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The Right of Self-Determination: Is East Timor a Viable Model for Kashmir?

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*by Amardeep Singh**

International bodies and legal scholars have universally accepted the idea that the realization of the group right to self-determination is a prerequisite for the effective enjoyment of individual rights. In its General Comment 12, the UN Human Rights Committee (HRC) states that "[t]he 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 . . . placed this provision as [A]rticle 1 [of the International Covenant for Civil and Political Rights] apart from and before all of the other rights. . . ." This principle is illustrated by the situation in Kashmir, where massive violations of individual rights are being committed daily in the context of a larger struggle over group rights and state boundaries. Nevertheless, unlike 50 years ago, when the universal human rights system was in its infancy, today the development of the right to self-determination points to a legally tenable solution. As exemplified by East Timor, this solution requires that the people of Kashmir be allowed to freely exercise their right to self-determination through an impartial plebiscite and that the international community serve as a guarantor of this right in the event the States involved do not allow for its realization.

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The Expanding Scope of the Right to Self-Determination in International Law

The right to self-determination of peoples is enshrined in the first article of the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). Article 1.1 of both the ICCPR and ICESCR states, "[a]ll 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." According to the Committee on the Elimination of all Forms of Racial Discrimination, the right to self-determination is "a fundamental principle of international law." This fundamental principle has slowly expanded from being a right exclusively belonging to colonized peoples to include all peoples who are systematically denied human rights.

Despite being enshrined in the first article of numerous human rights instruments, the right to self-determination is nevertheless relatively underdeveloped. This is in part because the HRC declared it has no competence to receive complaints asserting a violation of the right to self-determination because the right is a group right rather than an individual right. Individual rights, according to the HRC, are set out in articles 6 through 27 of the ICCPR. Modern commentary on the right to self-determination has thus been left to UN treaty bodies' comments on State reports, general comments, or recommendations, and resolutions of the UN General Assembly, which, according to Article 13(1)(a) of the UN Charter, is charged with "encouraging the progressive development of international law and its codification." The result is a relatively undefined scope of the right to self-determination.

The seminal issue in defining the right has been establishing to which peoples the right to self-determination belongs. The first significant comments on this issue, and on the right of self-determination in general, appeared in Resolutions 1514 and 1541 of the General Assembly. In those resolutions, the General Assembly made clear that the right to self-determination belongs to peoples under colonial domination who are struggling for independence. General Assembly Resolution 1514—the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples—relates the right to self-determination only to "the subjection of peoples to alien subjugation, domination and exploitation" and of those in "Trust and Non-Self-Governing Territories."

Neither of the resolutions addresses whether the right applies to peoples in non-colonial States. Additionally, Resolution 1514 seemingly closes the door on any unilateral right of secession by stating that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." Resolution 1514, therefore, applies the right of self-determination only to colonized peoples and forbids unilateral secession by stating that the right does not include an effort to disrupt the territorial integrity of a country.

The General Assembly revisited the issue of unilateral secession in 1970 when it passed Resolution 2625, the "Declaration on Principles of Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations." For the first time, a qualifying principle was applied to the notion of absolute territorial integrity. Resolution 1514 forbids any action that "would dismember or impair, totally or in part, the territorial integrity . . ." of a State. Resolution 2625 states that the Resolution 1514 prohibition applies only to those countries "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 as to race, creed or colour." Thus, if a State did not conduct itself in compliance with the principles of "equal rights and self-determination of peoples," its territorial integrity could be questioned.

Recently, commentators and courts have taken this qualification on territorial integrity to mean that the right of self-determination applies not only to colonized peoples, but also to peoples who suffer massive and systematic human rights violations, or have no means of representation or redress within their government. For instance, in a 1998 Reference Opinion on the secession of Quebec from Canada, the Supreme Court of Canada stated that "an oppressed people" who suffer "massive violation of its fundamental rights" may have a right to form a sovereign State. Also, in a Concurring Opinion in a case tangentially related to the issue of self-determination, Judge Wildhaber of the European Court of Human Rights noted, "[u]ntil recently in international practice the right to self-determination

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was . . . restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all . . . ." Thus, self-determination has developed over the years from being a right of peoples under colonial subjugation to a right of peoples who are subjected to massive human rights violations or who are without representation within their State.

