7. Independence referendums in international law

Daniel Moeckli and Nils Reimann

1 INTRODUCTION

In the early morning of Sunday, 1 October 2017, people started queuing in schools and other places turned into polling stations across Catalonia. They intended to vote in a poll on the region's independence that was called by the government of Catalonia but that the central government of Spain regarded as illegal. By noon, police in riot gear had arrived and started to forcibly stop people from voting, to raid schools housing ballot boxes, to confiscate ballots already cast, to make arrests and to use rubber bullets as well as batons against protesters. Despite this, 2.3 million of the region's 5.3 million registered voters managed to cast their ballot, with 90 per cent voting for Catalan independence.[1] In the evening, the then incumbent Spanish prime minister stated that there had 'not been a self-determination referendum in Catalonia' that day. The leader of the regional government, in contrast, declared that '[o]n this day of hope and suffering, Catalonia's citizens have earned the right to have an independent state in the form of a republic'.[2]

At the time of writing, Catalonia is still a part of Spain. Does this mean that Spain's prime minister was right? Was the independence referendum – from a legal point of view – meaningless? Or was Catalonia's leader justified in saying that, thanks to the referendum, the region's citizens had earned the right to have an independent state? The following pages will look at the matter of contention through the lens of international law. They will do so by, first, delineating the concept of the independence referendum, second, assessing a potential obligation under international law to hold an independence referendum and, third, surveying the international legal requirements for the conduct of such referendums. In contrast, an examination of the constitutional law aspects of independence referendums is beyond the scope of this chapter.[3]

2 CONCEPT AND TERMINOLOGY

While there is a rich body of research on independence referendums, the terminology and the conceptual approaches that are employed vary considerably. What is sometimes referred to as 'independence referendum' may at other times be covered under terms such as 'sovereignty

[1] For the official results as published by the government of Catalonia see Referèndum d'autodeterminació de catalunya – Resultats definitius, available at <https://govern.cat/govern/docs/2017/10/06/17/32/9948c0ea-be28-4def-9c9f-fe6ce189f5bd.pdf> accessed 16 May 2022.

[2] On these and more aspects of the events unfolding that day see eg Sam Jones and Stephen Burgen, 'Catalan Referendum: Preliminary Results Show 90% in Favour of Independence' *The Guardian* (London, 2 October 2017) <www.theguardian.com/world/2017/oct/01/dozens-injured-as-riot-police-storm-catalan-ref-polling-stations> accessed 7 December 2021.

[3] On these aspects see eg Peter Radan, 'Secessionist Referenda in International and Domestic Law' (2012) 18 Nationalism and Ethnic Politics 8, 15–18.

referendum',[4] 'secessionist referendum',[5] 'self-determination referendum',[6] 'ethno-national referendum'[7] or 'constitutional referendum'.[8] The following subsections will therefore juxtapose the independence referendum with other types of referendums and provide an overview of the relevant historical developments, before we explain our own understanding of the term 'independence referendum'.

2.1 Types of Sovereignty Referendums

Independence referendums are about the question whether or not to abandon a state of political dependence and become a separate – sovereign – entity. Therefore, it seems sensible to regard independence referendums as a subset of sovereignty referendums.[9] Several means are available to distinguish different types of sovereignty referendums. One particularly convincing typology, devised by Fernando Mendez and Micha Germann, encompasses two dimensions: the scope of sovereignty shifts and their logic.[10] While the scope can be divided into sub-national cases, national ones and supra-national ones, the logic of reallocations of sovereignty can either be integrative or disintegrative.[11] Other means to distinguish sovereignty referendums include the topic of the referendum (cession, secession, unification etc.) and variables such as binding/consultative or unilateral/bilateral/multilateral.[12] Such categorisations usually result in about half a dozen prototypes of sovereignty referendums, independence referendums being one of them.[13] Within the typology of Mendez and Germann, independence referendums fall into the category of sovereignty shifts with national scope and disintegrative logic.[14]

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4 Jean Laponce, *Le référendum de souveraineté: Comparaisons, critiques et commentaires* (Les Presses de l'Université Laval 2010); Fernando Mendez and Micha Germann, 'Contested Sovereignty: Mapping Referendums on Sovereignty over Time and Space' (2016) 48 British J Political Science 141; İlker Gökhan Şen, 'Sovereignty Referendums: People Concerned and People Entitled to Vote' in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge 2018).

5 Radan (n 3).

6 Micha Germann, 'Pax Populi or Casus Belli? On the Conflict Resolution Potential of Self-Determination Referendums' (Doctoral thesis, ETH Zurich 2017) <https://doi.org/10.3929/ethz-b-000164781> accessed 16 May 2022.

7 Matt Qvortrup, 'The History of Ethno-National Referendums 1791–2011' (2012) 18 Nationalism and Ethnic Politics 129.

8 Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012).

9 See eg Mendez and Germann (n 4) 148; Şen, 'Sovereignty Referendums' (n 4) 213.

10 Mendez and Germann (n 4) 146.

11 ibid 146–48.

12 These and other variables are used by Laponce (n 4) 55–73.

13 İlker Gökhan Şen, *Sovereignty Referendums in International and Constitutional Law* (Springer 2015) 64–66; Mendez and Germann (n 4) 146–48.

14 The same category also includes 'irredentist separations': Mendez and Germann (n 4) 148.

2.2 Historical Overview

The cornerstone of referendum research was laid a century ago, when Sarah Wambaugh published *A Monograph on Plebiscites*.[15] She provided a tripartite list of 'cases of change of sovereignty in which the right to self-determination has been recognized' that includes six entries for the 'period of the French Revolution', 12 for the 'period of 1848–1870' and three for the 'period of 1871–1914'.[16] Wambaugh's list begins with the 1791 referendum in Avignon.[17] It has later been contended, however, that one should regard Massachusetts' referendum on declaring independence of 1776 as the 'modern era's first sovereignty referendum' instead.[18] Historical overviews have continued to suggest divisions into different 'waves',[19] 'clusters',[20] 'stages' or 'eras'.[21] Such historical overviews exist for referendums in general,[22] for subsets such as sovereignty or self-determination referendums[23] as well as for independence referendums in particular.[24]

It seems quite uncontroversial that the first two waves of independence referendums – and of sovereignty referendums in general – were triggered by the formation of the United States of America[25] and the French Revolution,[26] followed by a further cluster of referendums related to the creation of modern Switzerland (in 1848) and modern Italy (also in 1848 and again from 1860 to 1870).[27] In the wake of the First World War, a number of referendums were held on the transfer of territory between European states, many of which were stipulated by the respective peace treaties.[28] The decolonisation process led to a further wave of sovereignty referendums,[29] with the former French colonies accounting for a notable share.[30] The latest cluster of independence and other sovereignty referendums was caused by the collapse of the

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[15] Sarah Wambaugh, *A Monograph on Plebiscites: With a Collection of Official Documents* (Oxford University Press 1920); but see for an earlier work Felix Stoerk, *Option und Plebiscit bei Eroberungen und Gebietscessionen* (Duncker und Humblot 1879).

