Chapter 5

THE RIGHT OF SELF-DETERMINATION OF PEOPLES

"In my view, it is very important to think of self-determination *as a process. The process of achieving self-determination is endless.* This is true of *all* peoples not only indigenous peoples. Social and economic conditions are ever-changing in our complex world, as are the cultures and aspirations of all peoples. For different peoples to be able to live together peacefully, without exploitation or domination—whether it is within the same state or in two neighboring states—they must continually renegotiate the terms of their relationships."

ERICA DAES
UN Special Rapporteur on Indigenous Peoples[i]

THE REALIZATION OF THE RIGHT OF SELF-DETERMINATION OF PEOPLES AS A CONFLICT-PREVENTION STRATEGY[II]

During my six years as independent expert, I repeatedly emphasized the importance of implementing the right of self-determination of peoples as an effective conflict-prevention strategy. Alas, since the Second World War and the Nuremberg Trials hundreds of wars have had their origin in the unjust denial of the right of self-determination of peoples.

The world witnessed the criminal efforts of colonial powers to hold on to their colonies, the continuing exploitation of indigenous peoples and the looting of their resources, the oppression by occupying powers over native populations, the implantation of settlers in order to change the demographics of a territory, the suppression of languages, cultural manipulations tantamount to cultural-destruction, the erasing of historical memory, and the adamant denial of autonomy or secession to peoples who had and have a legitimate right to determine their own future.

In the years 2012–18, I consistently demanded that the right of self-determination be included as a permanent agenda item of the Human Rights

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i "Striving for Self-Determination for Indigenous Peoples," in *In Pursuit of the Right to Self-Determination,* Y. N. Kly and D. Kly, Clarity Press, 2001.

ii Updated version of the speech delivered at the European Parliament on 27 February 2018. https://www.ohchr.org/EN/Issues/IntOrder/Pages/AlfredDeZayas.aspx

Council, as it had been a permanent item in the agenda of the Commission on Human Rights. I advocated the creation of the mandate of a new special Rapporteur or a working group on the right of self-determination. Further, I proposed that the General Assembly create the function of a Senior Advisor of the Secretary-General on the issue of self-determination with an "early warning" mandate to investigate grievances that might develop into a threat to local, regional or international peace.

I argued that it is the function of the United Nations to facilitate the exercise of self-determination of peoples, to organize and monitor self-determination referenda at the earliest possible time, and not to wait until hundreds of thousands of persons have lost their lives and livelihoods in senseless struggles, reprisals and counter-reprisals. Indeed, the UN-organized referenda in Ethiopia/Eritrea, Timor Leste and Sudan could have been held much earlier. Today referenda are needed inter alia in Kurdistan, Kashmir, Western Sahara, Southern Yemen, Biafra, the Cameroons, Equatorial Guinea, Sri Lanka, West Papua, the Ryukyu islands (Okinawa, Liuqiu), Rapa Nui, the Mapuche territories in Chile, the Amerindian territories in the Amazon basin, but also in established European States, where the Catalans of Spain, the Scots of the United Kingdom, the Corsicans of France, the Armenians of Nagorny Karabagh and the Russians of Donetsk and Lugansk are pursuing legitimate aspirations.

Indeed, the right of self-determination of peoples did not expire with the end of colonialism, as we know from the emergence of new states including Estonia, Latvia, Lithuania, Georgia, Azerbaijan, Slovenia, Croatia, Bosnia and Herzegovina, etc. And even the decolonization of Africa and Asia did not deliver results valid in all eternity. In 1971 Bangladesh split from Pakistan after a bloody war. But other peoples were not successful, and their claims were no less valid. The Igbos and Ogonis of Biafra struggled to gain their independence from Nigeria, the Tamils from Sri Lanka, suffering enormous human losses.

In 2017 the General Assembly adopted resolution 71/292 requesting an advisory opinion from the International Court of Justice concerning the incomplete decolonization of Mauritius by the United Kingdom. On 25 February 2019 the Court ruled that the decolonization of Mauritius was improper and that the Chagos Islands should be returned to Mauritius.[i] *The Bubi population of Bioko Island (Fernando Po), formerly a Spanish colony, have made submissions to the Commission on Human Rights*[ii] *and Human Rights Council demanding a*

i https://www.icj-cij.org/en/case/169, https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf

ii https://www.un.org/press/en/1998/19980324.HRCN824.html
https://infogalactic.com/info/Bubi_people

review of their "decolonization," which merged them, without their consent, to another former Spanish colony, Equatorial Guinea.[i]

The Alaskan indigenous population and the Hawaiian natives have made strong submissions to the Human Rights Committee, arguing that the referenda organised by the United States in 1958 had been fraudulent and that the adoption of General Assembly Resolution 1469, releasing the United States from its obligations under Chapter XI of the UN Charter, was therefore fundamentally flawed and should be revisited.[ii] *During my 6 years as UN independent expert I participated in numerous panels and side-events at the United Nations concerning the right of self-determination of the native peoples of Alaska and Hawaii. I also issued expert statements that were quoted in domestic United States jurisdictions.*[iii]

In this connection it is important to clarify that the exercise of the right of self-determination is not identical with secession and should not be the cause of panic by countries that want to maintain their territorial integrity. On the other hand, it is immoral and contrary to the UN Charter and Article 1 of the International Covenant on Civil and Political Rights to pretend that the issue of self-determination is closed and that future aspirants are simply out of luck. Self-determination may also express itself in the form of autonomy, federalism or incorporation into another state entity, but first it is necessary to know what the peoples genuinely want. That is why UN-organized and monitored referenda would contribute significant "added value" in the common effort to ensure world peace while promoting social and cultural justice.

In my 2013 report to the General Assembly I made a number of recommendations, which were commented upon by several States. Paragraph 69(n) of the report contains this pragmatic proposal, which thus far the General Assembly has not implemented:

> The General Assembly may consider revisiting the reality of self-determination in today's world and refer to the Special Committee on Decolonization and/or other United Nations instances communications by indigenous and unrepresented peoples wherever

i https://www.amnesty.org/download/Documents/140000/afr240011999en.pdf

ii https://talesofhawaii.net/2020/10/17/5949/
https://www.transcend.org/tms/2020/04/a-call-for-review-of-the-historical-facts-surrounding-the-unga-resolution-of-1959-that-recognized-attainment-of-self-government-for-hawaii/
http://www.hawaiiankingdom.net/news

iii https://www.courthousenews.com/alaskan-native-tribes-face-health-and-government-challenges-with-fishing-season/
https://www.courthousenews.com/wp-content/uploads/2020/06/Alfred-de-Zayas-April-30-Memo-Alaska.pdf
https://nation.com.pk/06-Oct-2020/okc-hold-virtual-conference-on-sidelines-of-un-hrc
https://www.peaceforokinawa.org/news/un-official-dr-alfred-de-zayas-supports-hawaiis-independence

> they reside, inter alia, in Alaska, Australia, Canada, Chile, China, the Dakotas, French Polynesia, Hawaii, Kashmir, the Middle East, the Moluccas, New Caledonia, Northern Africa, Sri Lanka and West Papua, with reference to Chapter XI of the Charter of the United Nations. The General Assembly may also consider amending its rules and procedures to allow for the participation of indigenous and non-represented peoples. Meanwhile, the Assembly should urge States to implement the Declaration on the Rights of Indigenous Peoples. It should ensure that indigenous, non-represented peoples, marginalized and disempowered peoples, and peoples under occupation have a genuine opportunity to participate in decision-making processes.[i]

In February 2018 I spoke on two occasions at the European Parliament in connection with the self-determination aspirations of the Catalans and of the Armenian population of Nagorno Karabagh (Artsakh).[ii] Of my 14 reports to the Human Rights Council and the General Assembly, it was my 2014 report to the GA that has had the most impact and has been invoked by numerous peoples in all five regions of the world. What follows is an updated version of my speeches before the European Parliament and excerpts from my 2014 report to the General Assembly, A/69/272. —AdeZ

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International law is not static but dynamic. It is a work in progress, guided by the United Nations Charter and its article 103, the supremacy clause. Some principles of international law, however, constitute peremptory rules, including the prohibition of the use of force, the prohibition of invading and occupying foreign territory, the prohibition of piracy, the prohibition of torture, and the principle of non-refoulement. The facts resulting from violation of *jus cogens* rules have no legitimacy and do not create new law, *ex injuria non oritur jus.*

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. Sometimes the facts on the ground, even *faits accomplis* by peoples or by States that did not conform to international norms at the time of their occurrence, can evolve into law, if recognized by the international community

i https://undocs.org/A/68/284

ii https://www.ohchr.org/EN/Issues/IntOrder/Pages/AlfredDeZayas.aspx Presentation to the Brussels conference on self-determination, Centre for European and Policy Studies & European Parliament," 26-27/02/2018

and if they do not violate *jus cogens* rules. For instance, the unilateral declarations of independence and the subsequent secession of Estonia, Latvia, Lithuania, Ukraine, Slovenia, Croatia, Bosnia and Herzegovina, notwithstanding the fact that the constitutions of the Soviet Union and of Yugoslavia did not allow secession by unilateral declaration, resulted in the emergence of these States as United Nations members. Other States that separate from the mother country and function within the international community as State entities, even if they do not enjoy international recognition, are considered *de facto* States, among them Kosovo, Abkhazia, Taiwan.

While the UN Charter serves as a kind of world Constitution, 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 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 of peoples plays and will continue to play an ever- increasing role. The international community should be ready to address self-determination grievances before they can grow into local, regional or international conflicts and thereby endanger the peace and security of humankind. Indeed, there are hundreds of peoples who have legitimate aspirations to exercise internal or external self-determination and the unjust denial of their right will lead to violence, as has happened in all continents. Indeed, the right of self-determination did not end with the partial achievement of decolonization in the 1960s and 1970s. Moreover, the sequels of colonialism, the irrational drawing of colonial frontiers, the perfunctory application of the obsolete rule of *uti possidetis* and the consequent emergence of artificial minorities will quite naturally lead to legitimate claims for adjustment in the name of ethnic, religious and historical considerations. It is time to recognize that self-determination is a *conditio sine qua non* for the establishment of a peaceful, sustainable, democratic and equitable international order.

My 2014 report to the General Assembly[1] was 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 VI of the UN Charter

to facilitate mediation and negotiation in a timely basis and under Chapter VII to adopt preventive measures to avert the outbreak of hostilities. 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 lost their lives.

Rights holders of self-determination are all peoples. Common Article 1(1) of the International Covenant on Civil and Political Rights and of the International 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.

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. A persistent obstacle to the realization of the right of self-determination of peoples has been the adamant insistence of some States not to negotiate with peoples living within their frontiers. We have witnessed this in the case of Sri Lanka, where as a sequel of an improper decolonization process, the Tamils and the Sinhalese were kept together in the island of Sri Lanka, instead of conducting a referendum to determine whether the Tamils and the Sinhalese were prepared to live together in one State or whether they preferred to emerge as two equal sovereign entitles. What has made the situation worse is the aggravating factor that the Sri Lanka government has wrongly labelled the Tamils as "terrorists" and contributed to the false narrative that the Tamils do not have a right of self -determination because they are "terrorists." This is a matter that the United Nations Rapporteur

on Human Rights while countering terrorism must address resolutely, because it has become too easy for certain States to avoid their obligations under Article I ICCPR and Art. I ICESCR simply by branding peoples with a legitimate claim to self-determination as terrorists.[2] The narrative managers in the mainstream media bear considerable responsibility for the negative perception of national liberation movements as somehow “terroristic.” It is worth recalling that the General Assembly adopted numerous resolutions recognizing the right of national liberation movements to engage in civil disobedience and in some cases in armed resistance against a central government that systematically ignores their right of self-determination.[3] Indeed, the right of liberation movements to have recourse to “all necessary means at their disposal”[4] including a *jus ad bellum*, and to invoke the *jus in bello*[5] has repeatedly been confirmed by the General Assembly.