Implementing the Right of Self-Determination—The Inevitability of the Referendum in East Timor

A question arises as to how the right to self-determination may be realized or implemented. Although no specific method for realizing self-determination is mandated, principles of international law dictate that whatever means are utilized, they must reflect the free will of the people. Nonetheless, as modern international practice has developed, it seems the preferred method for exercising the right of self-determination, especially in cases where state boundaries may change, is the referendum or plebiscite.

For example, in the case of the Western Sahara, Morocco agreed in 1998 to a referendum organized by the UN in cooperation with the Organization on African Unity, whereby the people of the Western Sahara could determine whether to remain part of Morocco. Similarly, the Sudanese government has agreed to a referendum for the people of southern Sudan, thus enabling them to choose either unity or secession. In Puerto Rico, the United States government held a non-binding plebiscite giving its citizens a choice between maintaining commonwealth status, becoming a state of the United States, or creating a sovereign State. In Quebec, the state government chose to conduct a referendum on whether the people of Quebec wanted to remain a part of Canada. Finally, the government of France has agreed to hold a referendum in New Caledonia on whether it will remain a part of France or become independent. Other examples abound.

East Timor's Effect on the Development of the Law of Self-Determination

UN action in East Timor created and solidified new developments in the international law of self-determination in two ways. First, by seeking to implement the right of self-determination by allowing the possibility of creating a new State from a territory with uncertain legal status, the UN for the first time affirmed the right to secede in a territory that was neither clearly a colony nor a non-self-governing territory. Second, by determining efforts to disrupt the results of the ballot were a "threat to peace," the UN seems to have defined an attempt to negate the exercise of self-determination as a subject of international concern justifying international intervention.

Thus, if a State did not conduct itself in compliance with the principles of "equal rights and self-determination of peoples," its territorial integrity could be questioned.

In 1960, when the General Assembly put East Timor on its list of non-self-governing territories, East Timor was a Portuguese colony. Portugal therefore rejected the view that East Timor was a non-self-governing territory. According to Article 73 of the UN Charter, a non-self-governing territory is an area "whose peoples have not yet attained a full measure of self-government." In 1974, Portugal finally succumbed to international pressure and accepted East Timor's status as a non-self-governing territory. In December 1975, Indonesia invaded and occupied East Timor, claiming sovereignty over it. East Timor's international status thus remained in question for over 25 years.

AP Photo/Ajit Kumar

UN Secretary-General Kofi Annan speaks with RK Sawhney, deputy chief of the Indian Army; Annan offered to help to resolve the Kashmir dispute.

The end of Indonesian President Suharto's dictatorial reign in 1998, and the resulting instability in Indonesia, instigated rapid progress in the negotiations on East Timor's final status. On May 5, 1999, Indonesia and Portugal signed an agreement—Agreement Between the Republic of Indonesia and the Portugese Republic on the Question of East Timor (May 5 Agreement)—to allow the UN to organize a "popular consultation" of the East Timorese people through a "direct, secret and universal ballot." The purpose of the ballot was to determine whether the people of East Timor wished to be part of an autonomous unit of Indonesia. If the East Timorese rejected this autonomous framework, the May 5 Agreement called for the Government of Indonesia to "terminate its links with East Timor" and for a "peaceful and orderly transfer of authority in East Timor to the United Nations," which would eventually lead to independence.

The popular consultation, organized and conducted by the UN, was held on August 30, 1999. Ninety-eight percent of the East Timorese people voted to reject autonomous status in Indonesia. Angered by the agreement to allow the popular consultation, and the eventual results of the vote, pro-Indonesia militias engaged in mass violence in East Timor before and after the ballot, including murders, massacres, disappearances, forced expulsion, rape, sexual harassment of women, and destruction of property. In response, the UN Security Council authorized the creation of the International Force for East Timor (INTERFET) to restore peace in East Timor and to protect the results of the popular consultation.

As discussed above, the status of East Timor was never clear until the popular consultation. UN General Assembly Resolutions up until 1982 classified it as a non-self-governing territory. The UN nevertheless negotiated the May 5 Agreement, and other agreements, with Indonesia as if Indonesia exercised

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some sovereignty over East Timor. Further, the May 5 Agreement carefully avoided any reference to the legal status of East Timor. Despite this unclear legal status, and despite the lack of any precedent supporting the right to independence in territories that were neither colonized nor non-self-governing, the UN chose to support the right of the people of East Timor to form a new State.

