SELF-DETERMINATION AS A KEY PRINCIPLE OF INTERNATIONAL ORDER

The progressive development of international law responds to economic, social and political needs. New conventions and Security Council resolutions impact international law, as does the actual practice of States, which generates precedents**.** *Faits accomplis* evolve into law. *De facto* States that separate from other States function within the international community as State entities, even if they do not enjoy international recognition -- *ex factis oritur jus.*

While the UN Charter serves as a kind of world Constitution and article 103 is unmistakable in stipulating that the Charter prevails over all other treaties, the political narrative does not always conform to this legality. There is a degree of “fragmentation” in international law, which States invoke self-servingly to apply international law selectively, violating general principles of law -- not by accident, but deliberately and calculatingly, just to see whether they can get away with it. Any observer will confirm that the application of international law *à la carte* was common in the past, as it is in the present. In the absence of effective enforcement mechanisms, States will continue to breach international law with total impunity, even in matters of *jus cogens* like flouting the prohibition of the use of force laid down in article 2(4) UN Charter.

In the international law of the 21st century, the right of self-determination plays and will continue to play a crucial role. It is a key principle of a peaceful, democratic and equitable international order.

My 2014 report to the General Assembly[[1]](#footnote-1) is devoted entirely to the proposition that the realization of the right of self-determination is a vital conflict-prevention strategy. The report demonstrates that countless wars since 1945 found their origin in the unjust denial of self-determination, and argues that the United Nations should have exercised its responsibilities under Chapter VII of the UN Charter and adopted preventive measures to avert the outbreak of hostilities that have endangered local, regional and international peace. Pursuant to the UN’s overarching objective of achieving sustainable peace, the UN could and should offer its good offices to facilitate dialogue and, where appropriate, organize self-determination referenda. It reflects badly on the United Nations, and on the international community in general, that self-determination referenda in Ethiopia/Eritrea, East Timor, and Sudan were only organized after tens of thousands of human beings had been killed.

Rights holders of self-determination are all peoples. Common Article 1(1) of the International Covenant on Civil and Political Rights and of the Covenant on Economic, Social and Cultural Rights, stipulates that “All peoples have the right of self-determination.” Neither the text nor the *travaux preparatoires* limit the scope of “peoples” to those living under colonial rule or otherwise under occupation. Pursuant to article 31 of the Vienna Convention on the Law of Treaties, “All peoples” means just that -- and cannot be arbitrarily restricted. Admittedly, the concept of “peoples” has never been conclusively defined, notwithstanding its frequent use in United Nations fora. Participants at a UNESCO expert meeting on self-determination in 1998 endorsed what has been called the “Kirby definition”, recognizing as a “people” a group of persons with a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, or common economic life. To this should be added a subjective element: the will to be identified as a people and the consciousness of being a people. A people must be numerically greater than just “a mere association of individuals within the State”. Their claim becomes more compelling if they have established institutions or other means of expressing their common characteristics and identity. In plain language, the concept of “peoples” embraces ethnic, linguistic and religious minorities, in addition to identifiable groups living under alien domination, or under military occupation, and indigenous groups who are deprived of autonomy or sovereignty over their natural resources.

Pursuant to common article 1(3) of the Covenants, duty bearers of the right of self-determination are all States parties to the Covenants, who are not merely prohibited from interfering with the exercise of the right, but “shall promote” its realization proactively. In other words, States cannot pick and choose according to their whims and do not have the prerogative to grant or deny self-determination claims *ad libitum*. They must not only respect the right, but implement it. Moreover in modern international law, self-determination is an *erga omnes* commitment stipulated in numerous articles of the UN Charter and in countless Security Council and General Assembly resolutions. The empowerment of peoples to enjoy human rights without discrimination and to exercise a degree of self-government is crucial for national and international stability. Otherwise, a significant potential for conflict remains.

Even though self-determination has emerged as a *jus cogens* right, superior to many other international law principles, including territorial integrity, it is not self-executing. There have been many legitimate claimants to the right of self-determination who have seen their right denied with impunity by occupying powers. Others possessing all the elements of entitlement have valiantly fought for their culture and identity and suffered disenfranchisement and even genocide. Still others did succeed in obtaining their independence, but only following war in which hundreds of thousands to millions of human beings had died.

Whether some political leaders in the world like it or not, *de facto* states can and do assert democratic legitimacy, since their populations have acted in pursuance of the right of self-determination, and are entitled to the full protection of the international human rights treaty regime. A solution to the impasse can only be through peaceful negotiation, since the use of armed force against self-determination would violate numerous international treaties, including the UN Charter, the human rights Covenants, and the Geneva Conventions. It would be the *ultima irratio.* It is important to underline that there are no “legal black holes” when it comes to human rights, and that the human rights treaty regime prevails in conflict zones and the populations of all *de facto* States enjoy protection under the customary international law of human rights.