In the case of the Catalan people of Spain, who have a thousand-year history, their own language, culture and identity, their elected leaders have always acted peacefully and in full compliance with their democratic mandates. In 2017 they kept their promise to the electorate by organising and conducting a self-determination referendum. However, in violation of various provisions of the ICCPR, and the European Convention on Human Rights and Fundamental Freedoms, the Spanish government prosecuted them for “sedition” and twelve of them are currently serving long prison sentences in Spain. Three ministers, including the 130th President of the Generalitat of Catalonia, Carles Puigdemont, have gone into exile. This means that there are political prisoners and political exiles in Europe, in breach of article 2 of the Treaty of Lisbon of the European Union. Such brazen suppression of the exercise of freedom of expression contravenes Spain’s own Constitution, in particular Articles 10(2) and 96, which incorporate Spain’s human rights treaty obligations into the Spanish legal order, including the right of self-determination of peoples, the right to freedom of expression and the right to peaceful assembly and association.[6]

Even though most professors of international law affirm that self-determination has emerged as a *jus cogens* right, superior to many other international law principles, including territorial integrity, it is not self-executing and never was. 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 and Ogonis of Biafra, the Tamils of Sri Lanka, and the Bubis of Equatorial Guinea[7], have valiantly fought for their culture and identity and suffered exploitation, discrimination, disenfranchisement, disappearances, massacres 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[8]), 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. In this context 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 egregious violation of article 2(4) of the UN Charter by Turkey, an illegal aggression and invasion of the island of Cyprus 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 and "ethnic cleansing" of some 200,000 Greek-Cypriots, whose ancestors had lived in Northern Cyprus for five thousand years. The criminal Turkish invasion was followed by the illegal settlement of Anatolia-Turks in Northern Cyprus, a deliberate attempt at demographic manipulation,

which is specifically prohibited in article 49 of the 1949 Fourth Geneva Red Cross Convention.[9] Illegal settlers, of course, are not a "people" entitled to claim the right of self-determination in Cyprus.[10]

A very incomplete list of peoples who have the right of self-determination and who have expressed their aspirations of self-determination and international recognition include the Kurds, the Tamils, the Tibetans, the Catalans,[11] the Corsicans, the Austrians of the Southern Tyrol, the Veneto-Italians, the Trieste population,[12] the Kashmiris,[13] the people of Southern Yemen[14], 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 Palestinians are closer to achieving their goal since they already enjoy observer status at the United Nations and have been able to ratify numerous international treaties. On the other hand, looking at the checkered map of Palestine and as a direct consequence of Israel's illegal settlements policy and the on-going encroachment of Palestinian territory, even the Palestinian leadership is bending towards a one-State solution.[15]

The United Nations could make a considerable contribution to durable peace and conflict-prevention by convening an international conference to revisit the reality of self-determination today and consider referring the claims of many aspirant peoples to the General Assembly Committee of 24.[16] Moreover, the General Assembly should 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. 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.[17]

THE PRINCIPLE OF TERRITORIAL INTEGRITY

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 apply. —AdeZ

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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: 1. What are the criteria that determine the legitimate exercise of self-determination by way of greater autonomy or independence? 2. 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? 3. What are the consequences of the continued refusal of States to grant self-determination to peoples under their rule? 4. What can the international community do to further the realization of self-determination by all peoples?

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 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 to the self-determination of the peoples 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 to deny them recognition by applying self-determination selectively and making frivolous distinctions that have no basis in law or justice.

The primacy of the principle of territorial integrity was rejected 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 independence by 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 decision of the Security Council under articles 39-42 of the UN Charter or any pertinent resolution 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 of the international community to abandoning the previously sacrosanct principle of territorial integrity.

This development was confirmed in the Advisory Opinion of the International Court of Justice in the case concerning the unilateral declaration of independence by Kosovo. Paragraph 80 of that advisory opinion states: “Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,” which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103,paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.” This

resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States."[18]

CRITERIA FOR PEACEFULLY AND DEMOCRATICALLY INVOKING SELF-DETERMINATION

The concrete application of the above text is that 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 that the United Nations and the international community must achieve.

Whereas guarantees of equality and non-discrimination are necessary for the internal stability of States, 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 endemic ethnic or religious hostility leading to violence that may gradually fester and erupt into civil war, thus endangering regional and international peace and security.

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 punishment. 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.[19]

Pursuant to the UN Charter, the United Nations has a crucial role to play in the exercise of the right of self-determination by all peoples, 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. Longstanding 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 and contrary to the fundamental principle of good faith. In the absence of a process of 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.

Excerpts from my 2014 Report to the General Assembly follow. —AdeZ

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INTRODUCTION

In its resolution 68/175, the General Assembly took note of the major changes taking place on the international scene and the aspirations of all peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, the rule of law, pluralism, development, better standards of living and solidarity. Bearing in mind that all States have a legal obligation to observe the purposes and principles of the United Nations and work to strengthen its three pillars—peace, development and human rights—the present report builds on paragraph 5 of resolution 68/175, in which the Assembly affirmed that a democratic and equitable international order required the realization of, among other things:

(a) The right of all peoples to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development;

(b) The right of peoples and nations to permanent sovereignty over their natural wealth and resources;

(c) The right of every human person and all peoples to development;

(d) The right of all peoples to peace.

In this connection, the Independent Expert has given attention to General Assembly resolution 68/153 and to the report of the Secretary-General on self- determination (A/68/318), which recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights. He further acknowledges the study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, submitted to the Permanent Forum on Indigenous Issues, in which special rapporteurs are encouraged to play a role in establishing relevant standards (E/C.19/2014/3, para. 36). Since 2012, the Independent Expert has received an increasing number of appeals and communications from stakeholders concerning self-determination issues.[20]

In its essence, the right of self-determination means that individuals and peoples should be in control of their destinies and should be able to live out their identities, whether within the boundaries of existing States or through independence. More than an outcome, self-determination should be seen as a process subject to revision and adjustment, and its outcome must correspond to the free and voluntary choice of the peoples concerned,[21] within a framework of human rights protection and non-discrimination. Self-determination cannot be understood as a one-time choice, nor does it extinguish with lapse of time because. Like the rights to life, freedom and identity, it is too fundamental to be waived. As an ongoing democratic exercise, self-determination entails a people's equal participation[22] in decision-making, a continuous dialogue by virtue of which parties adjust and readjust their relationship for mutual benefit. It can be exercised at various levels, from enhanced empowerment, regional autonomy and federalism to secession. When populations are disenfranchised and cannot exercise their cultural identities, tensions may increase, culminating in armed conflict, the outcome of which might be their military success and consequent independence, or their defeat and decimation. The process did not end with decolonization, with the dissolution of the Soviet Union and Yugoslavia, or with the independence of South Sudan. It continues today as many minorities, indigenous peoples and peoples living under occupation strive to achieve higher degrees of self-administration and self-government. The international community should develop strategies to facilitate early warning and assist States in devising timely solutions.

At the outset, it is useful to clarify that the rights holders of self-determination are peoples, a concept that has never been conclusively defined, notwithstanding its frequent use in United Nations forums. Participants at a UNESCO expert

meeting on self-determination endorsed what has been called the "Kirby definition,"[23] 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.[24] 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."[25] 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.

Duty bearers of the right of self-determination are all States Members of the United Nations, who must recognize and promote this right, individually and collectively, pursuant to *erga omnes* provisions of the Charter and human rights treaties. 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.

There are multiple ways of looking at self-determination. One understanding of the right focuses on the legitimacy of choice, so that every people may choose the form of government that it deems appropriate to its culture and traditions. Another perspective focuses on the right of two or more peoples to unify into one single State. An additional aspect emphasizes the possibility of exercising various degrees of cultural, economic and political autonomy within a State entity, and yet another expression of self-determination entails the aspiration to independent statehood. All these manifestations of self-determination should be interpreted in the context of the Charter and human rights treaties, which reject all forms of colonialism, neocolonialism and foreign occupation. As the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations annexed to General Assembly resolution 2625 (XXV) clarifies: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." In all the cases described, self-determination can be understood as a vector of peace and part of a democratic and equitable world order.

In this connection, the Independent Expert recalls that the post-Second World War international order has been frequently challenged and changed in response to the aspirations of non-self-governing peoples to achieve internal and external self-determination. In some States, federalism has guaranteed the self-determination right of parts of the population. In others, separation has been the result of armed conflict. It would have been preferable to see the implementation of the right of self-determination occur by virtue of the recognition of entitlement and good-faith negotiation instead of through the use of force. Considering that in the twenty-first century many peoples have not achieved self-determination, it is important for the international community to recognize their aspirations and devise a strategy to facilitate their realization without armed conflict.

For human rights, peace, security and stability to flourish, the relationships between peoples and governmental entities must be based on genuine and continuing consent, on the understanding of a *contrat social* and, if this *contrat* is violated by Government, the people as sovereign have the democratic right to redefine the relationship. As Michael van Walt has noted: "Peace cannot exist in States that lack legitimacy or whose governments threaten the lives or well -being of a section of the population. The international community, its members and institutions have an obligation to act where international law, including human rights and especially the right of self-determination, is violated."[26]

The present report builds on the Independent Expert's previous reports, which rest on the premise that the Charter of the United Nations is the world's constitution and that the best possibility for human advancement lies in the rule of law. A democratic and equitable international order requires that all States observe the Charter and apply international law uniformly. World peace and security are best served when States observe treaties in good faith (*pacta sunt servanda*) and do not hedge or invent loopholes in implementing treaties that defeat the object and purpose thereof. The credibility of law depends on its uniform application. Norms cannot be applied à la carte. Unilateralism and exceptionalism must be seen as anachronisms in the twenty-first century.[27]

In the report, the Independent Expert surveys applicable norms and practices and concludes that international peace and security are at risk as long as peoples have not achieved self-determination, and as long as they suffer occupation and exploitation by foreign Powers. Thus, to achieve a democratic and equitable international order, it is necessary to ensure the enjoyment of self-determination by all peoples, which necessarily includes the right to live

in one's homeland without being threatened by ethnic cleansing or expulsion from one's roots, history, land and resources.

Although the present interim report focuses primarily on external self-determination, which is where most conflict potential exists, the Independent Expert stresses the advantages of the internal dimension of self-determination.

By internal self-determination, we understand participatory democracy, as laid down in article 25 of the International Covenant on Civil and Political Rights, and the right of a population group within the State to participate in decision-making at the State level, which may also entail the right to exercise cultural, linguistic, religious and political autonomy within the boundaries of an existing State. By external self-determination or full self-determination, we understand the right to decide on the political status of a people in the international order in relation to other States, including the right to secede from an existing State.[28]

When human rights are enjoyed by all peoples without discrimination and populations have the feeling that they are in control of their destinies, they will be less disposed to seek external self-determination. Arrogance, exclusion, arbitrariness and neglect by Governments can drive peaceful peoples to despair and violence. Instead, Governments owe it to all persons under their jurisdiction to protect their human rights and to deploy confidence-building measures so as to create peaceful societies under the rule of law.

