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Understanding Self-Determination: The Basics
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DEFINITION OF SELF-DETERMINATION

The right to self-determination, a fundamental principle of human rights law,(1) is an individual and collective right to "freely determine . . . political status and [to] freely pursue . . . economic, social and cultural development." (2) The principle of self-determination is generally linked to the de-colonization process that took place after the promulgation of the United Nations Charter of 1945. (3) Of course, the obligation to respect the principle of self-determination is a prominent feature of the Charter, appearing, inter alia, in both Preamble to the Charter and in Article 1.

The International Court of Justice refers to the right to self-determination as a right held by people rather than a right held by governments alone. (4) The two important United Nations studies on the right to self-determination set out factors of a people that give rise to possession of right to self-determination: a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance.(5)

The right to self-determination is indisputably a norm of jus cogens. (6) Jus cogens norms are the highest rules of international law and they must be strictly obeyed at all times. Both the International Court of Justice and the Inter-American Commission on Human Rights of the Organization of American States have ruled on cases in a way that supports the view that the principle of self-determination also has the legal status of erga omnes.(7) The term "erga omnes" means "flowing to all." Accordingly, ergas omnes obligations of a State are owed to the international community as a whole: when a principle achieves the status of erga omnes the rest of the international community is under a mandatory duty to respect it in all circumstances in their relations with each other.

Unfortunately, when we review situations invoking the principle of self-determination, we encounter what we must call the politics of avoidance: the principle of self-determination has been reduced to a weapon of political rhetoric. The international community, therefore, has abandoned people who have the claim to the principle of self-determination. We must insist that the international community address those situations invoking the right to self-determination in the proper, legal way.

THE DE-COLONIZATION MANDATE

As a result of the de-colonization mandate, two types of situations emerged: situations I call "perfect de-colonization" and those that I call "imperfect de-colonization". The principle of self-determination arises in the de-colonization process because in a colonial regime the people of the area are not control of their own governance. In these situations there is another sovereign, and illegitimate one, exercising control. De-colonization, then, is a remedy to address the legal need to remove that illegitimate power. (P) A. Perfect de-colonization.

In a perfect de-colonization process the colonial power leaves and restores full sovereignty to the people in the territory. In these situations, the people have their own State and have full control of their contemporary affairs, with a seat in the United Nations and all other attributes of a State in international law. There are either no component parts of the State that would have the right to self-determination in its own right or if there are such component parts, the State has voluntarily become a working multi-group State. Some de-colonization that took place after the UN Charter can be viewed as "perfect." This is not to declare that all States that were former colonial States have a "perfect" current government or that a particular government in any of these States fully respects human rights. However, the issue of self-determination no longer arises in these countries.

B. Imperfect colonization.

Imperfect de-colonization occurs when there is an absence of restoration of full governance to a people having the right to self-determination. There are several types of imperfect de-colonization. In one scenario, separate States conquered by a colonial power were amalgamated into what the colonial powers frequently referred to as a "unitary" state -- a kind of forced marriage between the two or more formerly separate States. The people of these States usually have different languages, ethnicities, religions or cultures. At the termination of the colonial regime, the colonial power may simple turn over power to one of the groups and leave the other group or groups essentially entrapped into the new de-colonized State. The entrapped group may resist this, and may seek to restore its pre-colonial sovereignty.

In another scenario, these different groups may decide to continue as a unitary State, but with an agreement (usually through the de-colonization instrument or national constitution) that if it does not work out, then the component parts would go back to their pre-colonial status of independent units. This is what I call a "we'll give it a try" abrogation of full independence by usually the smaller group or groups with clear op-out rights (a fall-back position) if the "unitary" system set up by colonial power fails to afford them full rights. However, when a component part seeks to opt-out, the dominant power refuses.

In yet another scenario, one State may forcibly annex a former colonial people, but either the effected peoples, the international community or both do not recognize this as a legal annexation. The international community may have even mandated certain procedures, as yet unrealized, by which the effected people are to indicate their choice regarding self-termination rights.

In a fourth scenario, there may be a situation where a small component part of a colonially-created "unitary" state agreed to continue the unitary State but with no particular "op-out" agreements signed. Rather, there were either verbal or negotiated, written agreements about how the rights of the smaller (or in some situations weaker) group would be protected in the combined State. However, the smaller or weaker group then experiences severe curtailments of their rights over a long period of time by the dominant group and may lose the ability to protect its rights by peaceful means.