[16] Wambaugh (n 15) xxvii (capitalisation removed).

[17] ibid.

[18] Mendez and Germann (n 4) 150.

[19] Matt Qvortrup, 'Referendums on Independence, 1860–2011' (2014) 85 The Political Quarterly 57, 63.

[20] Mendez and Germann (n 4) 150.

[21] These two terms are both used by Şen, 'Sovereignty Referendums' (n 4) 210.

[22] See Matt Qvortrup (ed), *Referendums Around the World* (Palgrave Macmillan 2018).

[23] See Qvortrup, 'The History of Ethno-National Referendums 1791–2011' (n 7); Matt Qvortrup, 'Voting on Independence and National Issues: A Historical and Comparative Study of Referendums on Self-Determination and Secession' (2015) 20 Revue française de civilisation britannique 1; Mendez and Germann (n 4) 150–58.

[24] See Qvortrup, 'Referendums on Independence, 1860–2011' (n 19); Benjamin Levites, 'The Scottish Independence Referendum and the Principles of Democratic Secession' (2015) 41 Brooklyn J Intl L 373, 377–87.

[25] Qvortrup, 'Referendums on Independence, 1860–2011' (n 19) 57; Levites (n 24) 377–81; Mendez and Germann (n 4) 150–52.

[26] Wambaugh (n 15) 1, 33–57.

[27] Mendez and Germann (n 4) 152–53.

[28] Anne Peters, *Das Gebietsreferendum im Völkerrecht: Seine Bedeutung im Licht der Staatenpraxis nach 1989* (Nomos 1995) 51–57.

[29] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 76–79.

[30] Jean-François Dobelle, 'Référendum et droit à l'autodétermination' (1996) 77 Pouvoirs 42, 47, 55.

Soviet Union and the Socialist Federal Republic of Yugoslavia in the early 1990s.[31] The most prominent popular votes held since then that may be described as independence referendums include those in Eritrea (1993), Puerto Rico (1993/1998/2012/2017), Quebec (1995), East Timor (1999), Iraqi Kurdistan (2005/2017), Montenegro (2006), South Sudan (2011), Crimea (2014), Scotland (2014), Catalonia (2014/2017), New Caledonia (2018/2020/2021) and Bougainville (2019).

As regards the total number of independence referendums held to date, much depends on the definition of the term and the methodology used. In 2020, Matt Qvortrup counted 63 independence referendums held since 1860.[32] Germann's compilation of self-determination referendums between 1776 and 2015 contains 69 entries the subject matter of which involves independence.[33] The dataset by Mendez and Germann contains 602 sovereignty referendums held until 2012, more than 100 of which are expressly denominated as independence referendums.[34] The amount of independence referendums so far is thus a matter of definition but, considering the recent cases mentioned above, equates to at least 65 since the late eighteenth century.

2.3 Definition

'Independence referendums' can be defined, following İlker Gökhan Şen, as '[r]eferendums held to approve secession of a territory to create a new state'.[35] By 'referendum', we mean, as do Mendez and Germann, 'any popular vote on an issue of policy that is organized by the state or at least by a state-like entity'.[36] Unlike other authors,[37] we do not use the term 'plebiscite', as it has an ambiguous meaning and often a negative connotation.[38] As far as 'secession' is concerned, our understanding of this notion departs from the rather narrow definition used by James Crawford: 'the creation of a State by the use or threat of force without the consent of the former sovereign'.[39] Instead, we also include cases where no force is used and the existing state consents to the creation of the new state. This is in accordance with the definition advanced by Peter Radan: 'the creation of a new state upon territory previously forming part of, or being a colonial entity of, an existing state'.[40]

According to our understanding of 'independence referendum', it is irrelevant whether the government of the existing state does or does not accept the vote. Thus, also the referendum

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[31] Peters (n 28) 85–225; Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart 2013) 176–90.

[32] Matt Qvortrup, 'Democracy, Realism and Independence Referendums' in Martin Riegl and Bohumil Doboš (eds), *Perspectives on Secession: Theory and Case Studies* (Springer 2020) 46.

[33] Germann (n 6) 232–52.

[34] The dataset is available at <https://doi.org/10.7910/DVN/PXMGHF> accessed 7 December 2021.

[35] Şen, 'Sovereignty Referendums' (n 4) 213.

[36] Mendez and Germann (n 4) 144.

[37] See eg Wambaugh (n 15).

[38] See eg Matt Qvortrup, Brendan O'Leary and Ronald Wintrobe, 'Explaining the Paradox of Plebiscites' (2020) 55 Government and Opposition 202, 203.

[39] James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 375.

[40] Peter Radan, 'Secession: A Word in Search of a Meaning' in Aleksandar Pavković and Peter Radan (eds), *On the Way to Statehood: Secession and Globalization* (Ashgate 2008) 18.

held in Catalonia in 2017 qualifies as an independence referendum, as does that of 2014.[41] The definition also includes referendums that are held only *after* the respective secession. It does not, however, cover referendums held to approve detachment from a supranational organisation or an administrative subunit of a state, whereby no new state is created. Neither the United Kingdom's vote on whether or not to leave the European Union nor the vote of the municipalities in the Swiss Jura on whether or not to separate from the Canton of Bern are covered by our understanding of independence referendums.[42] Nevertheless, many of the following remarks might still bear some relevance for supranational and subnational cases; these cases, in turn, may offer revealing insights for the study of independence referendums.

3 INTERNATIONAL LEGAL OBLIGATION TO HOLD AN INDEPENDENCE REFERENDUM

There is nothing in international law that would *prevent* a state or a state-like entity from holding a referendum on the independence of a territory within that state. The International Court of Justice (ICJ) held in the *Kosovo Opinion* that international law does not prohibit declarations of independence, unless they are issued in violation of a peremptory norm.[43] This must hold all the more true for referendums preceding such declarations.

The more difficult question is whether, in certain situations, international law *obliges* a state or state-like entity to hold an independence referendum. The main sources from which an international legal obligation to hold an independence referendum could arise are treaties, such as peace agreements, concluded by the respective state (3.1), the right to self-determination (3.2), the right to political participation (3.3) and/or customary international law (3.4).

3.1 Treaties

Probably the first international treaty to prescribe a sovereignty referendum, although not an independence referendum, was the Treaty of Turin concluded between France and the Kingdom of Sardinia in 1860, providing for the cession of Savoy and Nice to France. Article 1 of that treaty stipulated that the populations of these two territories were to be consulted about their wish to join France.[44] The Paris Peace Treaties allowed the populations of a number of territories to decide on which one of two states to join; such referendums, monitored by the League of Nations, were held, for example, in 1920 in Schleswig (on joining Denmark or

[41] On the latter see Ashifa Kassam, 'Catalonia to Hold Unofficial Poll Instead of Independence Referendum' *The Guardian* (London, 14 October 2014) available at <www.theguardian.com/world/2014/oct/14/catalonia-calls-off-november-independence-referendum> accessed 16 May 2022.

