a break. This option of a true internal enlargement would guarantee continuity in the effective application of the legal system of the EU in the territory of the new state. It would *inter alia* guarantee the authority of the institutions and bodies of the European Union and particularly of the mechanisms of administrative and judicial control of the application of EU law. Automatic continuity is the most effective way to guarantee the continuity of the rights already acquired by the citizens of the new member state and of the other member states, including free movement of persons, goods, capital and services within the Union, the right to vote in municipal and European elections, and of the rights and obligations arising from Economic and Monetary Union or Eurogroup membership. However, this formula would not allow the conditions of permanence of the new state in the EU to be modulated, for the state would have the same rights and obligations as its predecessor, which could cause problems with regard to the application of certain provisions of institutional law of the European Union, as would happen, for example, in the case of quotas assigned to the member states.

On the other hand, **succession in membership** would be a way of responding to a situation created by the secession or dissolution of a member state and would also guarantee the continuity of the rights and duties derived from the application of the legal system of the EU. This option also respects the defence of the democratic principles postulated by the Union.

Ex novo admission of the new state arising from the secession or dissolution of a member state of the EU would imply an absolute break of the new state with the Union and the possibility that the EU might not accept the accession of the new state or delay it for an undetermined period of time. This option would suppose the non-application of the Constitutive Treaties from the time of the effective independence of the new state, with all of the consequences that this would have on the effective application of EU law, and particularly the effectiveness of the rights and obligations recognised not only to the states, but also with regard to the citizens and legal persons of the Union in the territory of the new state.

This shows the need for the development of specific EU rules on the continuity of membership in the event of the creation of a new state or states from a current EU Member State.

3. Actions and recommendations.

- To undertake a study on the scope and content of the right to self-determination in international law, covering international treaties, case-law and state practice in this field and defining the validity of the outcome of a referendum on independence regarding participation and percentage of votes for it (cf. the percentage imposed by the EU on Montenegro or the decision of the Canadian Supreme Court of 1998 on the secession of Québec).
- Study the case of Kosova and the arguments used by different countries such as USA, France, UK, Germany, Spain, Greece, etc.. to recognise it or not.

Special attention should be given to the opinion of the International Court of Justice.

- c. Produce a Handbook on self-determination and the possibilities of organising a referendum in cross-state border nations (nations divided in 2 different states or more –Fryslan, Catalunya, Basque Country, etc...-) to serve as a practical guide on the law of self-determination, the various possible outcomes of an exercise of the right to self-determination, and the means of raising the question at the international fora.
- d. Draft model provisions of the EU Treaties on the continuity of membership of new states created out of an EU Member State.
- e. Lobby for the establishment of a permanent international arbitration with jurisdiction and authority to hear disputes between States and the nations claiming the right to self-determination.
- f. To draw up a list of governments which abuse human rights and deny self-determination to peoples under their control, and distribute the list to other governments and international institutions.
- g. Share experiences, good practice and maintain a dialogue between the nations and peoples concerning the development, application and implementation of the right to self-determination.
- h. The implementation of the above-mentioned actions and recommendations shall be steered by a committee appointed by the EFA Bureau.