Of course, we must not let out of sight that some genuine aspirations to self-determination are supported, manipulated or exploited by neighbour states or by foreign powers with a view to encouraging separatism. Some states actively work to encourage separatism elsewhere. Divide and rule is still a tool in international power politics. But rights cannot be denied because of the abuse potential. *Abusus non tollit usum!*

The United Nations could make a considerable contribution to durable peace and conflict-prevention by convening an international conference to revisit the situation of *de facto* states, with a view to regularizing their status, so that their populations do not remain indefinitely in limbo. Indeed, we owe to these populations that they should be empowered to access the full benefits of being members of the UN family.

Criteria for peacefully and democratically invoking self-determination

My 2014 report to the General Assembly formulates a number of criteria that should be taken into account when addressing self-determination issues. Bearing in mind that the international community will have to address, rather sooner than later, the aspiration of so many peoples to self-determination, it is appropriate to review some of the norms that should be applied.

Every process aimed at self-determination should be accompanied by participation and consent of the peoples concerned. It is possible to reach solutions that guarantee self-determination within an existing State entity, e.g. autonomy, federalism and self-government.[[2]](#footnote-2) If there is a compelling demand for separation, however, it is most important to avoid the use of force, which would endanger local, regional and international stability and further erode the enjoyment of other human rights. Therefore, good-faith negotiations and the readiness to compromise are necessary; in some cases, these could be coordinated through the good offices of the Secretary-General or under the auspices of the Security Council or the General Assembly.

To address the multiple and complex issues involved in achieving self-determination, a number of factors have to be evaluated on a case-by-case basis. In this context, it would be useful if the General Assembly were to request the International Court of Justice to issue advisory opinions on the following questions: What are the criteria that would determine the exercise of self-determination by way of greater autonomy or independence? What role should the United Nations play in facilitating the peaceful transition from one State entity to multiple State entities, or from multiple State entities to a single entity?

The right of self-determination is not extinguished with lapse of time because, just as the rights to life, freedom and identity, it is too important to be waived. It is not valid to say that the “people” validly exercised self-determination 50 or 100 years ago. That would mean that one generation could deprive future generations of a *jus cogens* right. Self-determination must be lived every day.

All manifestations of self-determination are on the table: from a full guarantee of cultural, linguistic and religious rights, to various models of autonomy, to special status in a federal State, to secession and full independence, to unification of two State entities, to cross-border and regional cooperation.

The implementation of self-determination is not exclusively within the domestic jurisdiction of the State concerned, but is a legitimate concern of the international community.

Neither the right of self-determination nor the principle of territorial integrity is absolute. Both must be applied in the context of the Charter and human rights treaties so as to serve the purposes and principles of the United Nations.

The principle of territorial integrity must be understood as in Article 2(4) of the UN Charter and as in countless UN Resolutions, including 2625 on Friendly Relations and 3314 on the definition of the crime of aggression. The principle of territorial integrity is an important element of international order, as it ensures continuity and stability. But it is a principle of *external* application, meaning that State A cannot encroach on the territorial integrity of State B. The principle is not intended for internal application, because this would automatically cancel out the *jus cogens* right of self-determination. Every single exercise of the right of self-determination that results in secession has entailed an adjustment to the territorial integrity of the previous State entity. There are too many precedents to count.

It is undisputable that international law is not a static concept and that it continues to evolve through practice and precedents. The independence of the former Soviet republics and the secession of the peoples of the former Yugoslavia created important precedents for the implementation of self-determination. These precedents cannot be ignored when modern self-determination disputes arise. All these peoples have the same human rights and must not be discriminated against. As in the case of the successful claimants, these peoples also unilaterally declared independence. There is no justification whatever deny them recognition by applying self-determination selectively and making frivolous distinctions that have no base in law or justice.

Unquestionably, the principle of territorial integrity was significantly weakened when the international community accepted the destruction of the territorial integrity of the Soviet Union by recognizing the unilateral declaration of independence of its parts, ditto with regard to the unilateral declarations of the Yugoslav republics.

In any case, the principle of territorial integrity cannot be used as a pretext to undermine the State’s responsibility to protect the human rights of the peoples under its jurisdiction. The full enjoyment of human rights by all persons within a State’s jurisdiction and the maintenance of peaceful coexistence among States are the principal goals to achieve. Guarantees of equality and non-discrimination are necessary for the internal stability of States, but non-discrimination alone may not be enough to keep peoples together when they do not want to live together. The principle of territorial integrity is not sufficient justification to perpetuate situations of internal conflict that may fester and erupt in civil war, thus threatening regional and international peace and security.