[42] On the example of 'Brexit' see Jure Vidmar, 'Brexit, Democracy, and Human Rights: The Law between Secession and Treaty Withdrawal' (2018) 35 Wisconsin Intl LJ 426; on the example of the Swiss Jura see Andreas Glaser, 'Die Beilegung des Jurakonflikts – Ein Modell für direktdemokratische Sezession in Europa?' (2014) 115 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 463.

[43] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, paras 79–84 (*Kosovo Opinion*).

[44] On this and similar clauses in early cession treaties see Şen, *Sovereignty Referendums in International and Constitutional Law* (n 13) 81.

Germany)[45] and in 1921 in Upper Silesia (on joining Poland or Germany).[46] A treaty prescribing an actual independence referendum was the Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor of 1999, which provided that the people of East Timor ought to be allowed to choose between a special status within Indonesia and secession.[47] More often, agreements providing for an independence referendum are concluded, not between states, but between a state and a non-state actor, typically a separation movement. A prominent example is the Machakos Protocol, concluded between the government of Sudan and the Sudan People's Liberation Movement/Army in 2002, which stipulated that the people of South Sudan would be allowed, in an internationally monitored referendum, to choose between remaining with Sudan and secession.[48] That the main actors involved have been able to agree on a mode of decision-making means that independence referendums based on treaties are normally quite uncontroversial.

3.2 The Right to Self-Determination

According to Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) all peoples have the right to self-determination, understood as the right to 'freely determine their political status and freely pursue their economic, social and cultural development'. The wording of these provisions corresponds to that of the Declaration on the Granting of Independence to Colonial Countries and Peoples, passed by the UN General Assembly in 1960.[49] The Declaration on Principles of International Law Concerning Friendly Relations of 1970 contains a slightly expanded version of the formulation.[50] As has been confirmed by the ICJ, the right to self-determination has 'an *erga omnes* character' and is 'one of the essential principles of contemporary international law' and as such binds, beyond the vast majority of states that have ratified at least one of the human rights covenants, every state in the world.[51]

As far as its content is concerned, the right to self-determination may be divided into two dimensions.[52] The *internal dimension* refers to the right of a people to determine its political, economic, social and cultural destiny within the framework of an existing state and to freely

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[45] See Treaty of Versailles (signed 28 June 1919, entered into force 10 January 1920) <https://tile.loc.gov/storage-services/service/ll/lltreaties//lltreaties-ustbv002/lltreaties-ustbv002.pdf> accessed 16 May 2022, art 109.

[46] ibid art 88.

[47] Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor (signed and entered into force 5 May 1999) 2062 UNTS 7, art 1 and Annex II: Agreement regarding the modalities for the popular consultation of the East Timorese through a direct ballot.

[48] Machakos Protocol (signed 20 July 2002) <https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_020710_MachakosProtocol.pdf> accessed 16 May 2022, arts 1.3 and 2.5.

[49] UNGA Res 1514 (XV) (14 December 1960).

[50] UNGA Res 2625 (XXV) (24 October 1970) ('By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter').

[51] *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29.

[52] See Rupert Emerson, 'Self-Determination' (1971) 65 AJIL 459, 465.

choose a political system and a representative government.[53] The choice of the word 'freely' in Articles 1(1) of the ICESCR and the ICCPR makes it clear that individuals must be allowed to exercise those rights that permit the popular will to be expressed: freedom of expression, the right of peaceful assembly, the right to political participation etc. In this sense, Articles 1(1) of the ICESCR and the ICCPR establish a link between self-determination and civil and political rights.[54]

The *external dimension* of the right to self-determination refers to the ability of a people to freely determine its status in international relations, opting for independence or union with another state. Since the right to self-determination must be balanced with the territorial integrity and sovereignty of existing states, a right to external self-determination is only recognised for the decolonisation context. Outside of this context, the right to secede is said to exist, if at all, only in extreme situations of denial of the fundamental rights of a people. According to the – nowadays widely supported – concept of 'remedial secession',[55] a people can claim a right to separate statehood as a remedy where the state concerned denies it the exercise of its internal right to self-determination.[56] 'When a people is blocked from the meaningful exercise of its right to self-determination internally', the Supreme Court of Canada has succinctly summarised this position, 'it is entitled, as a last resort, to exercise it by secession'.[57] Internal and external self-determination are thus inextricably connected. According to some authors, the right to remedial secession is premised on the further condition that the group is subject to grave violations of human rights.[58] This right to remedial secession can, however, only be invoked as a last resort, once all possible remedies for the realisation of internal self-determination have been exhausted.[59]

The 'remedial' approach finds its roots in the 'safeguard clause' of the Friendly Relations Declaration, which links respect for a state's territorial integrity to its respect for the right to internal self-determination:

> Nothing in the foregoing paragraphs shall be construed as authorizing 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*[60]

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[53] *Reference Re Secession of Quebec* (1998) Supreme Court of Canada 2 SCR 217, (1998) 37 ILM 1340, para 126 (*Secession Reference*); *Kosovo Opinion* (n 43) Separate Opinion of Judge Yusuf, para 9.

[54] Cassese (n 29) 53–54.

[55] The term was coined by Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) 222.

[56] See eg *Loizidou v Turkey* App no 15318/89 (ECtHR [GC], 18 December 1996) Concurring Opinion of Judge Wildhaber, joined by Judge Ryssdal; *Kevin Mgwanga Gunme et al v Cameroon* Communication no 266/03 (ACHPR, 27 May 2009) paras 191, 194; Gerry J Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 Stanford J Intl L 255, 283–85; Hurst Hannum, 'The Right of Self-Determination in the Twenty-First Century' (1998) 55 Washington and Lee L Rev 773, 777; Christian Tomuschat, 'Secession and Self-Determination' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 38–42.

[57] *Secession Reference* (n 53) para 134.

[58] See eg Cassese (n 29) 119–20; Allen Buchanan, 'Theories of Secession' (1997) 26 Philosophy and Public Affairs 31, 37.

[59] *Kosovo Opinion* (n 43) Separate Opinion of Judge Yusuf, para 16.

[60] UNGA Res 2625 (XXV) (24 October 1970) (emphasis added).