CASE STUDIES

Burma. (8)

I will begin with the de-colonization process in British Burma. The 1947 Constitution of Burma, which was to be the constitution following the de-colonization process, had "opt-out" clauses regarding the many different people of the territory occupied by Great Britain. In other words, the groups that were put under "unitary" rule by the British would have the right to say they do not want to continue being united to the other groups in post-colonial Burma. This is the classic "we will give it try" scenario, with the protection of legal instruments to enforce the "opt out" rights.

The 1947 Constitution in Burma had a ten-year trial period, so theoretically a group couldn't have opted out until 1957. However, in the intervening years between 1947 and 1957, the Burmese, the majority in that area, seized power and the other ethnic nationalities that were part of the union of Burma began to suffer. Even worse, the Burmese government unilaterally extinguished the opt-out rights under the 1947 Constitution. Many people think the situation of human rights in Burma, under serious review by the United Nations Commission on Human Rights for many years, relates to the Burman (9) military regime against Daw Aung Sang Suu Kyi's ethnically Burman party and her supporters.

Unfortunately, the situation is far more complex than that -- the majority of the more serious human rights violations have occurred in the context of conflicts between the Burman army against the military forces of the other ethnic nationalities that were given the right to cede in the 1947 Constitution: the Karen, the Karenni, the Mon, the Shan and others. In fact some of those groups cast a leery eye at any Burman political party: they say that even if Daw Aung San Sui Kyi's party takes over, the relationship between that essentially Burman party and the other ethnic nationalities is not certain. In particular, some groups are unsure as to whether they will then be able to exercise their op-out rights conferred under the 1947 Constitution. The Moluccas. (10)

A second situation is that of the Moluccas. This situation arose in the area of the Netherlands East Indies. I use that term rather than Indonesia because the term Indonesia is term invented at the time of the de-colonization process - there was not a State called Indonesia prior to 1949. Whereas the British were mainly behind the scenes during the 1947 constitutional process in Burma,, the Netherlands authorities had their hands in very heavily throughout the de-colonization process of the Netherlands East Indies.

The Netherlands, as had Great Britain, amalgamated many unrelated nations and placed them under the colonially-imposed "unitary" state system --under one rule.

At the time of de-colonization there was great difficulty in reaching an agreement as to what should happen to all of those formerly independent island nations. The strongest and most populous group was the Javanese, centered in Jakarta although also located elsewhere in the islands. The Javanese became the bargaining power. So through the Netherlands and the Javanese and with the cooperation of the United Nations at that time, Indonesia was to come into being. The de-colonization instrument, called the Round Table Conference Agreements of 1949, was between the Netherlands, the Javanese - Indonesian leadership and the United Nations. (11) The new State to be formed from the Netherlands East Indies was to be called the United States of Indonesia and was to be made up of the Javanese islands to be grouped as "the Republic of Indonesia" and other co-equal "republics." The Moluccas was to be part of the Republic of East Indonesia.

The Round Table Conference Agreement had several "opt-out" provisions offering provisions for both internal and external choices. For example, the populations of territories were to be given a plebiscite to determine "whether they shall form a separate component state."(12) The second "opt-out" provision allowed states that did not ratify the constitution to negotiate with either the United States of Indonesia or the Netherlands for a "special relationship." (13) Thus, the de-colonization instrument itself for the Netherlands East Indies gives the Moluccas the legal right to secede.

Immediately following the turning over of power, the Javanese began to forcibly incorporate the component parts into the Republic of Indonesia (the Javanese stronghold) rather then implement any plebiscites. Additionally, the Javanese made clear they would not allow component parts to "opt-out" entirely. With increasing Javanese pressure on the Moluccas, the Moluccas responded by invoking Article 2.

2: on April 25, 1950 the Moluccan leadership declared the independent state of the Republic of South Moluccas. However, the Javanese strongly opposed this, and itself invaded the Moluccas. Sadly, at that same time, the Moluccan forces were seriously depleted because the Netherlands had transported 4,000 Moluccan troops and their families to the Netherlands. The Moluccan forces had been part of the Netherlands forces in the East Indies (the KNIL) and transported them to the Netherlands. The Moluccan people were left without defenders against the Javanese army.

