

Donbass Self-Determination: Referenda and the Rights of Minorities. Analysis by UN Expert

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In the wake of the controversies and heated debate generated in the wake of the referenda held last September in the regions of Donbass, it became necessary to get some clarity on the legal issues surrounding this event.

A graduate of Harvard Law School, Dr. Alfred de Zayas served as the first [UN Independent Expert on the Promotion of a Democratic and Equitable International Order](#), appointed by the [United Nations Human Rights Council](#) (2012-18). He worked with the United Nations from 1981 to 2003 as a senior lawyer with the Office of the UN High Commissioner for Human Rights, Secretary of the UN Human Rights Committee, and the Chief of Petitions.

Arnaud Develay: What is your analysis of the predicament facing Russian-speaking minorities living in the Donbass regions in the wake of the events of the Maidan? Could the actions of the Ukrainian government these past eight years be constitutive of an attempt to commit genocide on these populations?

Alfred de Zayas: The Russian population in Donbass certainly had reason to feel threatened in the light of the virulence of the anti-Russian rhetoric by the leaders of the Maidan coup and the anti-Russian legislation adopted by the putsch-Parliament.

The level of hatred expressed by politicians and media certainly constituted "hate speech" and violated article 20 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits both propaganda for war and incitement to hatred and discrimination.

The shelling of population centers in Donbas 2014-2022 entailed war crimes and crimes against humanity, but did not amount to genocide for purposes of the 1948 Genocide Convention.

While Art. 2 of 1948 of the Genocide Convention has 5 categories, it does not include cultural genocide. It is wiser to avoid hyperbole. War crimes and crimes against humanity

under articles 7 and 8 of the Statute of Rome are bad enough.

The right to speak one's language is protected in articles 2 and 27 of the ICCPR. It is also protected in articles 2 and 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR) and numerous UN resolutions. Moreover, it constitutes a legitimate exercise of the right of freedom of expression under article 19 ICCPR.

Ukraine is certainly in violation of articles 19 and 27 ICCPR.

Moreover, Ukraine is in violation of common article 1 of the ICCPR and ICESCR, which stipulates the right of self-determination of ALL peoples, necessarily including the Russian populations of Crimea and Donbas. Art. 1 reads as follows:

- "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 co-operation, 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."

Arnaud Develay: Did the Russian Federation act in the spirit of the UN Charter as it sought to engage in diplomacy rather than succumb to the calls of those advocating for immediate military intervention as early as 2014-15?

Alfred de Zayas: The Russian Federation spent three decades articulating its political will to pursue international cooperation and friendly relations with all countries, as envisaged in General Assembly Resolution 2625. It made valid overtures and concrete proposals for cooperation and building a joint European house based on sovereign equality and comprehensive national security. It is a great loss for all of humanity that Gorbachev's peace initiatives were not taken up by the US and NATO and that promises made in 1989-91 by US Secretary of State James Baker and others were not kept. The one chance to agree on nuclear disarmament as foreseen in article 6 of the Non Proliferation Treaty, the one chance to implement conventional disarmament and reorient the world toward development and peace, was thrown away by President Bill Clinton when he approved the eastern expansion of NATO, a grave breach of trust, a needless provocation, and a violation of article 2(4) of the UN Charter, which prohibits not only the use of force, but also the threat of the use of force.

After the Maidan coup d'état and the Ukrainian bombardment of the Donbas, the Russian Federation spent 8 years trying to solve the dispute by peaceful means as required under art. 2(3) of the UN Charter. The Minsk agreements were valid and moderate and would have led to durable peace, if implemented by Ukraine. The continued shelling of Donbas by Ukraine, as documented by OSCE[1], constituted repeated violations by Ukraine of Art. 2(4)

of the Charter. It is the *ultima irratio* to wage war on a hapless civilian population to prevent the exercise of their right of self-determination. All Russian attempts at peaceful negotiation in the context of OSCE and the Normandy Format were ignored. As late as December 2021 Russia put on the table the drafts of two treaties that would have been the basis of a fruitful dialogue pursuant to article 2(3) of the UN Charter. Again the US and NATO rejected these peaceful overtures.