The Independent Expert recalls the words of Federico Mayor, former Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), at a UNESCO conference on the right to self-determination:

> In today's global world, the official borders between States have been relativized … Everything possible must be done to ensure that the immediate political interests of States do not compromise the aspirations of all peoples for freedom and other legitimate rights. There must be negotiation among all the parties involved so that conflict is prevented and peaceful solutions found ... The right to self-determination must include cultural, linguistic and communication rights alongside of social, economic and political rights. One depends on the other.[29]

NORMS AND PRACTICE

There is consensus among States, judges of international tribunals and professors of international law that self-determination is not only a principle but also a right that has achieved the status of *jus cogens*. Unfortunately, there is no authoritative definition of the right. As a political rather than a legal concept, self-determination can be traced back many centuries. It suffices to recall the Declaration of Independence of the United States of 4 July 1776, which proclaimed that Governments derive their powers from the consent of the governed and that, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it." Similarly, the French revolution advanced the doctrine of popular sovereignty and considered that any annexation of territory should be by plebiscite.

When the President of the United States, Woodrow Wilson, championed the principle of self-determination during the First World War, it sounded utopian in an era of rampant imperialism, colonialism and unabashed exploitation of weaker peoples. The idea was applied very imperfectly at the Paris Peace Conference of 1919, which redrew European frontiers in a manner disadvantageous to the human rights of the defeated nations. Later, the Atlantic Charter of 14 August 1941 established in eight "common principles" a vision for a post-Second World War world order. The second principle enunciated the principle of self-determination as a commitment "to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned." The third principle affirmed "the right of all peoples to choose the form of government under which they will live."

The great step forward was the adoption of the Charter of the United Nations and its emphasis on the principle of self-determination as a cornerstone of peace. Implementing the right of self-determination, however, has posed enormous problems because it requires balancing with other competing interests, notably the principle of territorial integrity. It is with good reason that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States refers to the norm that "the territorial integrity and political independence of the State are inviolable." This does not mean, however, that flexibility is not possible or that frontiers cannot be subject to adjustment by peaceful negotiation with a view to better serving the purposes and principles of the United Nations. Additional problems arise as a result of geopolitical considerations that frequently affect the consistency and logic of States that enthusiastically recognize the exercise of self-determination by some peoples and just as passionately oppose it in other cases.

A review of norms and practice appears appropriate, beginning with the commitments undertaken by all States Members of the United Nations pursuant to Article 1 (2) of the Charter, which lists among the purposes of the Organization to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Pursuant to Article 14, the General Assembly may "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations." Pursuant to Article 24, the Security Council "shall act in accordance with the purposes and principles of the United Nations" in discharging its duties. Article 55 stipulates: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote…." Chapter XI is entitled "Declaration regarding Non-Self-Governing Territories,"[30] which imposes on the administrating Powers the "sacred trust" to advance the interests of the inhabitants, while Chapter XII established the international trusteeship system, the basic objectives of which were the promotion of "the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence" (Article 76).

In countless resolutions the General Assembly has affirmed the right of self-determination, notably resolution 2625 (XXV), by which the Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, whose preamble states "that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States." The Declaration recognizes that the foreign subjection, domination and exploitation of peoples violate their human rights and pose a threat to international peace and security. Among its principles the Declaration stipulates: "Every State has the duty to refrain from any forcible action which deprives peoples … of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." Here, it is useful to recall that the international community can devise and employ innovative methods to

support the bearers of the right of self-determination, to ensure the protection of their human rights while seeking to prevent or curtail violence and unrest.

The Vienna Declaration and Programme of Action, adopted in 1993, recognizes the right of self-determination in its preamble and stresses, in Part I, paragraph 2, that "all peoples have the right of self-determination…. Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination." The World Conference participants further fleshed out the links between the pursuance of self-determination and its interrelatedness with human rights by highlighting that the denial of self-determination is a violation of human rights.

While the above text recognizes self-determination as an inalienable right, it also points at the necessity of regulating its implementation in the light of other principles of international law, notably the maintenance of local, regional and international peace and security, as well as with principles of international human rights law, especially the right to be free from discrimination. The last part of paragraph 2 adds a caveat: "This shall not 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 and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind." In other words, although territorial integrity is a reasonable principle of international stability, it is not an immutable norm of international relations and must be balanced against other principles, including human rights and self-determination, which are also conditions for international stability.

While General Assembly resolutions and the Vienna Declaration and Programme of Action constitute what may be termed "soft law," they have the virtue of reflecting a very large consensus on these central principles of the Organization. The "hard law" provisions on self-determination are best articulated in common article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which stipulates:

1. 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.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, 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.

In its general comment No. 12, the Human Rights Committee stated: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants (para. 1)." The general comment underscores a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to dispose of their natural wealth and resources. The general comment continues: "This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant (para. 5)."

Article 2 of the two International Covenants imposes legal obligations on States parties to implement all human rights, including the right of self-determination, and to provide redress for violations. The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex) further underline the obligation of States to respect, ensure respect for and implement international human rights law and international humanitarian law; to take appropriate measures to prevent violations from happening; to investigate violations; and to ensure victims equal and effective access to justice as well as effective remedies.

Accordingly, the right of self-determination must be implemented through specific measures, including legislation and adjudication. The bearers of the right of self-determination possess justiciable rights, not mere promises.

Lastly, the International Court of Justice has pronounced itself on the principle and application of self-determination, among others in its advisory opinions on Namibia (South West Africa), Western Sahara and the legal consequences of the construction of a wall in the Occupied Palestinian Territory, including commenting on the *erga omnes* character of self-determination.

Progressive development of international law

The world order before the Charter of the United Nations was neither democratic nor equitable. International law reflected the interests of the great Powers and was codified to strengthen colonial and imperial sustainability. Since 1945 international law has not ceased to evolve. Respect for human rights has become a paramount consideration of legality, and self-determination is now recognized as a principle of legitimacy underlying modern international law.

External self-determination can entail unification or secession, the latter being the most contentious aspect. Historically, the separation of one part of a country from another has not been accomplished simply by virtue of pre-existing law, but frequently by force. Whereas the friendly separation of Czechoslovakia into two independent States in 1993 took place without force, the implosion of Yugoslavia in the 1990s was accompanied by war and ethnic cleansing and entailed the destruction of the country's territorial integrity and its separation into new entities and six new States Members of the United Nations. Similarly, the dissolution of the Soviet Union resulted in 15 new States. These are not only historical events, but legal precedents that have expanded the meaning of self-determination beyond the context of decolonization and placed it in the context of the human right to freedom by the expressed will of the peoples concerned.

More recent history has shown that the former entities and new States are also subject to internal tensions reflecting ethnic and religious differences, and sometimes the feeling of parts of the population that they cannot fully exercise their human rights in the context of the new State entity. Ensuring all human rights for all parts of the population so that they may feel empowered and represented in the new State entity is in the interest of all parties concerned. Otherwise, existing grievances may develop into a desire for full independence. If the principle of self-determination is recognized with regard to the secession of parts of old State entities, it can equally be applied to parts of new State entities.

A violation of the right of self-determination gives rise to a legitimate human rights claim by individuals and groups and triggers State responsibility to make reparation. Any such violation of *jus cogens* also has third-party effects and imposes *erga omnes* obligations on other States, however. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States reaffirms that "every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle."

In his final report, the Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities on human rights and population transfer, Awn Shawkat Al-Khasawneh, addressed the *erga omnes* issue in article 10 of his proposed draft declaration on population transfer and the implantation of settlers (E/CN.4/Sub.2/1997/23 and Corr.1, annex II):

> Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act …

Self-determination and democracy

Self-determination is an expression of the individual and collective right to democracy, as democracy is an expression of the individual and collective right of self-determination. Both have national and international dimensions. The hallmark of self-determination must be public participation in decision-making and control over resources. In most cases this can be achieved within existing State entities, inter alia through federalism and other models of autonomy.

In the case of Non-Self-Governing Territories, self-determination referendums must be carefully organized so as to guarantee their democratic legitimacy and limit participation to those who really have a link to the Territory and not

allow recent settlers and colonizers to participate therein on the same basis as natives;[31] nor can artificial barriers such as language tests be required, given that they sometimes exclude precisely those who are entitled to exercise self-determination. Articles 14, 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights should also inform every process of self-determination. The Vienna Declaration and Programme of Action added: "Democracy 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" (part I, para. 8). Support is also provided by the Forum on Minority Issues, the second session of which was devoted to minorities and effective political participation. It recommended:

> "Governments should take effective measures to end discrimination. They should consider, for instance, instituting independent monitoring and complaints mechanisms designed to prevent discrimination in voting, vote fraud, intimidation and similar acts that inhibit the effective participation of all, especially members of minorities, in electoral activities" (A/HRC/13/25, para. 10).

Unification in international law

The unification of States is a sovereign act and an expression of self-determination, consistent with the sovereign equality of States stipulated in the Charter. It cannot be frustrated by the geopolitical interests of third States. Thus, peoples who have been separated by the drawing of colonial or other arbitrary frontiers have a right to demand adjustment and reunification. Similarly, artificially separated States have a right to reunification, for example, when the two German States resulting from the surrender of Nazi Germany and the division of its territory into zones of occupation achieved reunification in 1990. Happily, this reunification occurred without the use of force and with the enthusiastic approval of the international community. In the twenty-first century there are other peoples who aspire to reunification. It is in the interest of peace and stability for the United Nations to address these concerns in a timely fashion and assist in coordinating negotiations in accordance with recognized international human rights standards.

RIGHT TO ONE'S HOMELAND

The right to one's homeland is the positive expression of the international prohibition of forced population transfers, recently referred to as ethnic cleansing. It is prior to and inseparable from self-determination. Several conventions specifically prohibit mass expulsions. Judgments and advisory opinions of the International Court of Justice and judgements of international human rights tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights, have held that forced transfers constitute massive violations of human rights and in particular of the right of self-determination.[32]

It would be too easy to frustrate the right of self-determination if it were legal to collectively uproot a population and bring in settlers so as to change the demographics of the territory concerned. In time of armed conflict this is specifically prohibited by article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Geneva Convention) ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country … are prohibited.") Article 17 (1) of Additional Protocol II of 1977 to the Geneva Conventions applies this prohibition to internal displacements ("The displacement of the civilian population shall not be ordered.…"). The expulsion of civilian populations constitutes a "grave breach" under article 147 of the Fourth Geneva Convention and under article 85 of Additional Protocol I of 1977. Mass expulsions are prohibited in the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

In the Rome Statute of the International Criminal Court, the States parties agreed that "deportation or forcible transfer of population" constitutes a crime against humanity under article 7 (d), and that "unlawful deportation or transfer" constitutes war crimes under article 8 (2) (a) (vii). Article 16 of International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) affirms the prohibition of involuntary transfers with regard to indigenous peoples.

Self-determination is inextricably related to the right to live in one's homeland and not be subjected to forced assimilation or mass expulsion. This right was already recognized in academic circles and consecrated in a series of lectures by the French international law expert Robert Redslob, who emphasized that "the forcible transfer of a population cannot be allowed because it violates a fundamental right … and entails abandoning … a highest possession, which

humankind demands on the basis of a sacred right which all men strive for: the Homeland…. There is a right to the homeland, and it is a human right."[33]

Awn Shawkat Al-Khasawneh affirmed the right to the homeland in his final report to the Subcommission, referred to above. Article 4 (2) of the draft declaration states: "No person shall be compelled to leave his place of residence." The then United Nations High Commissioner for Human Rights, José Ayala Lasso, expressed it thus in his introductory remarks to a United Nations expert meeting on population transfers[34] held in Geneva in March 1997: "Mass expulsions violate the gamut of civil, political, economic, social and cultural rights."[35]

On 28 May 1995, Mr. Ayala Lasso delivered a statement in Frankfurt, Germany, asserting that "the right not to be expelled from one's homeland is a fundamental human right," thus rejecting collective expulsions and "collective punishment on the basis of general discrimination."