Although this clause must be understood in the decolonisation context, it reveals that the principle of territorial integrity was, already at that time, regarded as hinging on minimal requirements of democratic legitimacy.[61] Importantly, the provision was reiterated, and indeed broadened, in the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights in 1993 and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations of 1995.[62]

Given the difficulty of reaching an international consensus on the *substantive* requirements of democracy that – existing and emerging – states must meet to be regarded as legitimate, the focus of attention has increasingly shifted to the *procedure* of state creation. This turn to procedural aspects is in line with the observation made by Niklas Luhmann that a decision (such as a decision to create an independent state) derives its legitimacy from an adequate decision-making process.[63] Moreover, the focus on the mode of the exercise of the right to self-determination is justified in view of both the origins and the nature of this right. The right to self-determination has its origins in the period of the Enlightenment, when it was regarded as the international correlate of popular sovereignty.[64] This correlation is evident, for instance, in the US Declaration of Independence of 1776, which rejected British rule with the explanation that it was not supported by 'the consent of the governed'.[65] It is no coincidence that, as explained above, the first sovereignty referendums were held in the United States and in revolutionary France where the inhabitants of annexed territories were consulted about their wish to join France. Thus, the right to self-determination must be regarded as essentially a procedural right: the right of peoples to 'freely determine' their destiny.[66] It does not point to the final goal of self-determination (internal self-determination, association with another state, independence etc.) or dictate substantive conditions for statehood, but rather lays down the *procedure* by which decisions concerning peoples must be reached.[67] In the words of Antonello Tancredi, self-determination sets out 'a normative "due process" through which a secessionist act must happen'.[68] Following a due process has a legitimising effect as it increases the likelihood that the resulting decision will be rationally justified.[69]

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[61] See Brad R Roth, 'The Relevance of Democratic Principles to the Self-Determination Norm' in Peter Hilpold (ed), *Autonomy and Self-Determination: Between Legal Assertations and Utopian Aspirations* (Edward Elgar 2018).

[62] UN Doc A/CONF.157/24 (Part I), para I.2; UNGA Res 50/6 (24 October 1995), para 1 (in both documents, the last part of the clause was broadened to '… without distinction of any kind').

[63] Niklas Luhmann, *Legitimation durch Verfahren* (Luchterhand 1969).

[64] Daniel Thürer, 'Das Selbstbestimmungsrecht der Völker: Ein Überblick' (1984) 22 Archiv des Völkerrechts 113, 115–16.

[65] US Declaration of Independence of 4 July 1776, available at <http://hdl.loc.gov/loc.rbc/pe.76546> accessed 16 May 2022, preamble.

[66] Otto Kimminich, 'A "Federal" Right of Self-Determination?' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 93–94.

[67] Paola Gaeta, Jorge E Viñuales and Salvatore Zappalà, *Cassese's International Law* (3rd edn, Oxford University Press 2020) 68; Antonello Tancredi, 'A Normative "Due Process" in the Creation of States Through Secession' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 188.

[68] Tancredi (n 67) 189.

[69] Peters (n 28) 361.

Such a due process includes, for example, an obligation incumbent on all parties concerned to engage, in good faith, in negotiations and to refrain from the use of force.[70] Above all, however, a procedure must be used that allows for the free expression of the popular will: 'there is no self-determination without democratic decision-making'.[71] The ICJ has confirmed, in the context of decolonisation, that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[72] '[T]he need to pay regard to the freely expressed will of peoples' is, in view of the court, 'not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory', as '[t]hose instances were based … on the conviction that a consultation was totally unnecessary, in view of special circumstances'.[73] Holding a referendum is the most obvious method of 'consulting the inhabitants of a given territory' on questions relating to self-determination, as it allows people to directly express their opinion on a specific proposed course of action.[74] A further reason that makes the referendum a particularly suitable decision-making procedure is that it is typically, and ideally, preceded by a broad public debate, in which the advantages and downsides of a range of potential solutions are discussed.[75] Nevertheless, as will be explained in section 3.4.1 below, international law does not categorically preclude resort to other democratic procedures.

3.3 The Right to Political Participation

The proposition that the right to self-determination must be exercised in a democratic procedure is supported by the rise in status of democracy in international law over the last few decades. While traditional international law, based on the notion of state sovereignty, did not take a position on the political model adopted by states, 'notions of democracy gradually entered international law through the back door of human rights protection'.[76] The Universal Declaration of Human Rights (UDHR), proclaimed in 1948, guarantees in Article 21(1) the right to political participation by providing that '[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives'. Explicitly referring to the core meaning of democracy, according to which '[t]he will of the people shall be the basis of the authority of government', it further provides in Article 21(3) that 'this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'. The ICCPR of 1966, which binds 173 states, contains almost identical provisions in its Article 25, as do Article 23

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[70] *Secession Reference* (n 53) paras 88–89, 92–97; Cassese (n 29) 212.

[71] Cassese (n 29) 54.

[72] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 55; see also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, paras 157, 160, 172.

[73] *Western Sahara* (n 72) para 59.

[74] See the judgment of the Swiss Federal Supreme Court of 13 March 1991, BGE 117 Ia 233, para 4c ('En droit international public, le plébiscite – soit la consultation de la population d'un territoire déterminé sur la question de savoir si ce territoire doit ou non changer de juridiction étatique – est un corollaire du droit des peuples à disposer d'eux-mêmes, qui a trouvé son expression notamment à l'art. 1er ch. 1 du Pacte international relatif aux droits économiques, sociaux et culturels').

[75] See also Peters (n 28) 361–62.

[76] Jan Wouters, Bart De Meester and Cedric Ryngaert, 'Democracy and International Law' (2003) 34 Netherlands YB Intl L 137, 143.

of the American Convention on Human Rights of 1969 and Article 13 of the African Charter on Human and Peoples' Rights of 1981. More limited in scope is Article 3 of Protocol 1 to the European Convention on Human Rights of 1952, which guarantees the right to free elections. The, by now, widespread practice of election monitoring by international organisations and further international initiatives to promote democracy and human rights[77] have given further impetus to the claim that there exists under general international law a right to democratic governance.[78] However, this claim is probably premature, as there is not sufficient consensus within the international community with regard to the exact content of such a right.[79] In Europe, in contrast, a right to democratic governance – understood as a right to free and fair elections – does exist, as is confirmed by all the major regional organisations; especially within the framework of the Organization for Security and Co-operation in Europe (OSCE), the requirement that governments must be based on the will of the people has become a central principle.[80]

As the UN Human Rights Committee has confirmed, the right to political participation overlaps with the right to self-determination, especially its internal dimension.[81] The right to self-determination, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has observed, 'implies that Governments owe their existence and powers to the assent of their people'.[82] Similarly, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, states that '[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing' and that '[d]emocracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.[83] From this perspective, democracy and self-determination appear as two sides of the same coin.[84] Given that, historically, they are both products of the Age of Enlightenment, this hardly comes as a surprise.

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[77] See section 4 below.

[78] See most famously Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

[79] Eg Steven Wheatley, 'Democracy in International Law: A European Perspective' (2002) 51 ICLQ 225.