At the time, the United Nations Commission for Indonesia took up the Moluccan case. But even so, it became apparent that the politics of the United Nations seemed to change. It is difficult to assess what occurred, in part because, as I discovered in researching the Security Council and United Nations Commission for Indonesia of that era, most of the documents are still embargoed. Researchers cannot even look at them. What is obvious is that a deal was made probably behind the scenes, because in the end, the United Nations did not insist on the removal of the Javanese from the Moluccas and the Commission for Indonesia quietly ceased to exist in about 1955.

As you know, many other component parts of the former Netherlands East Indies share with the Moluccas a continuing (and indeed worsening) period with rampant and violent attacks by the Indonesian Army and government-supported paramilitary groups as well as continuing violations of human rights. This is truly a crisis of self-determination, effecting especially the Moluccas, Acheh, and West Papua.

Kashmir. (14)

The next situation I want to present is Kashmir - an " imperfect" de-colonization process in which the United Nations also got involved. The United Nations interest in the situation of Kashmir began in 1947-1948 during the de-colonization process of the British Empire in south Asia. The leaders of what became Pakistan and India reached an agreement with the British that the people of Kashmir would decide their own disposition. Prime Minister Nehru (India) had gone on record publicly saying that the disposition of the Kashmir people will be up to them. (15) Due to a great deal of turmoil in the area, including a full-fledged

revolt in Kashmir against the British-imposed maharajah, the United Nations began formally to address Kashmir in 1948. That year, the Security Council established the United Nations Commission on India and Pakistan, which, in addition to the Security Council itself, adopted resolutions mandating that the final disposition of Kashmir was to be via a plebiscite carried out under the auspices of the United Nations. (16)

The Indian government backed up its earlier promises that the Kashmiri people would decide the future of Kashmir when it supported the plebiscite under the auspices of the United Nations. The Security Council resolutions cited above indicating United Nations action to settle the Kashmir question were all supported by India as were resolutions of the United Nations Commission for India and Pakistan. For example, on January 5, 1949, India agreed to a Commission resolution stating:

The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite. (17)

However, before such a plebiscite could take place, the armed forces of India seized much of Kashmir under the pretext of coming to aid the British-maharajah who was attempting to quell the Kashmiri's revolt against him. The maharajah obtained India's military help in exchange for an Instrument of Accession giving Kashmir to India. (18) Since that time, India has maintained control of what must be called Indian-occupied Kashmir, and continually refers to Kashmir as an integral part of India. India supports this view in part because of Indian-managed elections taking place in Kashmir. However, the United Nations Security Council has repeatedly rejected this argument, by stating that such unilateral acts do not constitute the free exercise of the will of the Kashmiri people: only a plebiscite carried out by the United Nations would be valid. (19)

Unfortunately, the plebiscite has still not occurred. By the mid-1950s, the Cold War deepened and the alliances in the region fell under different spheres of influence in that Cold War. The United Nations Security Council and the Commission had established a plebiscite administration under the authority of the president of the Security Council, and both directly with the President of the Security Council and the Commission on India and Pakistan, a series of plebiscite administrators were unable to secure a situation on the ground so that a plebiscite could take place. The last plebiscite administrator finished his term somewhere between 1955-1956.

Today we find that the disposition of Kashmir has not been legally decided. It is not an integral part of any country and yet we have the failure today of the realization of the expression of self-determination of the Kashmir people. The Kashmiri people are involved in a brutal war in Jammu and Kashmir - what I call the Kashmiri War - in which 5-700,000 Indian troops are present in the area carrying out military actions against civilians and Kashmiri military forces alike. In the course of that armed conflict, the Indian forces have engaged in grave breaches of the Geneva Conventions and the general laws and customs of war. Rapes, disappearances, summary execution, torture and disappearances related to the conflict are nearly every-day events in Indian - occupied Kashmir.