An essential component of the right of self-determination and of the right to the homeland is the right to return in safety and dignity to one's home and possessions. This right has been affirmed in many resolutions of the Security Council and General Assembly concerning, among others, Afghanistan, Bosnia and Herzegovina, Croatia, Cyprus, Kosovo,[36] Palestine and Timor-Leste. Article 16 (3) of ILO Convention No. 169 affirms the right to return of indigenous peoples who have been displaced.

As the Human Rights Committee has stated in its general comment No. 17, "the right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries" (para. 19).

The draft declaration on population transfer stipulates in its article 8:

> Every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice. The exercise of the right to return does not preclude the victim's right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.

The right to one's homeland is especially relevant to populations living under occupation, indigenous and non-self-governing peoples. Obstacles to the achievement of the implementation of the right to one's homeland, as an

expression of the right of self-determination, are the conflicting geopolitical agendas of major powers and the economic interests of transnational corporations over the natural resources of weaker peoples. Frequently, advocates of self-determination are discredited as radicals or irredentists. It is clear that governmental paranoia about irredentism cannot trump a legitimate entitlement of self-determination. Labels aimed at incitement against minorities or indigenous peoples may entail violations of article 20 (2) of the International Covenant on Civil and Political Rights, which specifically prohibits incitement to discrimination, hostility or violence.

DECOLONIZATION

In the light of the Charter of the United Nations, it became clear that colonialism had to be dismantled, but it was not until the 1960s that the General Assembly adopted groundbreaking resolutions on the subject.

The preamble to resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 establishes the symbiotic link between self-determination and friendly relations among nations.

However, decolonization alone would not have given the formerly colonized peoples a decent future and equal opportunity to participate in global decision-making. It was necessary to adopt resolution 1803 (XVII) on permanent sovereignty over natural resources in 1962, paragraph 1 of which declares: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

Paragraph 7 stipulates: "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace."

The decolonization process had already begun on the Indian subcontinent in 1947, followed by the independence of Indonesia in 1949, continuing in Asia, the Pacific Islands, Africa and Latin America. Decolonization was frequently preceded and accomplished by violence, as was the case in numerous African and Asian territories including Algeria, Namibia, Timor-Leste and Zimbabwe.

Decolonization was not only just and consistent with the Charter; it was necessary to end violence. Initially, decolonization was conducted on the basis of the *uti possidetis* doctrine, which had characterized the liberation of

Latin American republics from Spanish and Portuguese rule, providing for the maintenance of the old colonial frontiers. In the African context, however, *uti possidetis* ushered in many potential conflicts.

From 1960 to 1962, the decolonized Belgian Congo experienced a war in which two of its ethnically different and mineral-rich provinces unsuccessfully attempted secession. From 1967 to 1970, the Igbos of Nigeria unsuccessfully attempted to separate and the Biafran war left 1 million casualties in its wake. In 1971, East Pakistan separated and emerged as the new State of Bangladesh. In 1975, Timor-Leste became independent from Portugal, was invaded and occupied by Indonesia and emerged as a new independent State in 2002. In 1991, after a 30 -year war, Eritrea gained its independence from Ethiopia, following a referendum supervised by the United Nations. In 2011, after a 20-year war, South Sudan separated from the Sudan pursuant to a referendum also organized by the United Nations. Thus, it is clear that decolonization did not pronounce the last word on self-determination. To avert future armed conflict, timely adjustment of frontiers is a peace-promoting policy that should be applied with international solidarity. There is no reason to insist on the "sanctity" of national borders, which sometimes owe their existence to very unsaintly means.

Secession has also occurred outside the decolonization context in response to a people-centered perception that full independence is the only means to restore fundamental rights and freedoms. This aspect of self-determination draws its legitimacy from the fundamental right of rebelling against tyranny, a right of last resort specifically referred to in the preamble to the Universal Declaration of Human Rights.[37]

NON-SELF-GOVERNING AND INDIGENOUS PEOPLES

When the Charter was adopted, many peoples lived under foreign rule. Colonialism was widespread, peoples were subjected to military occupation and minorities and indigenous peoples had little or no international protection.

The process of self-determination did not end with decolonization and the independence of trust territories. Even today there are many unrepresented peoples and nations, peoples living under occupation and a majority of indigenous peoples in several continents who aspire to exercise self-determination, whether in the form of autonomy within existing States or independence. It is therefore necessary to devote attention to their situation, consult with the peoples concerned and ensure their right to participate in

decision-making, in particular on all matters that directly concern them, their lands, their natural resources and their culture.

There is a list of 17 remaining Non-Self-Governing Territories for which the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples carries out a degree of supervision.[38] This list is obviously incomplete, however, given that there are other non-self-governing peoples who aspire to have a voice before the Committee. The question thus arises whether other territories should be added to the list on the ground that the populations claim that they do not enjoy self-determination. Moreover, there are questions concerning the earlier delisting of some Territories for which the administrating Powers have ceased to report, but whose delisting has been described by observers as "irregular."

Even today, indigenous peoples and colonized and occupied peoples are not vested with their proper status at the national or international level. The United Nations could grant them such status as a corollary to the right of self-determination in a manner that allows for their equal participation and their free, prior and informed consent on all matters that affect them and at all levels within the United Nations system. Part of the problem with the delayed discussion on the self-determination of indigenous peoples was the fact that Governments essentially marginalized them. Moreover, the devastating impact of the policies applied by the colonizers, including massacres, spoliation, re-education and cultural dislocation paralyzed many indigenous peoples. Michael van Walt observed that "a number of first nations of the Americas … no longer exist as a result of genocide."[39] A partial recognition of the injustices is reflected in several apologies issued by Governments over the past two decades.[40] Such apologies are appropriate, but a proactive policy to reduce continuing effects and to heal the profound trauma inflicted on indigenous peoples is necessary.

As history has witnessed, indigenous peoples have been unable to achieve autonomy or self-government and obtain redress in the same ways as other rights bearers. This is attributable in part to the devastation of their numbers and the assault on their cultures, which rendered them too weak to assert their rights and frequently left them in extreme poverty, unable even to obtain adequate legal representation.[41] Greater access to the international forum and the permeation of human rights principles has allowed indigenous peoples to emerge from this past powerlessness.[42]

It is time to face "historical inequities"[43] and abandon the culture of silence. There are many open accounts worldwide that should be settled—peacefully—

through good-faith negotiation with indigenous peoples, whose inalienable rights have not been extinguished through lapse of time or through the racist and factually inapplicable doctrine of discovery (see E/C.19/2014/3). A breakthrough was achieved in 1992 in Australia when the High Court, in *Mabo and others v. Queensland*, overturned the *terra nullius* doctrine.[44] Similarly, the Supreme Court of Canada in a number of recent judgements has ruled in favour of the claims of First Nations to the return of their lands.[45] As the Permanent Forum study observes: "The Doctrine of Discovery is significant globally not only for abuses in the past, but also for its ongoing far-reaching consequences. Such colonial doctrines must not prevail in practice over human rights, democracy and the rule of law" (ibid., para. 32).

The adoption of ILO Convention No. 169 was of enormous importance, especially considering that indigenous populations are still subject to dispossessions and involuntary transfers.

The United Nations Declaration on the Rights of Indigenous Peoples constitutes a milestone in the struggle of indigenous peoples for self-determination and provides an important catalogue of rights and entitlements that should guide both Governments and the indigenous peoples themselves. Beginning in its preamble, the Declaration expresses concern "that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests." Article 3 stipulates: "Indigenous peoples have the right to self- determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 8 (1) affirms that indigenous peoples and individuals have the "right not to be subjected to forced assimilation or destruction or their culture." Article 19 states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 28 (1) stipulates that indigenous peoples have the right to get back or be compensated when the lands, territories or resources have been wrongly taken away, occupied, used or damaged without their free, prior and informed consent. Article 32 further stipulates that indigenous peoples have the right to decide how they wish to develop their lands and resources. Governments must respect and protect these rights. Indigenous peoples' free, prior and informed consent must be obtained when any decisions are made that may affect the rights to their lands, resources or waters (see A/HRC/18/35). Justice and equity require that many of these articles be given

some retroactive effect, so as to counter the continuing effects of earlier injustices and grant a measure of rehabilitation.

Unfortunately, some States reject the Declaration, considering it to be non-binding. In this regard, the Special Rapporteur on the rights of indigenous peoples, James Anaya, has observed:

> Debilitating to the Declaration are repeated assertions that the Declaration is non-binding, characterizations of the Declaration as granting privileges to indigenous peoples over others, and the position advanced by some States that the right to self-determination affirmed in the Declaration is different from self-determination in international law. These assertions and positions are each flawed … they only serve to weaken the force of the broad consensus underlying the Declaration and of its role as an instrument of human rights and restorative justice (A/68/317, para. 88).

With regard to sovereignty over natural resources, the Special Rapporteur has suggested that a new model more conducive to indigenous peoples' self-determination and their right to pursue their own priorities of development is needed, noting that direct negotiations between companies and indigenous peoples may be the most efficient and desirable way of arriving at agreed -upon arrangements for the extraction of natural resources (A/HRC/21/47, para. 70).

CRITERIA FOR THE EXERCISE OF SELF-DETERMINATION

Any 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.[46] 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?

Some of the factors to be taken into consideration in the context of unification, autonomy or secession are described in the following paragraphs.

Self-determination has emerged as a *jus cogens* norm and is enshrined in Article 1 of the Charter as one of the purposes of the Organization. The right is not extinguished with lapse of time because, just as the rights to life, freedom and identity, it is too important to be waived. 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.

The rule of law entails more than positivism, which is seldom adequate to solve complex political situations that require flexibility and compromise. More important is the spirit of the law, those principles that underlie the codification of norms as an approximation of justice.

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 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 and 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 erupt in civil war and threaten regional and international peace and security.

International law evolves through practice and precedents. The independence of the former Soviet republics and the secession of the peoples of the former

Yugoslavia created precedents for the implementation of self-determination that must be considered whenever self-determination disputes arise.

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.

The United Nations could be called upon to assist in the preparation of models of autonomy, federalism and, eventually, referendums. 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. Longstanding 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 *a fortiori* agreements with puppet representatives are invalid. In the absence of a process of good-faith negotiation or plebiscites, there is a danger of armed revolt.

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 all States have the right of self-defence from armed attack under Article 51 of the Charter, they also have the responsibility to protect the life and security of all persons under their jurisdiction. No doctrine, not that of territorial integrity nor that of self-determination, justifies massacres; neither doctrine can derogate from the right to life. Norms are not mathematics and must be applied with flexibility and a sense for proportionality in order to reduce and prevent chaos and death.

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.[47] 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.

Sustainable internal and external peace requires the implementation of self - determination of peoples, which is an expression of democracy: government by consent of the governed. As Willy Brand said in his Nobel Peace Prize lecture, waging war is the *ultima irratio*. This is all the more so when a State uses force to suppress the legitimate rights and aspirations of its own population.

OUTLOOK AND RECOMMENDATIONS

Self-determination is a work in progress, a process of adapting and readapting to tensions between power and freedom. Rather than perceiving self-determination as a source of conflict, a better approach is to see armed conflict as a consequence of the violation of self-determination. There are many countries in which issues of enhanced democracy, autonomy and self-government require timely discussion.