[80] For an overview see Jean d'Aspremont, *L'Etat non démocratique en droit international: Etude critique du droit international positif et de la pratique contemporaine* (Editions A Pedone 2008) 269ff; Wheatley (n 79).

[81] UN Human Rights Committee, 'General Comment no 25 – The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25)' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 2 ('The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs').

[82] Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (1981) UN Doc E/CN.4/Sub.2/404/Rev.1, para 228.

[83] Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23, para 8.

[84] Stefan Oeter, 'Demokratieprinzip und Selbstbestimmungsrecht der Völker: Zwei Seiten einer Medaille?' in Hauke Brunkhorst (ed), *Demokratischer Experimentalismus: Politik in der komplexen*

In light of the trend towards democracy in international law as well as of the close link between the right to political participation and the right to self-determination, it seems clear today that the latter right must be exercised in a democratic way and that it cannot be forfeited. A choice for a non-democratic system would be incompatible with the equalisation of self-determination and democratic governance.[85] 'L'existence d'une nation', Ernest Renan famously observed, 'est un plébiscite de tous les jours'.[86] What exactly democracy encompasses, remains contentious. Nevertheless, it seems safe to conclude that the right to political participation, in combination with the right to self-determination, requires important decisions concerning a people's political, economic, social and cultural destiny to be taken either by way of a referendum or by a democratically elected body.[87] Determination of the status of a territory clearly is an important decision. As explained in section 3.2, the most appropriate method of taking this decision is by holding a referendum.

3.4 Customary International Law

We have shown in sections 3.2 and 3.3 above that the rights to self-determination and political participation imply that decisions concerning secession of a territory must be taken in a democratic procedure. To ascertain whether there is, more specifically, an international legal obligation *to hold a referendum* on the question of independence, it is necessary to examine the relevant state practice that, in combination with the required *opinio iuris*, might have resulted in a corresponding rule of customary international law. Have states regarded a (successful) referendum as a necessary condition for achieving statehood? Is it, perhaps, even sufficient for an entity to become an independent state that the people have expressed their support for independence in a referendum?

3.4.1 A successful referendum as a necessary condition for independence?

Does secession without popular support determined in a referendum violate customary international law? Consideration of the years from 1945 to 1990 will not help us answer that question as, outside of the decolonisation process, hardly any cases of secession occurred during that period.[88] In contrast, an analysis of the surge of independence claims, and reactions to them, in the context of the collapse of the Socialist Federal Republic of Yugoslavia and the Soviet Union in the early 1990s is revealing.

The European Community, in its Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' of 16 December 1991, expressed

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Gesellschaft (Suhrkamp 1998); Jure Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 HRLR 239.

[85] Jan Klabbers and René Lefeber, 'Africa: Lost between Self-Determination and Uti Possidetis' in Catherine Brölmann and others (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff 1993) 45; Cassese (n 29) 54.

[86] Ernest Renan, 'Qu'est-ce qu'une nation ? Conférence faite en Sorbonne, le 11 Mars 1882' in Henriette Psichari (ed), *Œuvres complètes de Ernest Renan: Tome I* (Calmann-Lévy 1947) 904.

[87] William A Schabas seems to share this view when he writes that Article 25(b) of the ICCPR 'might … be violated if a body exercising State power has no (direct or indirect) democratic legitimacy': William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd edn, NP Engel 2019) 709.

[88] Peters (n 28) 73.

its 'readiness to recognise … those new states which … have constituted themselves on a democratic basis' and which respect the rule of law, democracy and human rights.[89] In line with these requirements, the Arbitration Commission of the Conference on Yugoslavia (commonly known as the Badinter Commission) at first refused to recommend recognition of Bosnia-Herzegovina because the will of its people(s) with regard to independence had not been clearly established. The Badinter Commission explained that it could review this assessment 'if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of (Bosnia-Herzegovina) without distinction, carried out under international supervision'.[90] Less than two months later, a majority of Bosnian voters expressed their support for independence in a referendum. Recognition by numerous states and admission to the United Nations followed suit.[91] Similarly, in its Opinions concluding that Croatia, (then-)Macedonia and Slovenia meet the conditions for recognition, the Badinter Commission took into account that in all these cases referendums supporting independence had been held.[92] By doing so, it arguably 'elevated the referendum to the status of a basic requirement for the legitimation of secession'.[93]

The practice relating to the recognition of former member states of the Soviet Union reveals a similar pattern. The three Baltic states held referendums on (restoration of) independence in spring of 1991. Lithuania had already declared its independence 11 months before the referendum, yet the Soviet Union and the international community recognised it as an independent state only once the people had been consulted.[94] The European Community and its member states welcomed the decisions to hold referendums in Lithuania, Latvia and Estonia[95] and took the position that their 'results cannot be ignored'.[96] Referendums approving secession from the Soviet Union were also held in Georgia, Armenia, Turkmenistan and Ukraine.[97] Especially in the case of Ukraine, the referendum result was regarded as a decisive factor for recognition by third states.[98] Once the Soviet Union had already been dissolved, referendums to confirm independence were held, on 29 December 1991, in Uzbekistan and Azerbaijan and, in 1994, in Moldova.[99] In contrast, for example, the population of the Chechen Republic of Ichkeria that existed in the 1990s was never consulted about its support for independence. International organisations and other states consistently refused to recognise the Republic.[100]

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[89] European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (16 December 1991) (1992) 31 ILM 1485, 1486–87.

[90] Conference on Yugoslavia Arbitration Commission ('Badinter Commission'): Opinions on Questions Arising from the Dissolution of Yugoslavia (11 January and 4 July 1992) (1992) 31 ILM 1488, Opinion no 4, 1501–03, 1503.

[91] See Diane F Orentlicher, 'International Responses to Separatist Claims: Are Democratic Principles Relevant?' (2003) 45 Nomos 19, 36.

[92] Badinter Commission (n 90), Opinion no 5, 1503–05, 1504; ibid Opinion no 6, 1507–12, 1508; ibid Opinion no 7, 1512–27, 1513.

[93] Cassese (n 29) 272.

[94] See Vidmar, *Democratic Statehood in International Law* (n 31) 185–86.

[95] EC Bull 24 (1991) no 1/2, para 1.4.21.

[96] EC Bull 24 (1991) no 3, para 1.4.2.

[97] Peters (n 28) 178–89.

[98] See ibid 187.

[99] ibid 198–202.

[100] Tarcisio Gazzini, 'Considerations on the Conflict in Chechnya' (1996) 17 Human Rights LJ 93, 97, 100.

Referendums have continued to strengthen the legitimacy of secessionist claims. In 1993 a huge majority of Eritreans voted in favour of independence from Ethiopia in an internationally supervised referendum that third states clearly regarded as a condition for recognition.[101] Finally, it is noteworthy that in all states that were admitted to the United Nations in recent years the people's will on the question of independence had been determined in a referendum: in East Timor in 1999,[102] in Montenegro in 2006[103] and in South Sudan in 2011.[104]

Although the existing state practice is not particularly rich (yet), one may tentatively conclude that a rule of customary international law has crystallised, according to which secession is only lawful if it has been approved in a referendum.[105] A state declaring independence without – or even against – the people's will expressed in a referendum would, as a general rule, not be recognised.