In addition, by authorizing INTERFET to restore peace in East Timor after the ballot, the UN seems to have authorized force to protect the right to self-determination. Chapter VII of the UN Charter authorizes the use of force where a "threat to the peace, breach of the peace, or act of aggression" has occurred. By referring to Chapter VII in its resolution authorizing the creation of INTERFET, the Security Council has endorsed the notion that a threat to the freely expressed will of the people in East Timor may allow international intervention, with the use of force if necessary.

Modern Developments in the Law of Self-Determination as They Apply to Kashmir

Modern developments in the international law of self-determination, especially in East Timor, allow for three principal arguments to be made in support of international enforcement of the right to self-determination in Kashmir. First, as with East Timor, Kashmir's international legal status is uncertain. It is not clear whether Kashmir is a part of India, Pakistan, both, or an independent territory. Like in East Timor, this uncertain status should not be an impediment to the implementation of the right to self-determination. Second, as in East Timor, the Security Council has determined the people of Kashmir should exercise their right to self-determination through an impartial plebiscite. Threats to peace in Kashmir, however, have hindered the realization of this right. Nevertheless, as with East Timor, these threats to peace should not be a legal impediment to Security Council action in defense of the right to self-determination.

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Finally, even if the above arguments are not sufficient legal justification for international action in support of the right to self-determination in Kashmir, the emerging principles that massive, systematic human rights violations or a lack of representation within an existing State create a right to secession, clearly support calls for international action in Kashmir.

Pakistan and India became independent States on August 15, 1947. Under the partition plan, all Muslim majority areas were to go to Pakistan and all other areas were to go to India. The *Maharaja* of Kashmir, a Kashmiri Hindu, acceded Kashmir to India on October 26, 1947, purportedly against the wishes of the people of Kashmir, who were 77 percent Muslim. Pakistan immediately disputed India's claim to Kashmir. In 1948, India brought this issue to the Security Council. On April 21, 1948, the Security Council, "[n]oting with satisfaction that both India and Pakistan desire that the question of accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite," called on India and Pakistan to "create proper conditions for a free and impartial plebiscite."

In July 1949, India and Pakistan signed the Karachi Agreement establishing a cease-fire line to be supervised by UN observers. On March 30, 1951, pursuant to the Karachi Agreement, the Security Council decided that the UN Military Observer Group in India and Pakistan (UNMOGIP) should supervise the cease-fire in Kashmir. The parties, however, were not able to agree on conditions for a plebiscite. The Security Council subsequently called for a plebiscite in Kashmir in 1951 and again in 1957. The parties, again, were not able to create conditions conducive to conducting a plebiscite. At the end of 1971, India and Pakistan again fought over Kashmir. In July 1972, India and Pakistan signed an agreement defining a Line of Control in Kashmir, which has approximately one-third of Kashmir under Pakistan's control and two-thirds under India's control. At present, UNMOGIP still supervises the cease-fire.

In 1990, clashes erupted *en masse* between the Kashmiri people and government forces in India's portion of Kashmir. According to government sources, at least 34,000 civilians have died as a result of the violence. The 2000 U.S. State Department Country Report on Human Rights Practices for India states that "[e]xtrajudicial killings, including faked encounter killings [whereby police falsely claim to have encountered a militant], deaths of suspects in police custody throughout the country, and excessive use of force by security forces combating active insurgencies," and "torture and rape by police and other agents of the Government" are prevalent throughout India-held Kashmir. In its 2000 Annual Report, Amnesty International states that in Kashmir, India's Armed Forces (Special Powers) Act "gives the security forces powers to shoot to kill and grants them virtual immunity from prosecution." In addition to suffering from government abuses, citizens in Kashmir also suffer from abuses by insurgents. The State Department Report states that in Kashmir "[t]he concerted campaign of execution-style killings of civilians by Kashmiri militant groups . . . continued, and included several killings of political leaders and party workers. Separatist militants were responsible for numerous, serious abuses, including killing of armed forces personnel, police, government officials, and civilians; torture; rape; and brutality." A general condition of lawlessness and mass human rights violations presently exists in Indian-held Kashmir.

The conditions in Kashmir, especially as seen in light of developments in East Timor, meet modern legal requirements for international intervention on behalf of the Kashmiri people so that they may exercise their right of self-determination. First, the uncertainty of Kashmir's international legal status is not a legal bar to intervention. It is not clear whether Kashmir is colonized by India and/or Pakistan, is a non-self-governing territory, or is some other legal entity. East Timor's ambiguous status, however, did not act as an impediment to the implementation of the right to self-determination. Rather, Kashmir's uncertain status, and the 52 years of bloodshed and human rights violations resulting from that uncertainty, calls for international intervention in order to serve the interests of stability and peace, which are enshrined in the UN Charter.