Even without the United Nations recognition of the Kashmiri's right to self-determination, the Kashmir claim is exceptionally strong and so makes a good case study from this perspective. The area had a long history of self-governance pre-dating the colonial period. (20) The territory of Kashmir has been clearly defined for centuries. (21) Kashmiri people speak Kashmiri, which, while enjoying Sanskrit as a root language as do all Indo-European languages, is clearly a separate language from either Hindi or Urdu. (22) The Kashmiri culture is similarly distinct from other cultures in the area in all respects -- folklore, dress, traditions, and cuisine. Even every day artifacts such as cooking pots, jewelry have the unique Kashmiri style. (23)

Most important to a claim to self-determination, the Kashmiri people have a current strong common aspiration for re-establishment of self rule. The Kashmiri people resisted the British, and maintained a degree of autonomy throughout British rule. In 1931 a major uprising of Kashmiris against the British and the British-imposed maharajah was brutally put down. But the "Quit Kashmir" campaign against the maharajah continued into 1946, when the Azad Kashmir movement gained momentum. During the breakup of British India, the Azad military forces began armed attacks against the forces of the maharajah -- prompting the accession to India in exchange for Indian military protection. (24) Resistance to India has continued unabated throughout Indian occupation, with major uprisings in 1953, 1964 and continuing essentially unabated since 1988.

While resistance to India has played a major role in Kashmiri events, there is also forward-looking political

leadership with a clear will and capability to carry on the governance of an independent Kashmir. There are a number of political parties in Kashmir that have been active for some time, even though at great risk. Many of the leaders of these parties have spent time in Indian jails, some for many years, merely because of their political views on Kashmir. In 1993 most of the Kashmiri political parties joined together to form the All-Parties Hurriyet Conference (APHC).

Since it formation, the APHC has sent leaders around Kashmir and around the world to forward dialogue, peaceful resolution of the Kashmiri war, and realization of the United Nations resolutions for a plebiscite of the Kashmiri people. Leaders and representatives of the APHC have regularly attended United Nations human rights sessions, special conferences and the General Assembly.

I also encourage people to investigate the situation in the Punjab in India as well. I am less an expert on the situation there. However, as part of the de-colonization processes, there have been a number of agreements, well before the British left, between the Punjabi leadership, the British and others with promises and agreements which have not been met, that are a factor in the disturbances and the question in the Punjab. Although it is different from the Kashmir question with the distinct Security Council resolution and obligation of the International community to carry out a plebiscite in Kashmir, it may be that final resolution to the difficulties in the Punjab will have to incorporate some form of self-determination in that region.

Tibet. (25)

I want to very briefly discuss Tibet. The Tibet situation represents a post-Charter annexation because China seized independent Tibet in1949 -1950. Rather than a de-colonization the international community was faced with a new colonization. For Tibet, of course, now the issue is de-colonization. The early documents of the United Nations on that question indicate the right to self-determination of the Tibetan people: quite obviously the international community had to recognize China's the post-Charter military seizure as illegal. (26) The situation in Tibet is still not resolved and the Tibetan people still have the right to self-determination, and have the right to their governance and culture.

Unfortunately, China is sending large numbers of non-Tibetan people into Tibet. Rather than ethnic cleansing, China is engaging in ethnic dilution. This is a violation of Article 49 of the Fourth Geneva Convention. This is where the government of China does the most damage to Tibetans and their culture, because in many parts of Tibet, Tibetans are now in the minority. This becomes a very serious situation in the realization of self determination. If you think for a moment at what Madame Daes said in her paper about a middle ground self-determination, where there is some agreement that the indigenous peoples' question should not be handled in terms of absolute sovereignty, China seeks to dilute Tibetans with others, so that if forced into any de-colonization process the Tibetan question might be viewed as an indigenous question rather than one involving full restoration of sovereignty. This "trick" is used elsewhere by other governments and has been especially rampant in the Moluccas where the Indonesian authorities have for may years sent Javanese "settlers" into Moluccan territory.

Sri Lanka. (27)

The situation in Sri Lanka, for many years now engulfed by armed conflict between the Sinhala-controlled government and the Tamil people, must be understood in terms of an "imperfect" de-colonization process by the British. Once again, two distinct countries - in this case the Tamil nation and the Sinhala nation -- were amalgamated under "unitary" rule by the colonizers.

The Sinhala and the Tamil people in the island of Ceylon are as distinct as say the Finns and Italians. The colonizers understood this clearly. The first colonial power on the island, Portugal, was only able to conquer the Tamil country more than 100 years after it conquered the Sinhalese one. In 1621 the Portuguese captured the Tamil king Sankili and killed him. The Dutch took over the island from the Portuguese, and apparently were able to exercise some loose governance over the Tamil areas but mostly ruled from the Sinhalese lands. When the British came, they were able to establish a unitary rule. This was not without protest from Britain's own early administrators, as the first of them said, and I paraphrase here, "I do not know how we are going to do this -- these people are really different", recognizing that in this case, the forced marriage of unitary rule would never work. (28) And in fact during the British administration, the two peoples were probably less amalgamated together than in other areas where the British created "unitary" states: there was clearly a governance recognizing the very different natures of these people.

In the de-colonization process in Sri-Lanka, there was an attempt between the Tamil and Sinhala leadership to try out a post-colonial unitary state despite the historic situation of the two countries. In the first two constitutions, there was an agreement between the majority Sinhalese people and the numerically fewer Tamil people for a government structure that would guarantee that the Tamil people would not become fatally submerged under the Sinhala. So there was an attempt to avoid submersion in the language of the Constitution of 1947. Before the ink was dry, the Sinhala leadership began to violate the terms. There were a number of subsequent agreements between the Tamil and Sinhala leadership to re-negotiate on various occasions, beginning even as early as 1950 and 1951. However major pacts between Tamil leadership and Sinhalese leadership that allowed the rights of the Tamil people and the rights of the Sinhalese people to be dually respected in a jointly run island also failed. (29) In evaluating this situation then, in light the right of self-determination, we can see that this was an "imperfect" de-colonization process. The attempts to negotiate and re-negotiate to try to keep open ways to guarantee rights for the Tamil people failed for nearly 30 years, at which point the combined Tamil leadership said that "unitary" rule was no longer an option.30 Since 1982, a war has ensued defending that right of the Tamil people to self-determination.

Western Sahara.

One last situation I want to bring up, that of Western Sahara, brings up an extremely important point that I will not be able fully to elaborate here, but that nonetheless helps us in some comparisons between "peoples" - people with a legal right to full sovereignty -- and "indigenous peoples" - people with a right to internal self-termination and local rule but not full sovereignty. The International Court of Justice, in its decision on the Western Sahara in 1975, ruled that if there is land that in fact no one has ever claimed, it is opened for grabs. Such land is called "terra nullius" - empty land. But if any land has had a population on it, that land belonged to that population and is not open for grabs. This question arose in the de-colonization process of Western Sahara because Morocco attempted to claim that prior to becoming a colony of Spain, Western Sahara has been "empty" except for a few nomadic Moroccans. The Court, however, found the Saharans to be a distinct people who historically populated that land.

When we realize that the international community, however, did not require that the colonizers of the lands of the American and Oceanic peoples to return those lands with full sovereignty, there appears to be a clear violation of the principle enunciated by the Court in the Western Sahara case. The sad fact is, that due to a legal principle usually referred to as "impossibility" - the European people were not obliged to cede land and power back to the American Indian and Oceanic peoples. Impossibility is those situations was in part related to the sheer numbers of colonizers, (31)

in part to the scale of "colonial" enterprises, and in part to the perceived idea that the Indigenous Peoples were not capable of taking over governance of the countries in their current state. Yet the numbers factor was a direct result of massive killing of the original people by the colonizers and their armies. So, in fact, the international community rewarded genocide by letting the colonizers and heirs to colonizers remain in full control. One wonders if the current schemes of both ethnic cleansing and ethnic dilution rampant today results from some perceived expectation by the perpetrators that the doctrine of "impossibility" may be applied to them and they will become the sole sovereign.

FINAL REMARKS

Most of you are aware of the facts set out in the above-outlines situations where people have the right to self-determination but have not yet realized it. In these countries there are conflicts -- I do not just mean verbal ones but armed ones. Unfortunately, many of the states involved in attempting to militarily obliterate the peoples with valid self-determination claims try to reduce these conflicts to "terrorism". So depending on which side of the fence you are on, group A is either a terrorist or a freedom fighter. Some of these regimes' friends either acquiesce or actively support this erroneous assertion.

Apart from the mud-slinging, the tragedy is that states are in open violation of their jus cogens and erga omnes obligations to defend the principle of self-determination. And also, very sadly, not enough people know sufficiently both the law of self-determination and the law of armed conflict to properly redirect the dialogue. The defenders of self-determination are in a very vulnerable position, charged with terrorism. The supporters of the groups fighting for the realization of national liberation may also be labeled or unduly burdened by laws against terrorism at the extremely serious expense of not only human rights but rights under the Geneva Conventions, other treaties and customary laws of armed conflict.

NOTES

1The Universal Declaration of Human Rights provides that "the will of the people shall be the basis of the authority of government." Universal Declaration of Human Rights, G.A. Res. 217A (III)(1948), Art. 21; The International Covenant of Civil and Political Rights (ICCPR), in force Mar. 23. 1976, 999 U.N.T.S. 171, Art. 1; The International Covenant on Economic, Social and Cultural Rights (ICESCR), in force Jan. 3, 1976, 999 U.N.T.S. 3, Art. 1.

2. ICCPR, Art.1; ICESCR, Art. 1; see also Karen Parker & Lyn Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 Hastings Int. & Comp. L. Rev. 411, 440 (1989), drawing on discussion of the right to self-determination in A. Critescu, The Right to Self-determination, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1, U.N. Sales No. E.80.XIV.3 (1980) and H. Gros Espiell, The Right to Self-Determination, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980).

3. This paper does not address the issue of the right to self-determination of Indigenous Peoples and is not meant to deny application of self-determination rights to Indigenous Peoples. Please refer to the paper of Mme Erica-Irene Daes in this document for discussion of Indigenous Peoples and self-determination.

4. Western Sahara Case, 1975 International Court of Justice 12, 31.

5. Gros Espiell, op.cit. and Critescu, op. cit.. Critescu defines "people" as denoting a "social entity possessing a clear identity and its own characteristics" (op. cit. at p. 41) and implying a "relationship to territory" (id.).

6. H. Gros Espiell, op. cit. at p. 12:"[N]o one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of jus cogens." Gros Espiell cites numerous references in United Nations documents referring to the right to self-determination as jus cogens. Id., at pp. 11-13. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W.Africa) 1971 International Court of Justice 16, 89-90 (Ammoun, J., separate opinion)(recognizes jus cogens nature of self-determination); I. Brownlie, Principles of Public International Law 83, (3d ed. 1979)(argues that combatants fighting for realization of self-determination should be granted a higher status under armed conflict law due to application of jus cogens to the principle of self-determination); See also Karen Parker & Lyn Neylon, op. cit. at 440-41 (discusses, with many references, self-determination as jus cogens right).

7. While not using the precise term as it did in an earlier case (Barcelona Traction, Light and Power Co. (Belg. v. Spain) 1970 International Court of Justice 3, 32), many consider the language of the Nicaragua Case reflective of both a jus cogens and erga omnes duty to respect the principle of self-determination. See The Nicaragua Case (Nicar. v. United States) 1986 International Court of Justice 14. The Inter-American Commission was explicit regarding the erga omnes duties of all states to guarantee civil and political rights. Inter-American Commission on Human Rights, Organization of American States, Press Communique no. 13/93 (May25, 1993).

8. Please also see Human Rights in Burma, Hearings on Burma before the Subcomm. On For. Ops. Of the Senate Appropriations Comm., 104 Cong., 1st Session (1995)(Statement of Karen Parker); Human Rights in Burma, Hearing on Burma before the Subcomm. On Asian and Pacific Affairs of the House Comm. on For. Affairs, 103rd Cong. 1st Session (1993)(Statement of Karen Parker).

9. I use the term "Burman" to refer to people who are ethnically Burman rather that the term "Burmese" - which refers to people who reside in Burma who may be either Burman or one of the other ethnic nationalities.

10. Please also see Karen Parker, Republik Maluku: The Case for Self-Determination, (IED/HLP 1996).

11. The United Nations involvement began with the establishment of Committee of Good Offices on the Indonesian Question of the Security Council in 1947. In 1949 this Committee ceased when the Security Council established the United Nations Commission for Indonesia. These bodies were constant participators in the de-colonization process.

12. Round Table Conference Agreement, Article 2.1 of the Third Agreement (Transitional Measure).

13. Idem, Article 2.2. The two "opt-out" measures were incorporated under pressure from the authorities of the Netherlands.