In the *Western Sahara Advisory Opinion*, the ICJ suggested that there may be instances where holding an independence referendum is 'totally unnecessary, in view of special circumstances'.[106] Such special circumstances may exist where it is obvious and not contested what the people's will is. Kosovo, where a popular consultation had been held in 1991 but not prior to the declaration of independence in 2008, might be a case in point, as it was undisputed that virtually all Kosovo Albanians, making up the vast majority of Kosovo's population, supported independence.[107] Some authors have argued that elections may also constitute a democratic procedure for ascertaining the people's wishes with regard to a proposed change of sovereignty over a territory, so that an overwhelming vote in favour of a political party supporting independence could replace a referendum.[108] However, an election cannot normally be an adequate substitute for a referendum. How people vote in elections will invariably depend on a range of factors, many of which will not be related to the issue of independence.[109] For this reason, it seems highly problematic, for example, to regard the dissolution of Czechoslovakia

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[101] See eg the importance that was attached to the fact that 'the referendum was free and fair' in the statement of the US Department of State of 28 April 1993, printed in (1993) 87 AJIL 597.

[102] UNGA Res 57/3 (27 September 2002).

[103] UNGA Res 60/264 (28 June 2006).

[104] UNGA Res 65/308 (14 July 2011).

[105] This view is shared by, eg, Tancredi (n 67) 190–91; Anne Peters, 'The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum' in Christian Calliess (ed), *Herausforderungen an Staat und Verfassung: Völkerrecht – Europarecht – Menschenrechte: Liber Amicorum für Torsten Stein zum 70. Geburtstag* (Nomos 2015) 288–90. For a different view see Emanuel Castellarin, 'Territorial Politics Through International Law? Independence Referendums Beyond Post-Colonial Situations' in Martin Belov (ed), *Territorial Politics and Secession: Constitutional and International Law Dimensions* (Palgrave Macmillan 2021) 139.

[106] *Western Sahara* (n 72) para 59.

[107] See also Vidmar, *Democratic Statehood in International Law* (n 31) 197. For an argument that Kosovo's declaration of independence without a prior referendum violated the (Serbian minority's) right of self-determination see Thomas Fleiner, 'The Unilateral Secession of Kosovo as a Precedent in International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 890–94.

[108] Anne Peters, 'Das Völkerrecht der Gebietsreferenden: Das Beispiel der Ukraine 1991–2014' (2014) 64 Osteuropa 101, 110–12; Markku Suksi, 'The Referendum as an Instrument for Decision-Making in Autonomy-Related Situations' in Peter Hilpold (ed), *Autonomy and Self-Determination: Between Legal Assertations and Utopian Aspirations* (Edward Elgar 2018) 135.

[109] Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1995) 66 BYBIL 283, 304.

in 1993 as having been adopted in a democratic procedure on the sole basis that the preceding general elections had been won by political parties advocating dissolution.[110] In any event, the case of Czechoslovakia concerned the voluntary dissolution of a state. State practice with regard to secession, where the parent state continues to exist, displays a different pattern: Here, a referendum is regarded as a necessary condition for achieving statehood.

In summary, apart from exceptional cases where popular support is clearly established without a referendum, a secession that is not supported by the people's will determined in a referendum constitutes an unlawful act. Third states have an obligation not to recognise the entity seeking secession: Article 41(2) of the ILC Articles on State Responsibility provides that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40', that is, a serious breach of *ius cogens*. According to the Commentary on the Articles on State Responsibility, the right to self-determination, from which the obligation to hold a referendum on the question of secession follows, belongs to the norms of *ius cogens* character.[111] The ICJ has held that, given the *erga omnes* character and importance of the right to self-determination, all states are under an obligation not to recognise a situation resulting from its violation.[112]

3.4.2 A successful referendum as a sufficient condition for independence?

A referendum, in which a majority of voters supports secession, is a necessary, but not a sufficient condition for independent statehood. A successful independence referendum does not create a right to unilateral secession; an entity's membership in the international community depends, after all, on its recognition as a state by other states.[113] That holding a referendum is not regarded as sufficient is, again, evidenced by the reactions of international organisations and states to certain secessionist claims. For example, even though the Serbian population of Bosnia and Herzegovina had voted for remaining part of a 'common Yugoslav state',[114] the Badinter Commission denied its right to form an independent 'Serbian Republic of Bosnia and Herzegovina'.[115] Similarly, the referendums held in South Ossetia in 1992 and 2006, which both produced majorities of 99 per cent in favour of independence, have not brought the entity any closer to recognition as a state by the international community.[116] Finally, to refer to a more recent example, in a referendum held in Crimea in 2014, reportedly more than 97 per cent of voters supported breaking away from Ukraine and joining Russia.[117] Nevertheless,

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[110] Maya Hertig, *Die Auflösung der Tschechoslowakei: Analyse einer friedlichen Staatsteilung* (Helbing und Lichtenhahn 2001) 347–78.

[111] ILC 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, Responsibility of States for Internationally Wrongful Acts, Commentary on Article 40, para 5; ibid, Commentary on Article 41, paras 5, 8; see also Peters, *Das Gebietsreferendum im Völkerrecht* (n 28) 483–86; Jure Vidmar, 'Conceptualizing Declarations of Independence in International Law' (2012) 32 OJLS 153, 166.

[112] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 156, 159.

[113] Crawford (n 39) 417.

[114] See Badinter Commission (n 90) Opinion no 4, 1501–03, 1503.

[115] Badinter Commission (n 90) Opinion no 2, 1497–99.

[116] See eg Radio Free Europe, 'International Community Will Not Recognize South Ossetia Vote' (13 November 2006) available at <www.rferl.org/a/1072687.html> accessed 22 May 2022.

[117] Luke Harding and Shaun Walker, 'Crimea Applies to Be Part of Russian Federation After Vote to Leave Ukraine' *The Guardian* (London, 17 March 2014) available at <www.theguardian.com/world/2014/mar/17/ukraine-crimea-russia-referendum-complain-result> accessed 16 May 2022.

the UN General Assembly passed a resolution underscoring that the referendum 'cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol' and calling upon states and international organisations not to recognise any such alteration on the basis of the referendum.[118] Seen from this perspective, the international obligation to hold a referendum that, in addition, must comply with the standards set out in section 4 below appears as a stabilising factor: rather than promoting changes of sovereignty over territory, it makes them more difficult.[119]

4 REQUIREMENTS FOR THE CONDUCT OF INDEPENDENCE REFERENDUMS

International law not only requires that decisions concerning secession of a territory must be taken by way of a referendum, it also provides rules on how such referendums must be conducted. Not all of these rules have the same legal quality, however. Some of them stem from hard-law sources such as international conventions or international custom, others belong to the category of soft law.