A consistent pattern of gross and reliably attested violations of human rights against a population negates the legitimacy of the exercise of governmental power. In case of unrest, dialogue must first be engaged in the hope of redressing grievances. States may not first provoke the population by committing grave human rights abuses and then invoke the right of “self-defence” in justification of the use of force against them. That would violate the principle of estoppel (*ex injuria non oritur jus*), a general principle of law recognized by the International Court of Justice. Although pursuant to article 51 UN Charter all States have the right of self-defence from armed attack, they also have the responsibility to protect the life and security of all persons under their jurisdiction. No doctrine, certainly not that of territorial integrity, can justify massacres or derogate from the right to life.

Although the ”remedial theory” of self-determination may have some appeal, especially if one considers the universal desire for justice and the general rejection of impunity for gross human rights violations, it is difficult to apply “remedial self-determination”, because there is no objective measuring-stick and no one has defined where lies the threshold of violation under which self-determination would not be envisaged and above which it would require separation as *punishnment*. It is far more practical to see self-determination as a fundamental human entitlement, not dependent on anyone’s wrongdoing. It is a stand-alone right. All peoples have the right because they are peoples with their own culture, identity, traditions – not because someone committed a crime or otherwise violated international law. The right attaches to peoples by their very ontology. Similarly, the doctrine of “responsibility to protect” does not help our analysis, because R2P is highly subjective and can be easily abused, as the debate in the General Assembly on 23 July 1999 amply demonstrated[[3]](#footnote-3).

Secession presupposes the capacity of a territory to emerge as a functioning member of the international community. In this context, the four statehood criteria of the Montevideo Convention on the Rights and Duties of States (1933) are relevant: a permanent population; a defined territory; government; and the capacity to enter into relations with other States. The size of the population concerned and the economic viability of the territory are also relevant. A democratic form of government that respects human rights and the rule of law strengthens the entitlement. The recognition of a new State entity by other States is desirable but it has declaratory, not constitutive, effect.

When a multi-ethnic and/or multi-religious State entity is broken up, and the resulting new State entities are also multi-ethnic or multi-religious and continue to suffer from old animosities and violence, the same principle of secession can be applied. If a piece of the whole can be separated from the whole, then a piece of the piece can also be separated under the same rules of law and logic. The main goal is to arrive at a world order in which States observe human rights and the rule of law internally and live in peaceful relations with other States.

The aspiration of peoples to fully exercise the right of self-determination did not end with decolonization. There are many indigenous peoples, non-self-governing peoples and populations living under occupation who still strive for self-determination. Their aspirations must be taken seriously for the sake of conflict prevention. The post-colonial world left a legacy of frontiers that do not correspond to ethnic, cultural, religious or linguistic criteria. This is a continuing source of tension that may require adjustment in keeping with Article 2 (3) of the Charter. The doctrine of *uti possidetis* is obsolete and its maintenance in the twenty-first century without possibility of peaceful adjustments may perpetuate human rights violations. In any event, *uti possidetis* is clearly incompatible with self-determination, and any treaty pretending to maintain it against self-determination would be void under article 64 Vienna Convention on the Law of Treaties[[4]](#footnote-4).

Pursuant to the UN Charter, the United Nations has a crucial role to play, and States should appeal to the Secretary General to take the initiative and assist in the preparation of models of autonomy, federalism and, eventually, referenda. A reliable method of determining public opinion and avoiding manufactured consent must be devised so as to ensure the authenticity of the expression of public will in the absence of threats of or the use of force. Long-standing historical links to a territory or region, religious links to sacred sites, the consciousness of the heritage of prior generations as well as a subjective identification with a territory must be given due weight. Agreements with persons who are not properly authorized to represent the populations concerned, and agreements with puppet representatives are *a fortiori* invalid. In the absence of a process of good-faith negotiation or plebiscites, there is a danger of armed revolt.

In order to ensure sustainable internal and external peace in the twenty-first century, the international community must react to early warning signs and establish conflict-prevention mechanisms. Facilitating dialogue between peoples and organizing referenda in a timely fashion are tools to ensure the peaceful evolution of national and international relations. Inclusion of all stakeholders must be the rule, not the exception

In conclusion, let us celebrate the implementation of self-determination of peoples as an expression of democracy, as indeed democracy is a form of self-determination**.**

**I thank you.**

**Professor Dr. Alfred de Zayas, UN Independent Expert on the Promotion of a Democratic and Equitable International Order, Geneva, Switzerland February 2018**

1. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/497/95/PDF/N1449795.pdf?OpenElement [↑](#footnote-ref-1)
2. See the rationale for the judgement of the Supreme Court of Canada concerning Québec, available from www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=25506. [↑](#footnote-ref-2)
3. See my 2012 report to the General Assembly, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/457/95/PDF/N1245795.pdf?OpenElement>, para 14. [↑](#footnote-ref-3)
4. https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf [↑](#footnote-ref-4)