Second, as mentioned above, threats to peace in Kashmir, like in East Timor, present an obstacle to conducting an impartial plebiscite. In East Timor, the Security Council, pursuant to its powers under Chapter VII of the UN Charter, authorized INTERFET to preserve the freely expressed will of the people. The legal authority to use force, if necessary, to implement the right to self-determination is stronger in Kashmir because threats to *international* peace are arguably greater in Kashmir

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crime against humanity. After reviewing the treatment of enslavement in domestic laws, conventions, and customary international law, the Trial Chamber determined that at the time relevant to the indictment, the crime of enslavement in customary international law consisted of "the exercise of any or all of the powers attaching to the right of ownership over a person." The *mens rea* is satisfied if such powers are exercised intentionally.

In determining whether enslavement has been established, the Trial Chamber cited a variety of indicators that could be considered, such as control, lack of consent, exploitation, compulsory labor, and the accruing of some gain to the perpetrator. "Sex" and "control of sexuality" were two of the many other factors cited as possible indicators of enslavement. The Trial Chamber opined that "[d]etaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement."

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Cumulative convictions

This issue concerns whether an accused can be found guilty of more than one offense for the same conduct. The Trial Chamber cited the Appeals Chamber Judgement in the *Čelebići* case, which allowed cumulative convictions for the same conduct provided there are different statutory provisions that have a "materially distinct element not contained in the other," such that one "requires proof of a fact not required by the other." Applying this approach to the case at hand, the Trial Chamber found that Article 3 and Article 5 of the Statute have at least one "materially distinct element that does not appear in the other." It noted that convictions for torture and rape for the same conduct are also permissible as they too have materially distinct elements.

Verdicts and Sentences

Kunarac was acquitted of responsibility as a superior for crimes committed by persons under his authority because the Trial Chamber concluded that it was not sufficiently proven that "the soldiers who committed the offences in the Indictment were under the effective control of Kunarac at the time they committed the offences." All convictions were based solely on individual criminal responsibility, crimes that the accused either committed physically or were otherwise responsible for facilitating. Each was acquitted of some charges, usually based on failure of the prosecution to prove the crime or the accused's responsibility for it beyond a reasonable doubt.

Kunarac was found guilty on 11 counts: three counts of rape as a crime against humanity, four counts of rape as a violation of the laws or customs of war, one count of enslavement as a crime against humanity, one count of torture as a crime against humanity, and two counts of torture as a violation of the laws or customs of war. He received a single sentence of 28 years imprisonment.

Kovač was found guilty on four counts: one count each for rape as a crime against humanity and a violation of the laws or customs of war, enslavement as a crime against humanity, and outrages upon personal dignity as a violation of the laws or customs of war. He was sentenced to 20 years imprisonment.

Vuković was found guilty on four counts: one count each for rape and torture as crimes against humanity and rape and torture as violations of the laws or customs of war. He received a sentence of 12 years imprisonment.

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than they were in East Timor. India and Pakistan have fought three wars over Kashmir. Both possess, and have tested, nuclear weapons and over 34,000 people have died in Kashmir in the past ten years. Therefore, UN intervention in support of the right to self-determination is justified in Kashmir through the example of East Timor.

Finally, even if these arguments are not sufficient legal justification, the principles now recognized in international law—that massive, systematic human rights violations or a lack of representation within an existing State create a right to secession—support calls for international action in Kashmir. As outlined above, all human rights bodies unequivocally agree that human rights are massively and systematically denied in Indian-held Kashmir and that the Kashmiri people have no recourse within the Indian union for exercising their right of self-determination.

Conclusion

The modern development of the right to self-determination, especially in East Timor, requires the people of Kashmir be allowed to exercise their right to self-determination. Security Council resolutions addressing the scope of the right to self-determination, in combination with State practice, indicate the right should be implemented through an impartial plebiscite, thereby enabling the Kashmiri people to freely determine their future. Finally, following East Timor's example, if the parties do not cooperate in creating conditions allowing the Kashmiri people to enjoy the right to self-determination, the threat to international peace caused by the mass violations of human rights in Kashmir provides clear legal justification for international intervention to implement the right. Indeed, until the group right to self-determination, which the Human Rights Commission states is essential to the effective guarantee of individual rights, is realized in Kashmir, it is likely the mass violations of individual rights will continue.

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