The most important legally binding rules are those contained in the UN human rights covenants. As explained in section 3.2 above, Articles 1(1) of the ICESCR and the ICCPR guarantee the right of peoples to 'freely determine' their destiny. The modalities of this free determination are spelled out in the voting principles of Article 25(b) of the ICCPR, most of which not only apply to elections, but also to referendums.[120] Thus, referendums must be by universal and equal suffrage, be held by secret ballot and guarantee the free expression of the will of the voters. An example of pertinent soft law is the Venice Commission's Revised Guidelines on the Holding of Referendums.[121] While the Guidelines are not legally binding, they are the most comprehensive source of normative guidance in the field of referendums, setting out in much more detail than the covenants how referendums ought to be conducted.

The international response to the Crimean referendum of 2014 illustrates the significance of these international standards. States and international organisations in unison declined to recognise the referendum result,[122] citing reasons such as military intimidation, a manipulated media environment, insufficient preparation, implausibility of the results reported or the lack of credible international observation.[123] Further areas of concern included the wording of the

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[118] UNGA Res 68/262 (27 March 2014) paras 5–6.

[119] See also Peters, *Das Gebietsreferendum im Völkerrecht* (n 28) 362–63.

[120] The UN Human Rights Committee's 'General Comment no 25' (n 81) explicitly mentions referendums in paras 6, 10 and 19.

[121] European Commission for Democracy through Law ('Venice Commission'), 'Revised Guidelines on the Holding of Referendums', CDL-AD(2020)031 (8 October 2020).

[122] For a summary of international reactions see Peters, 'The Crimean Vote of March 2014' (n 105) 301–03.

[123] See the following statements: OSCE Chairperson-in-Office (11 March 2014) <www.osce.org/cio/116313>; G-7 Leaders (12 March 2014) <www.consilium.europa.eu/media/25815/141460.pdf>; Presidents of the European Council and the European Commission (16 March 2014) <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141566.pdf>; Parliamentary Assembly of the Council of Europe, Resolution 1988 (2014) para 16; Delegation of the European Union to the International Organisations in Vienna (28 February 2019) <www.osce.org/permanent-council/413342> all accessed 7 December 2021.

referendum question and the lack of neutrality of the authorities.[124] Respecting international standards such as the ones below, in contrast, will increase the likelihood that a referendum result is recognised by the international community.

4.1 Peaceful Environment

The most basic condition for an orderly referendum process is a peaceful environment. The prohibition of the threat or use of force, stipulated in Article 2(4) of the UN Charter, implies that the territory in which an independence referendum is to be held must be pacified.[125] A referendum surrounded by violence or the threat of violence – as those held in Russian-controlled territories of Ukraine in September 2022 – will also violate the prohibition of 'undue influence or coercion of any kind which may distort or inhibit the free expression' of the voter's will that follows from Article 25(b) of the ICCPR.[126]

4.2 Protection of Civil and Political Rights

The voting principles of Article 25(b) of the ICCPR entail that the authorities must provide objective information and not engage in one-sided campaigning, that their use of public funds for campaigning purposes needs to be restricted and that the public media have to remain neutral.[127] Further guarantees of the ICCPR are relevant too. The freedoms of expression, assembly and association are essential preconditions for a genuine determination of the will of the people; without their effective protection, voters will not be able to freely form an opinion and express their wishes.[128] Article 2 of the ICCPR forbids any discriminatory distinction between different categories of voters and may require positive measures to help voters overcome impediments (such as illiteracy, language barriers or poverty) to exercising their right to vote effectively.[129] Finally, Articles 2(3) and 14(1) of the ICCPR guarantee voters

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[124] See Venice Commission, 'Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution Is Compatible With Constitutional Principles"', Opinion no 762/2014, CDL-AD(2014)002, paras 21–26; see also Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 367, 380–82.

[125] Peters, 'Das Völkerrecht der Gebietsreferenden' (n 108) 116–17; see also Peters, 'The Crimean Vote of March 2014' (n 105) 297.

[126] UN Human Rights Committee, 'General Comment no 25' (n 81) para 19; Shaun Walker, '"Referendums" on joining Russia under way in occupied Ukraine' *The Guardian* (Kyiv, 23 September 2022) <www.theguardian.com/world/2022/sep/23/occupied-parts-of-ukraine-prepare-to-vote-on-joining-russia> accessed 12 October 2022.

[127] Venice Commission, 'Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organisation of Referendums with Applicable International Standards', Opinion no 343/2005, CDL-AD(2005)041, para 12; Venice Commission, 'Revised Guidelines on the Holding of Referendums' (n 121) para I.3(1)(b).

[128] UN Human Rights Committee, 'General Comment no 25' (n 81) para 12; Venice Commission, 'Revised Guidelines on the Holding of Referendums' (n 121) para II.2.

[129] UN Human Rights Committee, 'General Comment no 25' (n 81) para 12.

access to an effective system of appeal in case of disputes concerning suffrage or the conduct of referendums.[130]

4.3 Universal Suffrage and the Question of Voter Qualification

One aspect of organising an independence referendum is particularly thorny: Who should be allowed to vote? Since a new *demos* is only about to be created, it is not self-evident who should have a say in its creation. Two principles are in tension here: universal suffrage and representation of the will of the persons most directly concerned by the decision.[131] Under domestic law, an eventual secession might entail a change of constitutional provisions and therefore require a state-wide referendum within the original state. As regards international law, recent practice suggests that a franchise confined to the sub-community which would eventually secede is sufficient.[132] Membership of this sub-community cannot be defined by reference to citizenship, as the state in question is yet to be created. Instead, place of birth and place of residence are the key criteria available for voter qualification.[133] That resident natives should be allowed to vote in independence referendums is rather uncontentious. More controversial is the right to vote of non-resident natives, non-native residents and non-native non-residents.[134] Recent examples of independence referendums relied chiefly on residence as the decisive factor.[135] The Human Rights Committee, interpreting Article 25 of the ICCPR in the light of the right to self-determination, regarded nativity and residence as reasonable criteria to prove voters' ties to a given territory, as long as the residence period required is not excessively long.[136] The Venice Commission has criticised the 24-month residence requirement applied in the case of the 2006 Montenegrin referendum as excessive;[137] its Revised Guidelines on the Holding of Referendums recommend a period of not more than six months.[138]

4.4 Clarity of the Referendum Question

Voters will only be able to freely form an opinion and express their will if they can understand the question put to them. Meaningful deliberation requires that the question is intelligible, that only one single issue is addressed and that the consequences of a Yes/No vote are predictable.[139] According to the Venice Commission, '[t]he question put to the vote must be clear and comprehensible; it must not be misleading; it must be unbiased, not suggesting an answer;

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[130] For the application of these guarantees to an electoral dispute see eg *Iporre v Bolivia* Communication no 2629/2015 (UN Human Rights Committee, 28 March 2018).

