The Law on self-determination today -- by Alfred de Zayas

Progressive development of international law has gradually brought forward the ideal of self-determination of peoples from early conceptions of autonomy in Woodrow Wilson's 14 Points to decolonization and to recognition of the right to secession as a last resort when internal self-determination cannot be achieved[1].

Pursuant to the 2010 Advisory Opinion of the International Court of Justice on Kosovo, a unilateral declaration of independence does not violate international law. The separation of Kosovo from Serbia has established an important precedent in international law that is being invoked by many peoples aspiring to independence, including the Kashmiris, the Kurds, the Tamils and the Catalans. While recognition is declaratory and not constitutive of statehood, it is in the interest of the international community to welcome *de facto* States into the United Nations and thus enable them to adhere to United Nations conventions, particularly the human rights treaty system. The elements of statehood are objective: defined territory, population, government and capacity to enter into relations with other States. A new State must be economically viable and observe human rights and international law.

Today international law recognizes self-determination as peremptory (*ius cogens*). Rights holders are peoples. Self-determination is not a prerogative of States to grant or deny. Self-determination is an expression of democracy, as democracy is also a mode of self-determination. However, this right -- like all rights -- is not self-executing. It requires the exercise of effective territorial control, which sometimes can only be obtained by waging a successful war as in Bangladesh in 1971, or can fail as in the case of the Tamils of Sri Lanka in 2009.

Implementing the right of self-determination has been and continues to be denied by some powerful States with impunity. The *ius cogens* prohibition of the use of force contained in article 2(4) of the UN Charter, is similarly too frequently violated with impunity, as in the case of the illegal invasion and bombardment of Iraq in 2003, which UN Secretary General Kofi Annan correctly denounced as an "illegal war". The violation of the right of self-determination or of the prohibition of the use of force does not diminish the legal force of the norm. It only manifests once again the lack of enforcement mechanisms in the UN system and the fact that war crimes and crimes against humanity often go unpunished.

Territorial integrity is a central principle of international law and international relations, particularly important when it reinforces peace and stability. The principle is related to the prohibition of the use of force in article 2(4) of the UN Charter, and is reaffirmed in General Assembly Resolution 2625 on Friendly Relations, and resolution 3314 containing the Definition on Aggression. The principle of territorial integrity means that no State can encroach on the territorial integrity of another State. But the principle cannot be invoked against a people seeking self-determination. Its application is external against outside threats and not internal, as that would be incompatible with article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic Social and Cultural Rights and could not justify continued subjugation of peoples, minorities or persons living under occupation.

When a people strives for internal or external self-determination, the world community should facilitate its realization and thus prevent a local dispute from becoming a threat to regional or

[1]See my 2014 report to the General Assembly A/69/272, especially the criteria in paras 63-77 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/497/95/PDF/N1449795.pdf?OpenElement

international peace. In case of conflict between the principle of territorial integrity and self-determination, it is the latter that prevails.

Addressing the aspiration of peoples to self-determination in a timely fashion is an important conflict-prevention measure, as is evidenced by the countless wars that have occurred since 1945 that found their origin in denial of self-determination. The best way to know whether a population wants autonomy or independence is by conducting a referendum. The United Nations conducted such referenda in Ethiopia/Eritrea, Timor Leste and South Sudan, but only after tens of thousands of persons had perished in war. It would have been preferable to have mediated in a timely fashion and organized referenda with necessary guarantees and monitoring.

Some antiquated writings on international law sought to freeze the progressive development of international law, contending that self-determination applied only to decolonization. Whoever is aware of the historical development of the norm will shake his head, because law is a living thing. We are not in the days of the pious pronouncements of the League of Nations, and the system of minorities protection. Article 3 of the Atlantic Charter of 1941 affirmed it boldly, and was enshrined in article 1(2) of the United Nations Charter, and chapter XI concerning non-self-governing peoples.

What has followed is a steady development toward letting people decide on their futures by way of plebiscite or referendum. We recall Security Council Resolution 47 on a plebiscite in Kashmir, General Assembly Resolution 194(III) on the right to return of the Palestinians, GA resolution 1514 on Decolonization (1960), the failed self-determination war of the Igbos for the independence of Biafra 1967-70, the declaration of independence of Bangladesh in 1971 and the Pakistani-Indian War, the entry into force of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1976, common article 1 of which proclaims the self-determination of peoples. The world also saw the establishment of the United Nations Mission for the Referendum in Western Sahara (MINURSO) by Security Council resolution 690 (1991); the independence referendum and secession of Nagorno Karabakh in 1988, the ensuing wars against Azerbaijan 1992-94, including OSCE mediation. The dissolution of the Soviet Union into 15 republics made evident that State entities can indeed separate into well-functioning new members of the international community. In 1991-92 wars and unilateral declarations of independence followed in Abkhazia and Southern Ossetia, the unilateral declarations of independence of the separatist regions of Yugoslavia, Slovenia, Croatia, Bosnia and Herzegovina, Macedonia through armed conflict. We also saw the friendly separation of the Czech and Slovak republics in 1993; the Eritrean referendum of 1993; the Quebec self-determination referendum of 1995; NATO's bombardment of Serbia in 1999 and dismantlement of its territorial integrity; the Timor Leste independence referendum of 1999; the Montenegro referendum of 2006, the 1983-2009 failed war of independence of the Tamils of Sri Lanka; the unilateral declaration of independence of Kosovo in 2008 and Advisory Opinion of the International Court of Justice in 2010; the South Sudan referendum in 2011; the Crimea referendum in 2014 and reincorporation into Russia; the de-facto separation of Donetsk and Lugansk from Ukraine in 2014; the Scotland referendum 2014; the Kurdistan referendum 2017; the Catalan referendum in 2017 etc.

The list of peoples still aspiring to self-determination -- including indigenous peoples in Asia and Africa, the United States, Canada, Alaska, Hawaii, Rapa Nui, West Papua, the Moluccas, the Mapuche of Chile, the Bubis of Fernando Poo -- is long. Surely it is in our own interest not to hide our heads in the sand, but to anticipate the needs of these human beings and propose solutions -- each one in a timely fashion.

Henceforth the United Nations, the European Union, the Organization of American States, the African Union, the OSCE and other international organizations should develop "early warning" mechanisms

and offer mediation and good offices so as to solve self-determination disputes before they degenerate into violent confrontation. Self-determination can be exercised as internal self-determination in the form of federalism with a high degree of autonomy, or in the form of external self-determination through secession. A democratic choice through referendum is the preferred way to implement this right which is so essential to sustainable peace.

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