Arnaud Develay: How does the argument of self-determination behind the recent referenda reconcile itself with the outcome in the case of Catalonia?

Alfred de Zayas: Art. 1 of the International Covenant on Civil and Political Rights is clear – ALL peoples have the right of self determination – not only formerly colonial peoples. This includes Estonia, Latvia, Lithuania, Slovenia, Croatia, Kosovo. It also includes the Catalans, the Crimeans, the Donbass population, the peoples of Nagorno Karabakh, Abkhazia and Southern Ossetia. Rights holders of self-determination are PEOPLES – duty-bearers are States, which do NOT have a prerogative to grant or deny self-determination. Of course self-determination is not co-terminous with secession. According to the doctrine of internal self-determination, a people has a right to exercise it through internal self-determination in the form of autonomous status (as envisaged in the Minsk agreements). Ideally self-determination should be preceded by reliable referenda, organized and monitored by the United Nations, as was the case in Timor Leste, Sudan and Ethiopia/Eritrea. The UN failed the Ukrainian and Russian peoples when it failed to organize referenda in 1991, when Ukraine unilaterally seceded from the Soviet Union, or at the latest following the unconstitutional coup d'état against the democratically elected President of Ukraine Victor Yanukovich.

Arnaud Develay: Did the ICJ open a Pandora box with its 2010 decision bearing on the legality of Kosovo's unilateral declaration of independence?

Alfred de Zayas: I would NOT call it a Pandora's box at all. It represents a reaffirmation of Article 1 ICCPR. In the post-UN Charter age, decolonization of Africa and Asia was mandated – self-determination being one of the pillars of the UN Charter, and incorporated in numerous Security Council and General Assembly Resolutions. The gradual exercise of self-government was foreseen in Chapter XI of the Charter. The ICJ advisory opinion[2] is very clear in stating that the principle of territorial integrity is only for external use and cannot be invoked to deny the people's right of self-determination. See para. 80. The advisory opinion did create an international law precedent, as did the de facto and de jure emergence of Estonia, Latvia, Lithuania, Ukraine, Slovenia, Croatia, Bosnia, etc. by virtue of unilateral declarations of independence at the expense of the territorial integrity of the Soviet Union and Yugoslavia.

Arnaud Develay: What should be the criteria retained to evaluate whether the right of self-determination should overcome the territorial and administrative integrity/cohesion of an already established State?

Alfred de Zayas: Neither right is absolute. Both are important international law principles that can and do coexist in the context of the one "rules based international order" we know – the UN Charter. Some international lawyers have invented the concept of "remedial secession", which I reject as an artificial "doctrine", because it is impossible to set an objective threshold.

A better approach is to apply the over-arching principle of sustainable peace, which is at the heart of the UN Charter. It is NOT the exercise of self-determination that causes wars, but the unjust denial thereof. Indeed, the denial of self-determination has led to armed conflict in countless cases since 1945. It is the function of the UN and the Security Council to prevent threats to and breaches of the peace for purposes of article 39 UN Charter. Hence, it is the function of the UN to ensure the realization of the right of self-determination as a conflict-prevention strategy.[3]

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Notes

[1] <https://www.osce.org/special-monitoring-mission-to-ukraine/512683>. Alfred de Zayas, Countering Mainstream Narratives, Clarity Press, Atlanta, 2022, p. 80.

<https://www.counterpunch.org/2022/07/22/prolonging-war-is-a-crime-against-peace-and-a-crime-against-humanity/>

[2] <https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

[3] See chapters 3 and 5 of A. de Zayas, "Building a Just World Order", Clarity Press, Atlanta, 2021.

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