[131] See *Gillot v France* Communication no 932/2000 (UN Human Rights Committee, 15 July 2002) paras 13.3, 13.16.

[132] See Joan Vergés-Gifra and others, 'Who is Entitled to Vote? And other Controversial Issues Surrounding Secession Referendums' (2017) <www.academia.edu/33608063> accessed 16 May 2022, 44–46.

[133] Şen, 'Sovereignty Referendums' (n 4) 214.

[134] ibid 214–22.

[135] See Vergés-Gifra and others (n 132) 44–46.

[136] *Gillot v France* (n 131) paras 11.1ff.

[137] Venice Commission, Opinion no 343/2005 (n 127) para 63.

[138] Venice Commission, 'Revised Guidelines on the Holding of Referendums' (n 121) para I.1.1(c)(3).

[139] Tierney (n 8) 227–28.

voters must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote'.[140] The Clarity Act, passed by the Canadian Parliament as a reaction to the Quebec referendum of 1995, gives the House of Commons the power to decide whether the question for a proposed referendum on secession is clear and specifies that any question not solely referring to secession is to be considered unclear.[141] In Scotland, the Electoral Commission decided to reformulate the question for the independence referendum since the one initially proposed by the Scottish government ('Do you agree that Scotland should be an independent country?') appeared too biased towards independence.[142]

4.5 International Observation

Since the 1990s, compliance of elections with international standards has been commonly monitored by international observers.[143] Members of the OSCE, for example, have committed to inviting international election observers and to following up promptly on their recommendations.[144] International oversight enhances the integrity and thus also the credibility of democratic processes.[145] In the case of sovereignty referendums, international observation has an even longer tradition: The referendums held in the wake of the First World War were organised and monitored by the League of Nations, those during the decolonisation process by the United Nations.[146] With regard to more recent independence referendums, international observation has equally been the general rule.[147] Thus, the requirement of international observation has established itself as an international standard for the legitimacy of a referendum.[148] The Venice Commission's Revised Guidelines on the Holding of Referendums state that international observers should be given the widest possible opportunity to monitor referendums, specifying that observation must not be confined to the referendum itself, but must also include the assessment of the question put to the referendum, the referendum campaign, the voter registration period and a potential signature collection period.[149]

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[140] Venice Commission, 'Revised Guidelines on the Holding of Referendums' (n 121) para I.3(1)(c).

[141] 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 (SC 2000, c 26) (Canada).

[142] Electoral Commission, 'Referendum on Independence for Scotland: Advice of the Electoral Commission on the Proposed Referendum Question' (2013) available at <www.electoralcommission.org.uk/sites/default/files/pdf_file/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf> accessed 16 May 2022.

[143] For a detailed account of the rise of election observation see Judith G Kelley, *Monitoring Democracy: When International Election Observation Works, and Why It Often Fails* (Princeton University Press 2012) 16–42.

[144] OSCE, Istanbul Document (1999) available at <www.osce.org/mc/39569> accessed 16 May 2022, para 25.

[145] See the 'Declaration of Principles for International Election Observation' and the 'Code of Conduct for International Election Observers' (2005) available at <www.ndi.org/DoP> accessed 16 May 2022.

[146] Yves Beigbeder, 'Referendum' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press 2011) paras 32–39.

[147] See eg the final report of the OSCE/ODIHR referendum observation mission to Montenegro (4 August 2006) available at <www.osce.org/odihr/elections/montenegro/20098> accessed 16 May 2022.

[148] Peters, 'Das Völkerrecht der Gebietsreferenden' (n 108) 118–19.

[149] Venice Commission, 'Revised Guidelines on the Holding of Referendums' (n 121) para II.4.2.

5 CONCLUSION

The rights to self-determination and political participation imply that important decisions concerning a people's political, economic, social and cultural destiny must be taken in a democratic procedure. Determining whether or not to secede from an existing state and create a new state clearly belongs to these types of decisions. The most appropriate procedure for taking such a decision is by holding a referendum. Accordingly, a (successful) referendum on the question of independence has come to be regarded as a necessary condition for achieving statehood. Apart from exceptional cases where popular support is unequivocally established by other means, a secession that is not supported by the people's will determined in a referendum will be contrary to customary international law. International law also provides rules on *how* an independence referendum ought to be conducted: It needs to be held in a peaceful environment, civil and political rights must be effectively protected, voter qualification must be based on reasonable criteria, the question must be clear, it should be monitored by international observers etc.

Deciding on independence by way of a popular vote is a complex undertaking, the outcome of which will be influenced by a number of contentious factors (determination of those allowed to vote, formulation of the question etc.).[150] This makes it all the more important that the rules for the conduct of independence referendums are designed carefully. The popular votes that led to the separation of the Swiss part of the Jura from the Canton of Bern may serve as an example of such a thoughtfully designed procedure. A series of referendums was held at all four levels of government (federal, cantonal, district, municipal) to decide, first, on the creation of the Canton of Jura and, next, the exact determination of its boundaries.[151] This process made it possible to also identify the will of the population within the various sub-entities and thus to largely prevent the creation of new, dissatisfied minorities within the new majority. Moving democratic decision-making to the lower levels helped defuse the conflict.[152]

Such a process inevitably takes time. In the case of the Jura, the first referendum was held in 1970, and one municipality has, at the time of writing, still not completed its separation from the Canton of Bern.[153] This should not be regarded as a problem. On the contrary, as the Canadian Supreme Court has pointed out with regard to the secession of Quebec, 'a functioning democracy requires a continuous process of discussion'.[154] In some situations, it may even make sense to submit, after the expiry of a reasonable period of time, an issue previously

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[150] See also Maya Hertig Randall, 'Démocratie directe et partition d'Etats: réflexions sur l'exercice du pouvoir déconstituant' in Andrea Good and Bettina Platipodis (eds), *Direkte Demokratie: Herausforderungen zwischen Politik und Recht: Festschrift für Andreas Auer zum 65. Geburtstag* (Stämpfli 2013) 339.

[151] See Glaser (n 42) 465–73.

[152] ibid.

[153] After a previous referendum had been declared invalid by the Administrative Court of the Canton of Bern, Moutier voted to join the Canton of Jura in March 2021. For the result, which is yet to be fully implemented, see <https://moutier.ch/app/uploads/2021/03/res-vote-Appart-21.pdf> accessed 16 May 2022.

[154] *Secession Reference* (n 53) para 68.

decided by the people to a second referendum.[155] That nothing is decided forever is, after all, one of the very characteristics of a democracy.

[155] The Venice Commission's 'Revised Guidelines on the Holding of Referendums' (n 121) explicitly provide for this possibility in para III.4.