14. Please see Karen Parker, The Kashmiri War: Human Rights and Humanitarian Law, (IED/HLP 1996).

15. For example, in a 3 November 1947 radio broadcast, Mr. Nehru stated: "We have declared that the fate of Kashmir is ultimately to be decided by its people. That pledge we give not only to the people of Kashmir but to the world. We will not and cannot back out of it."

16. See, especially Security Council resolutions 39 (1948), 47 (1948), 80 (1950), 91 (1951) and 96 (1951).

17. Resolution of the United Nations Commission for India and Pakistan, adopted on 5 January 1949, reprinted in UN Doc. S/1196 of 10 January 1949.

18. An interesting side note to this involves this Instrument of Accession, supposedly signed by the Maharajah Hari Singh and Lord Mountbatten, and rumoured to be missing from the Indian state archives. News reports indicate that the United States, other western and some Arab states wished to view the text because of serious questions of its validity. See,for example, "Instrument of Accession to India missing from state archives", PTI News (New Delhi), 1 September 1995.

19. See, for example, Security Council resolution 122 of 24 January 1957. India had claimed that the Kashmiri people accepted secession to India because a Kashmiri Constituent Assembly approved it in 1956. However, that assembly was chosen by India and does not meet requirements of a plebiscite as expressed in Security Council resolution 122. As states Rapporteur Gros Espiell: "A people under colonial and alien domination is unable to express its will freely in a consultation, plebiscite or referendum organized exclusively by the colonial and alien power." H. Gros Espiell, op cit. at p. 11.

20. Kashmir successfully regained independence when overrun by Alexander's Empire in the 3rd century B.C. and the Moghul Empire of the 16th and 17th centuries.

21. Historic Kashmir comprises about 84,000 square miles, making it somewhat larger that the United Kingdom. Its current population is about 12 million.

22. Spoken Kashmiri also draws on the Persian and Arabic languages. Written Kashmiri uses a variation of Urdu script.

23. Even fabrics, embroidery and carpets have uniquely Kashmiri designs. My organization's delegates to the area report that recognition of the distinct culture of Kashmir is unanimous in India. Unfortunately, this recognition is in the negative in that every-day Indians show great prejudice against anything Kashmiri. Our delegates confirm the Indian mind-set that Kashmiri people, their culture, cuisine, indeed everything about Kashmiris is inferior. But in these displays, they clearly indicate that Kashmiri is not Indian.

24. Kashmiri self-determination is also defended by the principle that the determination of the political future of a colonized people made either by the colonial power itself or a "ruler" established by the colonial power is repugnant to the process of de-colonization and the principle of self-determination. I would challenge the legitimacy of an instrument of accession of Kashmir to India if in fact one were to be found. This rejection of "determination by colonial power" seems to be the guiding principle of the Security Council in its dealing with Kashmir. It is also clearly behind the fact that the government of Spain sought advice from the International Court of Justice on the question of to whom should Spain hand over power when they left the Spanish Sahara. See The Western Sahara Case, 1975 Int'l Court of Justice 12.

25. Please see Report [on Tibet] of the Secretary-General, U.N. Doc. E/CN.4/Sub.2/37, which includes my submission regarding self-determination and Tibet.

26. See especially General Assembly resolutions 1353 (1959); 1514 (1960) and 1723 (1961).

27. Please see the following written statements submitted to the United Nations by International Educational Development/Humanitarian Law Project: Self-Determination, E/CN.4/1998/89; The Situation in Sri Lanka, E/CN.4/Sub.2/1995/17; E/CN.4/1994/37.

28. In 1799 Sir Hugh Cleghorn, the first Colonial Secretary, wrote what has become known as the "Cleghorn Minute": "Two different nations, from very ancient period, have divided between them the possession of the island. . . These two nations differ entirely in their religions, language and manners."

29. The major pacts were the Bandaranaike-Chelvanayagam Pact of 1957 and the Senanayake-Chelvanayagam Pact of 1965.

30. The Vaddukkoddai Declaration of 1976 marks a clean rupture from any further attempts by the Tamil leadership to negotiate a dual state. The Declaration calls upon all Tamils to work for the sovereignty of Tamil Eelam.

31. Note that some of the colonizers were actually "break-away" colonizers - people who had rejected their original sovereign in favor of self-rule in the "former" colony.

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