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* that evolve into law, *de facto* States that separate from other States and 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 and 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] 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

[1] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/497/95/PDF/N1449795.pdf?OpenElement

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, notably the Kurds, the Sahraouis, the Palestinians, the Kashmiris. Others possessing all the elements of entitlement, including the Igbos of Biafra and the Tamils of Sri Lanka, have valiantly fought for their culture and identity and suffered disenfranchisement and even genocide. Others, like the Bangladeshis, did succeed in obtaining their independence from Pakistan, but they had to fight a nearly genocidal war in 1971, with estimates of civilian deaths ranging from 300,000 to three million human beings.

Over the past decades, some peoples have achieved self-determination through effective separation from the State entities with which they had hitherto been associated, but their international status remains inchoate because of the political bickering among the great powers and consequent lack of international recognition, among them the Russian-Ukrainian entities of Lugansk and Donetsk, the Republic of Pridnestronia (Transnistria-Moldavia), the Republic of Artsakh (Nagorno Karabagh), Abkhazia, and Southern Ossetia. Another case concerns the separation of the Crimea from the Ukraine by virtue of a referendum and a unilateral declaration of independence by the Crimean Parliament. Although this expression of self-determination with explicit reference to the Kosovo precedent did not receive international recognition, Crimean independence was followed by another act of self-determination – its formal application for reunification with Russia, which was granted by the Russian Duma on 20 March 2014 and held to be constitutional by the Russian Constitutional Court. With or without international recognition, the Crimean people are today Russian citizens. and it is not conceivable that Crimea will ever be separated from Russia, except through a major international war, a highly unlikely scenario.

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 Red Cross 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.

Different from the above is the situation in the Turkish Republic of Northern Cyprus, because this de facto State emerged out of an illegal invasion of the island of Cyprus by Turkey in 1974, in violation of the UN Charter and UN Security Council Resolutions, and accompanied by war crimes and crimes against humanity, including the expulsion of the native Greek-Cypriot population, followed by the illegal settlement of Anatolia-Turks, who obviously are not a "people" entitled to claim the right of self-determination in Cyprus.

A very incomplete list of peoples who have expressed aspirations of self-determination and to international recognition include the Tibetans, the Catalans, the Corsicans, the Austrians of the Southern Tyrol, the Veneto-Italians, the Trieste population, the anglophone Cameroonians, many minority groups in post-colonial Africa, the Mapuches of Chile and Argentina, the peoples of Rapa Nui, West Papua, the Molukans, Aceh-Sumatrans, etc.

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 them to these populations that they should be empowered to access the full benefits of being members of the UN family. We remember that for many decades the two Koreas were outside the UN system, because one power coalition would block one candidate, while the other coalition would block the other. The impasse was broken in 1991 when both countries were simultaneously welcomed into the UN pursuant to Security Council Resolution 702. Similarly, neither North Vietnam nor South Vietnam had ever achieved UN membership. This happened only after the reunification of North and South Vietnam and formal UN resolutions in 1977

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] 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. It is not possible to say yes to the self-determination of Estonia, Latvia, Lithuania, Slovenia, Croatia, Bosnia and Herzegovina, Kosovo, but then say no

[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.

to the self-determination of the people of Abkhazia, Southern Ossetia or Nagorno Karabagh. 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. Most significantly, in 1999 NATO countries undertook a frontal attack on the territorial integrity of the Federal Republic of Yugoslavia, when it bombarded Yugoslavia without any resolution of the UN Security Council under Chapter VII. This massive violation of international law has remained unpunished to this day. But one clear consequence of that war was the tacit consent to the abandonment of the sacrosanct principle of territorial integrity.

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].

[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.

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].

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**.**

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[4] https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf