

FOUR QUESTIONS ON CATALONIA¹

- DOES CATALONIA HAVE THE RIGHT TO SELF DETERMINATION?

Every people has the right of self-determination. The UN Charter (Article 1(2), 55 and chapter XI) affirm this right. Article 1 common to 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. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Rights holders are "all peoples", and not just persons living under colonialism or foreign occupation. Nothing in the Covenant limits the application to any specific group of rights-holders. Accordingly, the Catalans, the Kurds, the Saharaouis, the Palestinians, the Tamils, the Igbos of Biafra all have a legitimate claim to self-determination, which may be expressed in the form of autonomy in a federal state, or by means of secession and independence.

The formal conditions of statehood are four: population, defined territory, government and the capacity to enter into relations with other States (see Montevideo Convention of 1933). Recognition by other States is not constitutive of statehood, but only declaratory. Nevertheless, in order to function properly in the international community, recognition is desirable.

While many peoples today aspire to the realization of their positive right to Self-determination, the implementation of the right depends on the respect by States of their obligations under the UN Charter and ICCPR/ICESCR. Indeed, the duty-bearers of the right are the States, as stipulated in article 1(3) of ICCPR/ICESCR : "The States Parties to the present Covenant...shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." This obligation in positive international law has been violated and continues to be violated by numerous States who refuse to allow referenda (e.g. Western Sahara, Kashmir), or who have crushed by force of arms the aspiration of the Kurds of Turkey and Iraq, the Tamils of Sri Lanka, the Igbos of Biafra (Nigeria) to shape their own futures.

As experience has taught us, the right of self-determination is not self-executing. It was achieved peacefully when Norway separated from Sweden, when Iceland separated from Denmark, when Slovakia separated from the Czech Republic. But millions of human lives were lost in the efforts of many peoples throughout the world to obtain their rights, including the Irish, who struggled long to obtain their independence from England (1922), Bangladesh from Pakistan (1971), Slovenia, Croatia, Bosnia and Herzegovina, Kosovo from the former Yugoslavia.

My 2014 report to the General Assembly A/69/272 is entirely devoted to the theory and practice of self-determination and argues that the prompt realization of the right of self-determination is an effective conflict-prevention strategy. For this reason, it would be necessary for the European Commission, the OSCE, the United Nations to offer their good offices in mediating current and future self-determination disputes. They should be called upon to organize referenda, which should be monitored by international observers, including the Carter Center.

¹ Written in my capacity as Professor of International law and not as UN independent expert.

In my report I made it clear that international law has seen a considerable development since the early ideas of Woodrow Wilson expressed in his 14 Points, since the League of Nations minority protection system, since the Atlantic Charter, the UN Charter, decolonization process and the dissolution of the Soviet Union and Yugoslavia. Those who pretend that self-determination is limited to decolonization are way behind the times.

Two issues must be kept in mind. First: The right of self-determination is a right of peoples, and not a prerogative of States to grant or deny it. As far as who constitutes a "people", certainly the Catalans are a "people", characterized by their own history, culture, language, traditions, cuisine etc. -- all humanistic values recognized by UNESCO

Second: the principle of territorial integrity as understood in the UN Charter and in numerous GA resolutions including 2625 and 3314, is primarily a principle with external application. In other words, State A is forbidden from encroaching on the territorial integrity of State B. It should not be understood as applying internally, because that would completely hollow out the right of self-determination, which by now has emerged as a *ius cogens* norm (peremptory international law).

Besides, let us remember that European states were the first to recognize the unilateral declarations of independence of Slovenia, Croatia etc. And with respect to Kosovo, the US and NATO carried out an illegal assault on Yugoslavia in 1999, against a sovereign State and without any resolution of the Security Council. Not only was the NATO aggression against Yugoslavia illegal, most pertinently it was conducted to destroy its territorial integrity. The 2010 advisory opinion of the International Court of Justice stating that the unilateral declaration of independence of Kosovo did not violate international law must also be taken into account. Once the genie is out of the bottle, who can force it back in?

Hence, it is bizarre to hear voices in Brussels who continue invoking the principle of territorial integrity to deny the Catalans their right of self-determination. This is one of the many anomalies of the modern world, where international law is being applied *à la carte*.

Prevention of violence is all the more important today, when local and regional conflicts can expand into international conflicts. In this context, article 39 of the UN Charter should be invoked, since there is a current threat to local, regional and international peace.

- LEGALITY: Does the Spanish constitution deny the right of self-determination?

The pillars of the European Union are indeed democracy, the rule of law and human rights. The current situation in Spain raises issues of compatibility with the Lisbon Treaty and multiple other human rights issues. Indeed, self-determination is a foundational principle of the UN Charter and its scope cannot be unilaterally restricted. The issue should be brought before the European Court of Justice in Luxembourg.