A peaceful, democratic and equitable international order is best served by a symbiotic accommodation of the principle of territorial integrity, vindicated by States, and the right of self-determination held by peoples. Both are subject to adjustment and should not be treated as hyperboles of immutable law. While the extreme notion of sovereignty has a territorial fixation, sometimes the concept of self-determination is reduced to only one option: separation. There are multiple ways of exercising self-determination, the implementation of which

constitutes an important strategy to promote national and international stability and prevent ethnic or religious tensions from developing into breaches of local, regional or international peace.

There is an emerging customary international law on self-determination that takes into account the emergence of new State entities following the dissolution of the Soviet Union and Yugoslavia and the friendly separation of Czechoslovakia. This customary international law is not self-executing, however.

International law being dynamic, it is no longer the same as it was at the beginning of the twentieth century, or at the end of the Second World War. There has been a progressive development towards the primacy of human rights over State rights. Many international lawyers, political scientists and sociologists recognize that, whereas States are pragmatic constructs that enable effective exercise of jurisdiction, and while many States have been shaped by imperial and colonial policies that disregard geographic, ethnic, religious, linguistic and historical realities, peoples constitute another kind of reality, an older and deeply felt force that binds generations and survives changes in boundaries and Governments. Whereas the principle of territorial integrity is a legal, political and pragmatic construct, the right of self-determination has a profound ethical basis.[48]

Meanwhile, the principle of territorial integrity no longer possesses a higher status in international law than the right of self-determination, which is anchored in the Charter of the United Nations and in the International Covenants on Human Rights. A balancing of rights and interests must be carried out, always with a view to achieving greater respect for human rights and widening the democratic space.

There remains insufficient consciousness in the international community of the enormity of the injustice that colonialism and settlement meant for the peoples of many continents. It is to be welcomed that gradually, politicians have found words to apologize. Apologies should, however, be followed by rehabilitation.

In recent decades, the international community has witnessed instances of the reunification of States and also the separation of States into independent State entities. Current and future conflicts concerning the implementation of self-determination should be solved by negotiation within the context of the Charter and the rule of law.

Bearing in mind that international law is universal, the criteria for exercising and recognizing the right of self-determination must be applied uniformly. Otherwise, the credibility and predictability of international law would be seriously compromised. The modern perspective on self- determination focuses

on its function as a means to promote peace. In short: States have the sacred duty to ensure peace, while individuals and peoples have the right to peace.[49]

On the basis of the foregoing, and with the view to advancing the implementation of General Assembly resolution 68/175, the Independent Expert recommends that States:

(a) Take measures to implement common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which stipulates the right of all peoples to self-determination;

(b) Treat all populations under their jurisdiction in accordance with internationally accepted human rights norms, enable their participation in decision-making, consult them, provide legal remedies for violations of their rights and ensure enforcement of judicial decisions;

(c) Proactively report to the Human Rights Council on the enjoyment of self-determination by populations under their jurisdiction, pursuant to the universal periodic review procedure. They should similarly report on self- determination matters to the Human Rights Committee and to the Committee on Economic, Social and Cultural Rights;

(d) Demonstrate that they are prepared to work towards a peaceful change of status through democratic political means, especially in situations of protracted conflict;

(e) Assist post-secession States in establishing the rule of law and ensuring human rights;

(f) Surpass the minimum required by human rights treaties and implement soft law in the spirit of the Charter. They should not shun good-faith pledges and commitments merely because they do not constitute “hard law”;

(g) Enforce treaties made with indigenous populations (see E/CN.4/Sub.2/1999/20) and negotiate only with their legitimate representatives. Decisions affecting indigenous peoples must be taken with their free, prior and informed consent. States should adopt appropriate national legislation to implement the provisions of the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169;

(h) Recognize and support indigenous peoples’ legal systems and parliaments, which should have a special status so as to authentically represent their communities nationally and internationally.

He recommends that the General Assembly:

(a) Consider establishing a special mechanism to monitor the reality of self-determination today, in particular the situation of unrepresented peoples and non-self-governing peoples who are not currently being considered under

(b) Article 73 of the Charter, or assign more targeted functions to the Fourth Committee of the General Assembly, so as to supervise the proper application of Chapter XI procedures;

(c) Consider tasking the Human Rights Council with the examination of self-determination issues as a permanent item in its agenda or as part of the universal periodic review procedure, especially from the functional perspective of self-determination as a tool to promote international peace and security;

(d) Consider referring to the International Court of Justice for advisory opinions on specific legal questions concerning the scope of application of self- determination, its erga omnes implications, and issues of restitution and reparation to victims;

(e) Consider employing the good offices of the Secretary-General to advance the implementation of self-determination;

(f) Consider activating the special status of indigenous peoples and granting them, along with colonized and occupied populations, standing to participate in the General Assembly and its subsidiary bodies;

(g) Demonstrating the same realism shown in General Assembly resolutions 1654 (XVI) and 1803 (XVII), proactively assist in the peaceful achievement of self-determination by non-self-governing peoples and peoples living under occupation in the twenty-first century, bearing in mind that the post-colonial world inherited ethnic, social and religious problems resulting from the arbitrary drawing of frontiers;

Consider developing programmes of assistance and transitional justice to support peoples who have recently attained self-determination, in cooperation with United Nations agencies including the United Nations Children's Fund, the United Nations Development Programme, ILO, the World Health Organization, UNESCO, the United Nations Environment Programme and the World Intellectual Property Organization.

ANNEX

THE APPLICATION OF THE RIGHT OF SELF-DETERMINATION IN THE CASE OF THE PEOPLE OF CATALONIA: CASE STUDY

While still Independent Expert, and in preparation of my presentation to the European Parliament, I drafted this opinion applying the criteria set out in my report A/69/272 to the Catalan people.

During the weeks preceding and following the self-determination referendum conducted in Catalonia on 1 October 2017, I issued several press releases and persuaded some of my rapporteur colleagues to join me in light of the violation of the right of self-determination, the right to freedom of opinion and expression, the right to peaceful assembly and association, the right to participate in the conduct of public affairs and the threat to the rule of law not only in Spain but in the European Union. [i]

I summarized the criteria for the exercise of the right of self-determination in a document (not included here) entitled "Practical notes for the assessment of activities and allegations related to the peaceful and democratic exercise of the right of self-determination of peoples" (hereinafter, the "Notes" [ii]*), which contain the following legal conclusions about the right of self-determination of peoples (hereinafter, the "right of self-determination"):*

1. *The right of self-determination is jus cogens, a fundamental norm of superior hierarchical rank, recognized by the United Nations founding treaty, compulsory on national and international judicial and administrative instances, and superior to any national constitution or law that may conflict with it.*[iii]

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i https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22295&LangID=E
https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22197&LangID=E
https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22197&LangID=E
See also the 161-page Report by an International Expert Commission made up by Professors Nicolas Levrat, Sandrina Antunes, Guillaume Tusseau and Paul Williams, *Catalonia's Legitimate Right to Decide,* September, 2017.

ii http://www.ohchr.org/EN/Issues/IntOrder/Pages/Articles.aspx (see under "Open Letter: Right to Free Determination , 12/22/2017")

iii In this respect, refer to the recent Judgment of the Court of Justice of the European Union of February 27, 2018, in Case C-266/16, which reaffirms once again the pre-eminence of the right of self-determination of peoples which is a "rule of general international law" fully applicable to the European Union, rejecting in the case in question the scope of application of an international agreement concluded by the European Union that did not take into account this fundamental right (full text of the Judgment at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=199683&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part= 1 & cid = 446411)

2. *The right of self-determination refers to the peoples' capacity to decide their political status. This includes the external exercise of the right of self-determination (secession or unification with another state) as well as its internal exercise (deciding on the degree of integration within a State). The exercise of the right of self-determination entails the equal participation of all peoples within the State in the decision-making in an ongoing dialogue in which the parties adjust and readjust their relationship for their mutual benefit. Self-determination is an expression of human dignity and an enabling human right necessary for the enjoyment of many other human rights in their holistic dimension—collective and individual.*

3. *The rights holders of the right of self-determination are "all peoples" without distinction. Although the definition of "people" does not yet exist internationally, in general it is recognized for a group of persons with a common historical tradition, an ethnic or racial identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection or a common economic life, with the awareness of being a people and the willingness to be recognized as such. Any arbitrary limitation of the right of self-determination only to some peoples (for example, those subjected to military occupation or colonial domination) or only in certain historical moments in time (for example in situations of armed conflict) would be contrary to international law.*

4. *The duty bearer of the right of self-determination is "Every State," whose institutions should not only respect the exercise of that right (for instance refraining from external interference) but also proactively facilitate it, especially in relation to the peoples under its jurisdiction.*

5. *The principle of territorial integrity as laid down in the United Nations Charter (article 2(4)) and General Assembly Resolutions 2625 and 3314, is intended for external application. This means that a State cannot invade or encroach on the territorial integrity of other States. The principle of territorial integrity must not be invoked internally nor can it be used as a pretext to restrict the human rights of the peoples under a State's jurisdiction. The right of self-determination is a right recognized to peoples as right holders, and it is not the prerogative of the State to grant or deny, not even on the basis of the principle of territorial integrity, unless there is external interference. In case of conflict between the principle of territorial integrity and the human right of self-determination, it is the latter which prevails.*

6. *Peoples should exercise the right of self-determination in a peaceful and democratic manner. States should facilitate such an exercise effectively, under conditions of equality, securing a permanent dialogue in their mutual benefit. All the organs of the State are bound by it; creating obstacles to the exercise*

of the right of self-determination would amount to a serious violation of a fundamental human right and would result in the responsibility of the State (see Permanent Court of International Justice, Chorzow Factory Case).

7. *The right of self-determination exists in the internal national order of all the Member States of the United Nations, since it is jus cogens, an imperative norm of superior hierarchical rank, of mandatory compliance in accordance with the Charter of the United Nations. Pursuant to article 103 of the United Nations Charter (the supremacy clause), the Charter prevails over other treaties and agreements.*

8. *The denial of the right of self-determination (article 1 of the International Covenant on Civil and Political Rights) is frequently associated with the violation of other fundamental rights, including the right to personal integrity, the prohibition of torture and degrading treatment (article 7 ICCPR), the prohibition of arbitrary arrest or detention (art. 9 ICCPR), the right to a fair trial before a competent and impartial public court and the prohibition of trying civilians before military tribunals (art. 14 ICCPR), the right to access to information and freedom of expression (art. 19 ICCPR), the right to peaceful assembly (art. 21 ICCPR), the right to association (art. 22 ICCPR), the right to participate in the conduct of public affairs (art. 25 ICCPR), the right to equality and non-discrimination (art. 26 ICCPR) and the special rights of minorities (art. 27 ICCPR).*

Given the interest and numerous inquiries received on the situation in Catalonia, this document examines the recommended application of the referred "Notes" to the specific case of the CATALAN PEOPLE, under the jurisdiction of the KINGDOM OF SPAIN. —AdeZ

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A. On the ratification of the relevant international instruments, in this specific case

The first step in considering the application of the right of self-determination in a specific case is to establish whether the State in question has ratified one or more of the relevant international instruments (for details on these, see section 1 of my Notes, above) and whether they are in force in relation to that State.

Regarding the most important instruments that recognize the right of self-determination, the situation in the case of Spain is as follows:

- **Charter of the United Nations** (CNU 1945).[50] In force in relation to Spain since 14 December 1955 through its Declaration of acceptance [51] of the obligations of the Charter and the entry of Spain into the United Nations. Reservations, interpretative declarations, objections or notifications: none.

- **International Covenant on Civil and Political Rights** (ICCPR 1966).[52] In force in relation to Spain since 27 July 1977 through the deposit of the corresponding Instrument of ratification.[53] Reservations, interpretative declarations, objections or notifications: none in relation to the right of self-determination.

- **International Covenant on Economic, Social and Cultural Rights** (ICESCR 1966).[54] In force in relation to Spain since 27 July 1977 through the deposit of the corresponding instrument of ratification.[55] Reservations, interpretative declarations, objections or notifications: none in relation to the right of self-determination.

In addition to its adherence to the most important international instruments on the right of self-determination, Spain has voted in favor of numerous resolutions of the United Nations to support it.

CONCLUSION: Spain has committed internationally to abide by the right of self-determination, without any reservation in that respect.

B. On the incorporation of those international obligations in the national legal order

The next step is to examine how these provisions, to which Spain is bound, are incorporated into the Spanish legal order.

Like many other States, Spain has incorporated them through its ordinary mechanism of reception of international law, which in the case of Spain is Article 96 (1) of the Spanish Constitution:

> 1. **Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order**. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.

As the Legal Advisor of the Spanish Parliament pointed out in his commentary on this article,[56]

> According to the constitutional drafting, the treaty is incorporated into the internal order through publication, provided it has been

> authentically concluded. An internal normative act that transforms the content of the treaty is not required; nor can it be interpreted that the mere conclusion of the treaty without publication is sufficient for its internal applicability. The publication and valid conclusion are required.

Obviously, the three main instruments referred to in the previous section have been duly published in the Official State Gazette (*Boletín Oficial del Estado*, BOE) of Spain:

- **Charter of the United Nations**: BOE nr. 275, of November 16, 1990, pages 33862 to 33870;[57]
- **International Covenant on Civil and Political Rights:** BOE nr. 103, of 30 April 1977, pages 9337 to 9343;[58]
- **International Covenant on Economic, Social and Cultural Rights:** BOE nr. 103, of 30 April 1977, pages 9343 to 9347.[59]

Through these publications in the Official State Gazette, and in application of article 96 (1) of the Spanish Constitution, it is obvious that these international instruments are fully incorporated into the Spanish legal system. Given that such instruments include the recognition of the right of self-determination, it can be concluded that said right is in force in the Spanish legal system.

As indicated in section 7 of my Notes, the fact that some States (though not Spain) may have decided to expressly mention the right of self-determination in their Constitutions is irrelevant. Article 96 (1) of the Spanish Constitution fully incorporates the right of self-determination in the Spanish legal system as if the Constitution had mentioned it explicitly (in the same way that any "treaty is incorporated into the internal order through publication," as noted by the Legal Advisor of the Parliament).

In fact, as it is concluded in section 7 of my Notes, the right of self-determination exists in any case in the internal national order of all Member States of the United Nations, since it is a matter of *jus cogens*, a mandatory right of higher hierarchical order, whose implementation is compulsory according to the Charter of the United Nations. This was understood, for instance, by the United Kingdom and by Canada, which negotiated the holding of referenda in Scotland and Quebec respectively.

CONCLUSION: The right of self-determination is fully integrated and in force in the Spanish domestic legal system. It is not necessary to modify the Spanish Constitution in that respect.

C. On the application of the right of self-determination in the Spanish legal order

Once the validity of the right of self-determination in Spain has been confirmed, it is necessary to examine how it is regulated and how it is applied at the national level.

Spain has not yet explicitly developed rules regarding the exercise of this fundamental right. However, Article 10 (2) of the Spanish Constitution indicates how to interpret its exercise at the national level:

> 2. The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.

Thus, in accordance with the Spanish Constitution, the right of self-determination is applicable in Spain in line with the provisions of international law, obviously including its normative and interpretative development. Indeed, the right of self-determination is a fundamental right recognized by the United Nations in its foundational Charter, as well as by the Spanish Constitution through its article 96 (1) (see previous section), and its development is therefore automatically included by Article 10 (2) amongst those that will be interpreted in accordance with the international order ratified by Spain.

The generic description of the international order on the right of self-determination is accurately explained in my Notes. Such a description is entirely valid for Spain because it has not made any reservation in relation to the application of that right, which, in any case, is *jus cogens*, mandatory according to United Nations law. Therefore, one can refer to my Notes for the details of that international order. We will just recall three key matters which address recurrent questions and comments in this specific case:

- The rights holders of the right of self-determination are "all peoples" without exception. Any arbitrary limitation of the right of self-determination to some peoples only (for example, to those subjected to colonial domination or subjected to non-democratic or oppressive states) or only during particular times in history (for example, in situations of armed conflict or violations of human rights) would be contrary to international law (for more details and the legal basis on this matter, refer to section 3 of my Notes).
- The principle of territorial integrity regulates the behavior of Member States amongst themselves, basically ensuring the safeguard of the territory against any external interference. The right of self-determination is a right

recognized to peoples as rights holders, and it is not up to the State to grant it or deny it, not even based on the principle of territorial integrity, unless there is external interference. Otherwise, the exercise of this right would be completely emptied of content (for more details and the legal basis on this matter, refer to section 5 of my Notes).

- It is entirely irrelevant to the specific case whether any other United Nations Member State may have violated the right of self-determination *vis-à-vis* any of its peoples, since it is obvious that the alleged violation of a fundamental right by another Member State (were that to be confirmed by a competent body) does not legitimize another Member to commit a similar violation.

The validity of the right of self-determination, thus defined, is consolidated by the Spanish Constitution at the highest level within the configuration of the Spanish legal system, and is therefore imposed on any norm or resolution of lower rank.

In that respect, as indicated in section 7 of my Notes, any national rule must be interpreted in accordance with the right of self-determination, in the sense of facilitating it and not hindering it. Any internal rule in blatant contradiction (be it legislative, executive or judicial) must yield to this fundamental right and, ultimately, be considered as contrary to articles 96 (1) and 10 (2) of the Spanish Constitution, and therefore unconstitutional, null and void.

CONCLUSION: In accordance with the Spanish Constitution, the right of self-determination must be applied in Spain in line with the provisions of international law. The current status of international law is developed in my "Notes." In this regard, it should be recalled that the holders of the right of self-determination are "all peoples" without exception, and that the principle of territorial integrity can only be invoked in the case of external interference by another State and not as a pretext to restrict said fundamental right. The validity of the right of self-determination established by the Spanish Constitution must prevail over the norms or resolutions of lower rank.

D. On the scope of the term "people"

Having thus established the validity of the right of self-determination in Spain within the parameters defined in international law, it remains to be determined whether there exists in Spain a "Catalan people" that can be considered as the holder of said right within the framework of the Charter of the United Nations, the International Covenants and the Spanish Constitution.

As indicated in section 3 of my Notes, although the definition of the term "people" has not been agreed to internationally, in general it is recognized as

applying to all groups with a common historical tradition, an ethnic or racial identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection or a common economic life, with an awareness of being a people and willingness to be recognized as such.

Notwithstanding the fact that there may be different opinions on the exact terms to be used to define what is a “people,” it seems beyond doubt that, in any case, there is indeed a “Catalan people” in Spain, which is conscious of being a people and desirous of being recognized as such. For purposes of international law, it must be clear that the Catalan people, numbering more than seven million human beings, are not just a “minority” but a “people.”

There are in fact more than enough historical, political, institutional, legal, linguistic, cultural, identity, customary and territorial evidences to consider that there is a group in Spain that considers itself as “Catalan people,” and that is recognized by the State and by Spanish society as such, as well as by the international community.

From a political point of view, we can, for example, remember that the Generalitat of Catalonia as an institution of self-government has a medieval origin (from 1359 until this date there have been 131 presidents of the Generalitat of Catalonia). After its abolition following the War of the Spanish Succession and the Treaty of Utrecht (1713), and its subsequent restitution, the Spanish Constitution of 1978 declared the objective of “Protecting all Spaniards and *peoples of Spain* in the exercise of human rights, their cultures and traditions, languages and institutions,” and recognized the “right to autonomy of the *nationalities* and regions that make it up.”

The evidences of the existence of a Catalan people are so overwhelming and well-known that it seems superfluous to develop them in greater detail in this document. References to them are easily available in numerous official sources of the Kingdom of Spain and the Autonomous Community of Catalonia, among others.

The acknowledgment of the existence of a “people” (in this case the “Catalan people”) is without prejudice to possible differences of opinion on the precise geographical area currently occupied by said people, as well as the criteria to define a personal belonging to it (for example, criteria of residence, filiation, self-designation or personal self-identification etc.). Indeed, it is not necessary to limit precisely these sociological questions, which are often fluid, to recognize whether a people exists as such or not.

Finally, it should be stressed that the existence of a Catalan people does not contradict that of a Spanish people. Both realities are not exclusive from a sociological point of view, but have been complementary for centuries.

For the legal purpose that concerns us, that is, the recognition or not of the validity in Spain of a right of self-determination for the Catalan people, it is the existence of the latter that is most relevant.

In this sense, the recognition of a "Spanish people" in article 1 of the Spanish Constitution ("National sovereignty resides in the Spanish people, from which the powers of the State emanate") with the recognition of the right of citizenship is not legally contradictory with the self-determination of the "Catalan people," which logically flows from articles 96 (1) and 10 (2) of the Spanish Constitution.

In effect, the Catalan people exercised their right of self-determination (internal) by voting in referendum in favor of the Spanish Constitution on 6 December 1978, in force in Spain's adherence to the Charter of the United Nations since 1955 and the International Covenants since 1977, incorporated by the previous regime. Voting in favor of article 1, but also of articles 96 (1) and 10 (2) of the same Constitution, which form a whole and cannot be separated in the matter at hand, the Catalan people agreed to integrate their sovereignty into the framework of the Spanish people, thus establishing a framework of institutional relationship between the new Kingdom of Spain established by the 1978 Constitution, and the pre-existing Catalan people recognized in the Constitution.

In any case, even assuming *arguendo* that the Catalan people somehow had renounced their status as a political subject by voting in favor of Article 2 of the Spanish Constitution ("The Constitution is based on the indissoluble unity of the Spanish Nation, common and indivisible homeland of all Spaniards "), it should be remembered that, according to international human rights law, the right of self-determination is inalienable and not subject to statutes of limitations (like all fundamental rights), whereby the decision of the Catalans in 1978 cannot be seen as an immutable decision for all eternity and cannot deprive today's Catalan people (and future generations of Catalans) of their ongoing fundamental right of self-determination. Thus, today's Catalans are not in a straight-jacket of legalism and are free to assert their right of self-determination.

Finally, it should be recalled that, according to articles 26 and 27 of the Vienna Convention on the Law of Treaties (ratified[60] and integrated into the Spanish legal system), Spain cannot invoke any domestic regulation to escape its international obligations such as those they are derived from the adhesion of Spain to the right of self-determination:

> *Article 26. PACTA SUNT SERVANDA*
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
>
> *Article 27. INTERNAL RIGHT AND OBSERVANCE OF TREATIES*
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Thus, articles 1 and 2 of the Spanish Constitution must be understood within the framework of the right of self-determination in force in Spain for the Catalan people according to articles 96 (1) and 10 (2) of the Constitution itself, as well as constitutional references to the "peoples of Spain" and to "the nationalities" of Spain, without there being any contradiction between these constitutional norms.

CONCLUSION: There is a "Catalan people" in Spain that holds the right of self-determination recognized by the United Nations and the Spanish Constitution. The guarantor of the peaceful and democratic exercise of this right is the Kingdom of Spain, which currently exercises jurisdiction over the Catalan people.

E. On the practical application of the right of self-determination

The conclusions of applying my Notes (sections 1 to 7) in relation to the Catalan people (paragraphs A to D above) are basically the following:

- The right of self-determination consists in the ability of peoples to decide their political destiny. The headlines are "all peoples," including the Catalan people (Article 1 of the Charter of the United Nations and the International Covenants, among others).
- The duty bearers of the right of self-determination are "all States" that have been obliged to respect it, including the Kingdom of Spain in relation to the Catalan people (Article 1 of the International Covenants, among others).
- The principle of territorial integrity is only applicable in case of external interference by another State in Spanish territory, which is not the case in the present case (Article 2 of the Charter of the United Nations, among others).
- The right of self-determination thus defined already exists in the Spanish legal system (articles 96 (1) and 10 (2) of the Spanish Constitution), without it being necessary to reform the Constitution to integrate it.
- All the bodies and institutions of the Kingdom of Spain must facilitate the exercise by the Catalan people of the right of self-determination in a peaceful and democratic manner. To create obstacles to it would be to seriously attack

a fundamental human right protected at the highest level by the United Nations and by the Spanish Constitution.

Having established these conclusions, it is appropriate to examine the practical consequences thereof, as well as to make recommendations in this regard within the framework of the mandate granted by the member states to the United Nations Independent Expert on the promotion of a democratic and equitable international order, in particular, the mandate "to support the strengthening and promotion of respect for human rights and fundamental freedoms throughout the world."

RECOMMENDATION 1: Refrain from OBSTRUCTING the peaceful and democratic exercise of the right of self-determination of the Catalan people.

It is recommended that all parties, as well as any organ, institution and public official, refrain from executing public actions or resolutions, whether administrative or judicial, whose objective or consequence is to hinder acts of peaceful and democratic pursuit of their exercise of the right of self-determination by the Catalan people. In effect, such actions or resolutions should be considered as serious violations of a fundamental human right protected by the Charter of the United Nations, by the International Covenants and by the Spanish Constitution, and normally null and void.

It is also recommended that public officials (state, regional or local) not be ordered to execute such actions or resolutions, and that conscientious objection be recognized if so alleged in view of the serious potential for violation of human rights.

Below are examples of public actions or resolutions that could be considered obstacles to the peaceful and democratic exercise of the right of self-determination (in addition to potentially violating other fundamental rights such as those of access to information, freedom of opinion and expression, of peaceful assembly and association, of public manifestation, and political participation). If so, such official's abstention would be recommended.

Note: This list is not exhaustive and is offered in an exemplary and doctrinal way to facilitate the practical understanding of the issue. As it cannot be otherwise, only the competent authorities at the national level (and ultimately at the international level) will be able to decide on the compatibility with national and international law of actions related to the peaceful and democratic exercise of the right of self-determination, as well as public actions or resolutions impeding them. The list that follows is generic. For details on specific situations, there are hundreds of complaints from Catalan citizens, voters and demonstrators, as well

as two criminal complaints with a list of specific cases forwarded by more than 600 jurists in December 2017 and February 2018 to the United Nations[61] and the Council of Europe,[62] and a report[63] about restrictions on freedom of information prepared by a group of journalists.

The Spanish Government and other authorities must refrain from adopting:

- Administrative or judicial actions or resolutions whose objective or consequence could be to hinder peaceful and democratic acts of information or demonstration about the right of self-determination of the Catalan people, for example:
  - hinder or prevent the peaceful holding of conferences and information events on the right of self-determination of the Catalan people, as well as the celebration of marches or peaceful demonstrations in support of it;
  - compel the identification for no apparent reason, and in an abusive and intimidating manner, of participants at said events;
  - withdraw and requisition documents of information or publicity about such events, or about the right of self-determination of the Catalan people in general; prohibit the use of separatist flags in events, and confiscating them;
  - block publications, as well as closing websites and web pages dealing with such events or the right of self-determination of the Catalan people in general;
- Administrative or judicial actions or resolutions whose objective or consequence could be to hinder peaceful and democratic acts of organization or support of a consultation or referendum to gather the opinion of the Catalan people on the exercise of their right of self-determination. Indeed, consultations or referendums conducted in a peaceful and democratic manner constitute a reliable method to poll public opinion and avoid artificial consent in order to guarantee the authenticity of the expression of public will in an environment free of threats and the use of force. They are standard instruments to facilitate the peaceful and democratic exercise of the right of self-determination, and actions or resolutions of hindrance could de facto prevent the exercise of such right, for example:
  - hinder or prevent the dissemination of information and publicity normally carried out in public and private media; make abusive entries and records in the media and identify journalists in an abusive manner; close websites, web pages and applications (even from a political party); withdraw and requisition information or advertising documents; remove posters, banners

and advertisements from the public thoroughfare, even if they were in usual places to do so, and even remove them from private balconies; compel the identification of persons related to such acts in an abusive and intimidating manner;

- hinder or prevent the peaceful holding of conferences, demonstrations and other events on the consultation or referendum; compel the identification for no apparent reason, and in an abusive and intimidating manner, of participants at said events;
- obstruct or prevent the logistical organization of the consultation or referendum; make abusive entries and registrations in official bodies and subcontracted companies; conduct wiretaps and stop, interrogate and / or imprison public officials and businessmen who could be facilitating the logistics of such consultation or referendum; hinder or prevent the normal use of public financing mechanisms; close logistic facilitation websites and web pages; requisition voting materials such as ballots; violate institutional and private correspondence and seize postal material related to such consultation or referendum.

RECOMMENDATION 2: Refrain from CRIMINALIZING the peaceful and democratic exercise of the right of self-determination of the Catalan people.

The criminalization of the peaceful and democratic exercise of as fundamental human right as the right of self-determination must not exist among the advanced democracies of the 21st century.

Therefore, it is recommended that all parties, as well as any organ, institution and public official, refrain from executing public actions or resolutions, whether administrative or judicial, whose objective or consequence is to criminalize acts of peaceful and democratic exercise of the pursuit of their right of self-determination by the Catalan people. In effect, such actions or resolutions should be considered as serious violations of a fundamental human right protected by the Charter of the United Nations, by the International Covenants and by the Spanish Constitution, and normally null and void.

It is also recommended that public officials (state, regional or local) not be ordered to execute such actions or resolutions, and that conscientious objection be recognized if so alleged in view of the serious potential for violation of human rights. If applicable to any of the actions undertaken by the Spanish Government as listed below, this abstention would be recommended.

The following are examples of actions or public resolutions undertaken by the Spanish Government that could be considered as criminalization of the peaceful and democratic exercise of the right of self-determination, as well as serious impairment of the legitimate functioning of democratic institutions of the Catalan people, and serious impairment of electoral rights. and the representation of elected politicians by the Catalan people (in addition to violating other fundamental rights such as those of access to information, freedom of opinion and expression, of assembly and association, of manifestation, and of political participation):

- on the day of the consultation or referendum, violently assaulting crowds of citizens waiting to vote or peacefully demonstrating before polling stations, causing injuries of varying severity to 1066 persons (58% over 41 years old, 23 over 79 years old, 22 minors, two under 11 years old) who had to be treated according to official health sources[64] (including a myocardial infarct, loss of vision in one eye, 31 head injuries and 25 fractures); enter by force and cause material damage to schools and voting centers; confiscate ballot boxes and ballots, and close polling stations; use electronic measures to hinder the logistic management of the consultation or referendum. There are two reports of missions of independent international observers[65] that supervised the referendum as well as a great deal of audiovisual documentation.

- opening a criminal proceeding and condemning the 129th President of the Generalitat of Catalonia and members of his Government to political disqualification for promoting a non-binding popular consultation in 2014 to gather the opinion of the Catalan people on the exercise of their right of self-determination; opening and instructing a new and separate judicial proceeding for the same acts, preemptively seizing the private homes and other assets of the same persons for more than five million euros;

- ordering the opening of investigative proceedings by the Public Prosecutor's Office against 712 mayors (75% of Catalonia mayors) for giving peaceful support to a referendum or consultation by assigning voting premises, proposing their arrests in case of lack of cooperation;

- opening and instructing criminal proceedings, detaining and / or interrogating numerous persons such as school teachers, computer technicians, comedians or users of twitter, among others, for the treatment and dissemination of information related to the Catalan process and / or the referendum;

- opening and instructing criminal proceedings against high officials and officials of the Generalitat of Catalonia, particularly in the economic, police

and technological fields, arresting and imprisoning some of them for several days, for supporting the Catalan process and / or the referendum;

- opening and instructing criminal proceedings against leaders of Catalan civil society, interrogating them and imprisoning them without prior trial for an indefinite period (from October 16, 2017) at the request of the Public Prosecutor, for an alleged offense of sedition;
- dismissing the 130th President of the Generalitat of Catalonia and the members of his Government, and intervening in the administration of Catalonia by placing it under the direct instruction of the Government of Spain, dismissing officials and removing charges, among others (note: these measures have been challenged, because article 155 of the Spanish Constitution, on which they are based, does not attribute said powers to the Government of Spain);
- opening and instructing criminal proceedings against the newly dismissed President of the Generalitat, Vice President and members of the Government, at the request of the Public Prosecutor, for the alleged offense of rebellion, among others;
- interrogating and imprisoning without previous judgment the newly dismissed Vice-President of the Generalitat and several members of the Government, at the request of the Public Prosecutor; keeping the Vice President and a member of the Government in prison indefinitely (from 2 November 2017);
- issuing warrants of arrest against the newly dismissed President of the Generalitat and members of the Government residing in Brussels, at the request of the Public Prosecutor's Office (note: Spain requested Belgium to arrest and extradite the President and members of his Government residing in Brussels, but withdrew such a request just before the Belgian courts could decide, however, arrest warrants issued for the Spanish territory remain in force);
- dissolving the Parliament of Catalonia, calling for early elections, and supervising them directly by the Government of Spain on the basis of Article 155 of the Spanish Constitution (note: these measures have also been subject to several appeals for the reasons mentioned in a note previous);
- opening and instructing several criminal proceedings against the President of the Parliament of Catalonia and separatist members of the Parliament's Bureau, at the request of the Public Prosecutor's Office, for the alleged offense of rebellion, among others;

- interrogating, and imprisoning in a prison in Madrid for one night, after having transferred him in a police van while held with handcuffs, the President of the Parliament of Catalonia, the first authority of the country at that time, after the dismissal of the President of the Generalitat of Catalonia; requiring bail, withdrawing his passport and requiring weekly appearances to provisionally release him from prison;
- after the Government of Spain's calling early elections, preventing the participation in the electoral campaign of independent political candidates, including a head of the electoral list and a second head of the electoral list, keeping them in prison without trial; denying their departure at any time during the electoral campaign, thus imposing a situation of inequality of opportunity with respect to other candidates;
- after the holding of the elections, to continue keeping elected officials in pretrial detention and for an indefinite period, thus hindering their functions of political representation; denying them transfer to prisons in Catalonia, near their representatives and families (in contravention of article 10 ICCPR), keeping them away in prisons in Madrid; denying penitentiary permits so that they can attend plenary sessions of the Parliament of Catalonia, establishing a "prolonged legal incapacity," all without prior trial;
- after the holding of the elections, expanding the list of those investigated for rebellion to presidents and spokespersons of pro-independence parliamentary groups, as well as presidents and general secretaries of pro-independence political parties and the President of the Association of Independent Municipalities. According to the Spanish press,[66] the new resolutions "raise to 286 the total of those investigated by the Supreme Court in the case of rebellion. (...) The list could be extended, since the *Guardia Civil* attributes the criminal activities to other lower levels."
- after holding the elections, denying a prison permit enabling the candidate elected President of the Generalitat to leave prison for a few hours and be invested by Parliament as the 131st President of Catalonia, despite the elected candidate having all of his civil and political rights; denying such request without hearing the parties; denying also a non-face-to-face or delegated investiture, which does not need his physical presence in Parliament, thus ending by de facto denying his right to passive suffrage, all without prior trial.