I am neither Spanish nor Catalan, nor an expert in Spanish constitutional law. At present I am retired from the practice of law, which I practised as a member of the New York and Florida Bar Associations. I have, however, read the Spanish constitution and consider that pursuant to articles 10(2) and 96 of the Constitution, all laws in Spain must conform with international law and should be interpreted in a way not to frustrate the object and purpose of international treaties, including the UN Charter, the ICCPR and ICESCR. Spain can not opt out of articles 1 and 55 of the UN Charter, but it could have formulated a reservation or interpretative declaration concerning the scope of application of articles 1 ICCPR and ICESCR, which Spain did not do at the time of their ratification.

Since the Spanish constitution guarantees human rights, the apparent violations of the rights of freedom of expression (Art. 19 ICCPR), including by holding a referendum, freedom of peaceful assembly and association (Arts. 21-22), and right to participate in the conduct of public affairs (Art 25) should be tested before the United Nations Human Rights Committee. Individual complaints can be submitted to the Human Rights Committee pursuant to the Optional Protocol to the ICCPR, which Spain ratified. The issues should also be brought before the European Court of Human Rights and the Venice Commission. The denial of the right of the Catalans to hold a referendum is in itself a serious denial of democracy. It manifests *demophobia* -- fear of the people -- fear that the people might decide differently than the government would like. This is unworthy of a modern European State.

- CATALANS: What should the Catalan government have done differently, and what should they do at this point?

Who am I to tell the Catalans what to do? I respect the democratic ethos applicable in all European countries and regions. I think that holding a referendum was an eminently democratic act which should never have been forbidden. Bearing in mind the tense atmosphere of the past year, perhaps it would have been prudent to postpone the referendum to 2018 and to continue negotiating with Madrid for a *modus vivendi*. Personally I think that a referendum with considerable consequences for the Catalan and Spanish peoples should have been organized by the Catalan authorities in cooperation with Madrid and with international observers. Moreover, a high level of participation should have been required (perhaps 70%) and a qualified majority of 2/3 of yes votes. A referendum held under appropriate conditions should have been welcomed by the European Commission as the exercise of democracy by a democratic people. Let us not forget that Catalans are Europeans and they have a right to expect solidarity from the rest of Europe. As far as I understand the situation -- and I have read the arguments on all sides and consulted reliable sources -- *audiatur et altera pars* -- it appears that thus far the Catalan authorities have conducted themselves in a peaceful, democratic manner, which should be honoured by the European Commission. Crushing the self-determination movement now in Catalonia may provide temporary respite, but it is hard to believe that an aspiration for self-determination dating back to the Treaty of Utrecht of 1713 -- and even before -- will simply disappear.

- THE EU: Why is the EU behaving the way it is?

The behaviour of the European Union is regrettable. On 3 November an open letter to Jean-Claude Juncker signed by 188 academics and politicians, including Professor Nicolas Levrat, Chair of the International Law Department of the University of Geneva, expressed concerns over the inaction of the EU in what is happening and calling upon the EU to mediate. This irresponsible silence, not to say connivance, is surprising, considering the activism of Brussels in the past concerning alleged violations of human rights in Austria, Poland, Slovakia, Hungary, etc. In my modest opinion, what is happening in Spain is far more serious to the credibility of the EU and cannot be easily explained.

The Spanish government must have made many promises to other countries of the European Union to persuade them to either be silent or to support Madrid's policies. The former Spanish Foreign Minister Garcia-Margallo said as much.

We read in the press about the potential "domino effect" of Catalonian independence. Who will be next? The Bretons? Corsica? the Germans of Southern Tyrol? The Sorbs of Germany? The Lombardians and Venetians? The Albanians of Macedonia? Who knows?

But what cannot be tolerated is that the principles of the European Union -- namely democracy, rule of law and human rights, seem to be sacrificed on the altar of expediency, economic stability, geopolitical considerations etc.

What more democratic example than that given by the Scots in 2014 when they had their referendum and decided -- after all -- to stay in the United Kingdom.

Professor Alfred de Zayas holds a Juris Doctor from Harvard and a Dr. phil. in History from the University of Göttingen in Germany. He is a double national (US and Switzerland) and has taught in numerous universities in the United States, Canada, Spain, France, Germany and Tunisia. He is the author of 9 books on legal and historical matters and co-author of the manual United Nations Human Rights Committee Case Law, N.P. Engel Kehl/Strasbourg 2009 (together with Judge Jakob Möller). He is a retired senior lawyer with the United Nations, was Secretary of the UN Human Rights Committee and chief of the Petitions section at the Office of the High Commissioner for Human Rights.