In short, the actions by the Spanish Government listed above entail violations of articles 1, 7, 9, 10, 14, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights and should be brought before the United Nations

Human Rights Committee for adjudication pursuant to the Optional Protocol to ICCPR, to which Spain is a State party.[67] Said actions by the Spanish Government also violate numerous provisions of the European Convention on Human Rights and Fundamental Freedoms and its Protocols, for which the European Court of Human Rights in Strasbourg is competent to adjudicate. Moreover, they are incompatible with the three pillars of the European Union—democracy, rule of law and human rights—contravening article 2 of the Treaty of Lisbon and requiring appropriate action under article 7 of the Treaty of Lisbon. The European Court of Justice in Luxembourg should adjudicate on the matter.

RECOMMENDATION 3: FACILITATE the peaceful and democratic exercise of the right of self-determination of the Catalan people.

My 2014 report to the General Assembly of the United Nations (A /69/272)[68] affirms and documents the proposition that the peaceful and democratic exercise of the right of self-determination contributes to greater enjoyment of human rights, peace and national and international stability. In effect, the modern perspective on the right of self-determination focuses on its function as a means to promote peace. Thus, respect for the right of self-determination on the part of the States allows maintaining harmonious relations with the peoples under their jurisdiction and constitutes an important strategy to promote national and international stability.

On the other hand, the violation of this right causes instability and can degenerate into situations of conflict that must be avoided through timely and good faith negotiations. In order for human rights, peace, security and stability to flourish, relations between peoples and governmental entities must be based on a genuine and permanent agreement, in turn based on a social contract. In case the government violates said contract, the people, as sovereign, must have the democratic right to redefine the relationship.

In this sense, it should be remembered that self-determination does not always mean secession. The right of self-determination entails the intrinsic capacity of the people to decide on their political future, being able to freely prioritize, at a specific historical moment, from a complete integration into a State even without differentiation with other regions (possibly guaranteeing specific cultural, linguistic and religious rights), all the way to secession and full independence, going through different models of regional empowerment, autonomy, or special status in a federal State (in all cases with varying degrees of cultural, economic and political autonomy).

In fact, when all peoples enjoy human rights without discrimination and populations feel that they hold the reins of their destiny, their interest in achieving external self-determination (secession) is lower. Arrogance, exclusion, arbitrariness and carelessness on the part of governments can lead a peaceful people to despair and violence. Governments have an obligation to protect the human rights of those under their jurisdiction and to adopt confidence-building measures to create peaceful societies governed by the rule of law. In most cases, this can be achieved within the framework of existing state bodies, among other ways, through federalism and other models of autonomy.

However, if there is an urgent demand for separation, the most important thing is to avoid responding by the use of force, which would endanger local, regional and international stability and further erode the enjoyment of other human rights. Negotiations in good faith and the willingness to compromise are therefore necessary.

In this regard the former Director General of UNESCO, Federico Mayor Zaragoza published the following reflection after the independence referendum on October 1, 2017:[69] "CATALUNYA: it's never too late for the meeting. It is never too late for the meeting and to approach with serenity the problems that, if they do not find a solution in time, can lead to undesirable situations for everyone. As I have repeatedly indicated in relation to the events that took place in Catalonia, I believe it is fundamental and urgent that a meeting of representatives of both parties takes place without conditions or a priori, addressing the different dimensions of the conflict with serenity and a high level of vision. to conclusions that allow to avoid the serious consequences that could derive. As former Director General of UNESCO, President of the Culture of Peace Foundation and co-President of the University Institute for Human Rights, Democracy and Culture of Peace and Non-Violence (DEMOSPAZ) I wish to join my voice to those who seek it, from different national and international instances, adequately resolve an issue that concerns and challenges us all."

Based on all of the above, **FIVE RECOMMENDATIONS** are proposed to facilitate a solution to a common problem, which is shared by the Spanish State and by the Catalan people:

(a) The immediate reconsideration of the measures adopted that may criminalize the peaceful and democratic exercise of the right of self-determination of the Catalan people, particularly those that affect the functioning of democratic institutions of the Catalan people and their fundamental human rights, especially those of elected representatives, without waiting for such measures

to be formally questioned in international jurisdictional areas. In effect, measures to criminalize fundamental rights is contrary to international law, and from the outset they make a solution to the conflict difficult, with the potential to generate even more instability in the region. In this sense, it is understood, for example, that the Public Prosecutor has the power to modify his request for provisional measures so that elected deputies imprisoned without a trial can be released from prison and that they can begin to fully exercise their political rights in the Parliament of Catalonia.

(b) The recognition that the Catalan people have manifested over the last two decades, and persistently, an aspiration to peacefully and democratically modify their current framework of self-government, and that the representatives freely elected by the Catalan people are the legitimate interlocutors to negotiate with the Spanish State on their behalf (just as they were recognized as such by the State when the reform of the Statute of Catalonia was negotiated bilaterally in the last decade).

(c) The urgent start of a bilateral negotiation process in good faith between representatives of the Spanish State and the Catalan people, to jointly examine, without *a priori* impositions, the possibilities of reaching agreements satisfactory to both parties. In this regard, the international community (particularly at the European level and the United Nations) has extensive experience in the provision of mediation and good offices to assist the parties.

(d) The understanding of the parties that either of them should be able to submit proposals or results of said negotiating process to appropriate democratic validation mechanisms, whether representative (parliamentary) or direct democracy (consultation or referendum). In effect, any negotiating process must be accompanied by the participation and consent of the citizens concerned. The details of that can be included in the negotiation process (question, census, quorum and majorities etc.). European and United Nations bodies have extensive experience in the matter and can assist in the supervision of a consultation or referendum.

(e) The acceptance by the international community that a refusal of the Spanish State to participate, urgently, in good faith and with a willingness to compromise, in a bilateral dialogue process should, in the current situation, open the possibility to the Catalan people to prioritize alternative ways for the peaceful and democratic exercise of their legitimate right of self-determination, in particular the holding of a binding referendum of self-determination under the direct supervision of the international community. In this connection, one may refer to the UN-organized and monitored

> referendum held in 1999 in Timor Leste, against the wishes but ultimately with the consent of the occupying power, Indonesia, which realised that it could no longer stop it.[70]

Finally, as indicated in my report to the General Assembly of the United Nations, the application of the right of self-determination (like that of all fundamental rights) is not simply relegated to the exclusive competence of the national jurisdiction of the State in question, but is a legitimate concern of the international community, because of the consequences of its refusal for the peace and stability of the region. A democratic and equitable international order requires that all States observe the Charter and apply international law in a uniform manner. The best way to ensure world peace and security is for States to observe treaties in good faith (*pacta sunt servanda*) and apply them in the light of the international human rights treaty regime.

The credibility of the common effort to realize human rights depends on its uniform monitoring, both in developing regions and in developed regions. The rules cannot be applied selectively or à la carte, as some states claim. In addition, the criminalization of the exercise of human rights, including the right to one's own identity and self-determination, is contrary to the obligation of states to observe treaties and conventions in force. The international community cannot accept repressive spirals anywhere. Exceptions are anachronisms in the 21st century.

For this reason, the United Nations and all its member states, the Council of Europe and all the Member States of the European Union are invited to ensure respect for human rights and fundamental freedoms also in Catalonia, and to ensure their proper application in relation to the Catalan people, with the aim of continuing to develop their potential to promote peace and stability in Europe.

Endnotes

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22 See Human Rights Council resolution 24/8.

23 Michael Kirby, speech delivered at the UNESCO International Meeting of Experts on Peoples' Rights and Self-Determination," Budapest, 25-29 September 1991. Available from www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/906 -Peoples'_ Rights_and_ Self_Determination_-_UNESCO_Mtg_of_Experts.pdf.

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32 See Council of Europe, Parliamentary Assembly, "Enforced population transfer as a human rights violation," report of the Committee on Legal Affairs and Human Rights, document 12819, 9 January 2012. Available from http://assembly.coe.int/ ASP/Doc/XrefViewPDF.asp?FileID= 13204&Language=EN; A. de Zayas, "Forced population transfers," Max Planck Encyclopedia of Public International Law.

33 Robert Redslob, *Collected Courses of The Hague Academy of International Law,* vol. 37 (1931), p. 45; A. de Zayas, *Heimatrecht ist Menschenrecht* (Munich, Universitas, 2001), p. 39.

34 The expert group affirmed the right to live and remain in one's homeland, i.e. the right not to be subjected to forcible displacement, as a fundamental human right and a prerequisite to the enjoyment of other rights. Reference was made to the extensive discussion of this issue at the session of the Institute for International Law held at Siena, Italy, which had concluded that transfers of population entailed serious violations of human rights. See also A. de Zayas, "The right to one's homeland, ethnic cleansing and the International Criminal Tribunal for the Former Yugoslavia," *Criminal Law Forum,* vol. 6, No. 2 (1995), pp. 257–314.

35 See A. de Zayas, "Ethnic cleansing: applicable norms, emerging jurisprudence, implementable remedies," in J. Carey, W. Dunlap and R. J. Pritchard, eds., *International Humanitarian Law* (Martinus Nijhoff, 2003).

36 References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

37 "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

38 In Africa: Western Sahara. In the Atlantic and Caribbean: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Islands. In Europe: Gibraltar. In Asia and

the Pacific: American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn and Tokelau.

39 See footnote 5.

40 Apology by the United States Government to the Hawaiian people, 1993; apology by the Government of Australia to Australia's indigenous peoples, 2008; apology by the United Stat es Government to native peoples of the United States, 2010; apology by the Government of Canada for injustices to the native peoples, 1998; apology by the Government of Canada to former students of Indian Residential Schools, 2008; apology by the Government of Sweden to the Sami people, 1998; apology by King Harald V of Norway to the Sami people, 1997.

41 Bartolomé de las Casas, *Brevísima relación de la destrucción de las Indias (A Brief Account of the Devastation of the Indies)*, 1542; Richard Drinnon, *Facing West* (University of Oklahoma Press, 1997); Frederick Hoxie, ed., *Encyclopedia of North American Indians* (Houghton Mifflin Harcourt, 1996), in particular the entry "Population: precontact to present"; David Stannard, *American Holocaust* (Oxford University Press, 1992; Eduardo Galeano, *Open Veins of Latin America* (Monthly Review Press, 1997).

42 See www.idlenomore.ca/.

43 *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada,* communication No. 167/1984, views of the Human Rights Committee adopted on 26 March 1990, p. 33: "Historical inequities to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 [of the International Covenant on Civil and Political Rights] so long as they continue." Cited in Möller and de Zayas, p. 447.

44 www.aiatsis.gov.au/_files/ntru/resources/resourceissues/mabo.pdf.

45 See http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

46 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.

47 See www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml.

48 See footnote 5.

49 A. de Zayas, "Peace as a human right," in A. Eide, J. Möller and I. Ziemele, eds., *Making Peoples Heard* (Leiden, Martinus Nijhoff, 2011), pp. 27-43.

50 http://www.un.org/en/charter-united-nations/index.html

51 https://treaties.un.org/doc/source/docs/spain.pdf

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54 http://www.ohchr.org/SP/ProfessionalInterest/Pages/CESCR.aspx

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67 Jakob Möller/Alfred de Zayas, *United Nations Human Rights Committee Case Law,* N.P. Engel, Strasbourg 2009.

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70 John Taylor, East Timor: The Price of Freedom. Australia: Pluto Press, 1999..