

July 12, 1973

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Memo to: Messrs. Willens, Lapin, Carter
from: Elinor Schroeder
re: Self-Determination and Self-Government in the
United Nations.

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Discussed circumstances
under which
U.N. has
considered
Trustships
terminated.

This memo will attempt to set forth the meanings
of the terms self-determination and self-government as used
by the United Nations in its supervision of dependent
territories. Although any disposition of the Marianas
will be handled under the portions of the Charter dealing
with trust territories, I have confined my comments to
those resolutions and committee actions on non-self-
governing territories under Article 73 of the Charter.
While the Charter would seem to provide no source of U. N.
control over non-self-governing territories, the body
charged with collecting information supplied under Article
73e has consistently tried to assume an active role in
supervising the administration of these territories. Hence
U. N. action vis-à-vis Article 73 territories has become
a good indicator of the General Assembly's attitudes toward
administering powers and the destiny of dependent areas.
This memo should be read with the caveat that the U. N.'s
inclination toward independence as the only solution for
trusteeships may be even stronger than the present views
on the elimination of colonialism. The objective of the
trusteeship system is development of the territory toward

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"self-government or independence" (Article 76, U. N. Charter), while the duty of members with responsibilities for non-self-governing territories under Article 73 is merely "to develop self-government." Further, all trusteeships terminated to date have resulted in independence for the territory or union with an independent state other than the former Administering Authority.

The Charter mentions "self-determination" twice. Article 1, ¶ 2 states that one of the U. N.'s purposes is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..." Article 55 speaks 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..." Although there is some question whether this language actually establishes self-determination as a legal right, see Emerson, Self-Determination, 65 Am. J. Int'l L. 459 (1971), from our point of view the matter is academic, since the General Assembly has long spoken of the "right to self-determination" in resolutions concerning non-self-governing territories. See, e.g., Res. 637 (VII). Self-determination is the right of a people freely to choose their political status and to pursue their economic, social and cultural development, see, e.g., International Covenant on Economic, Social and Cultural Rights, Res. 2200, Annex (XXI).

The choice of political status would seem to include both the form of internal government and the international status, the U. N. has concerned itself primarily with trying to prescribe the relationship, or lack of it, between a territory and its administering power. Self-determination and self-government are often intertwined in U. N. documents, and there is an assumption that no act of self-determination could ever lead to less than self-government. If self-determination has led to a status of self-government short of complete independence, the people of the territory are considered to continue to possess the right. Once, however, an independent state has come into existence, there can be no further self-determination. There can be no retreat from the "ultimate" step of independence. Emerson, at 464. It is clear that the right to self-determination is limited to distinct colonial areas and does not operate to legitimize secessionist movements within existing states. de Smith, Microstates and Micronesia 41 (1970); Emerson, at 465.

~~In 1949 the General Assembly~~ created the Committee on Information from Non-Self-Governing Territories and charged it with collecting the economic, social, and educational data required by Article 73e. The Assembly had previously proclaimed its right to be informed of changes in the constitutional status of such territories, so that it could determine whether further transmission of information was necessary. In other words, the Assembly believed

it had a right to study the change and decide whether the territory in question had become self-governing. It was obviously expected that the territory and the administering state might continue to be closely linked, for it was suggested that the evidence of a change in status might include "the constitution, legislative act or executive order providing for the government of the territory and the constitutional relationship of the territory to the Government of the metropolitan country." Res. 222 (III).

In 1953, the Assembly promulgated, in Resolution 742 (VIII), a list of factors to be taken into account in determining whether a territory is self-governing. The Resolution stated that each case should be decided on its own facts and that "the validity of any form of association between a Non-Self-Governing Territory and a metropolitan or any other country essentially depends on the freely expressed will of the people at the time of the taking of the decision." The Resolution further declared that "the manner in which Territories ... can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of absolute equality."

The factors listed in the Resolution were grouped under three headings: (1) those indicative of independence; (2) those indicative of other separate systems of self-government; and (3) those indicative of free association on

an equal basis with the metropolitan or some other country.

Considerations under the second category included "[f]reedom of choosing...between several possibilities, including independence..." and "...the freedom of the population of a territory which has associated itself with the metropolitan country to modify at any time this status through the expression of their will by democratic means." The third category included the same provision as to freedom of unilateral modification, as well as a constitutional consideration that association should be "by virtue of a treaty or bilateral agreement affecting the status of the Territory, taking into account (i) whether the constitutional guarantees extend equally to the associated Territory, (ii) whether there are powers in certain matters constitutionally reserved to the Territory or to the central authority, and (iii) whether there is provision for the participation of the Territory on a basis of equality in any changes in the constitutional system of the State."

It was thus recognized that development toward self-government and the exercise of self-determination could include alternatives to complete independence. After the passage of Resolution 742 there were several instances in which self-determination led to a status other than independence. In 1953, the General Assembly approved the cessation of transmission of Article 73e information on Puerto Rico. Res. 748 (VIII). When the matter was considered by the U. N.'s Fourth Committee before referral to the

Assembly, the question was raised whether free expression of the popular will leading to something other than independence could be a legitimate act of self-determination. Such a position would seem to negate the entire rationale of Resolution 742. The Committee finally decided to respect the wishes of the people. Shukri, The Concept of Self-Determination in the United Nations 99 (1965). The General Assembly's resolution categorized the newly-formed relationship between Puerto Rico and the United States as "a mutually agreed association", and stated that "when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination"... and that they "have been invested with attributes of political sovereignty which clearly identify the status of self-government...as that of an autonomous political entity." The U. N. did not, however, appear to be dismissing all of its responsibility for the territory; it went on to express the hope that "due regard will be paid to the will of both the Puerto Rican and American peoples ... in the eventuality that either of the parties ... may desire any change in the terms of this association."

In 1954, after Denmark changed its constitution to make Greenland an integral part of the Danish realm and the elected representatives of the people of Greenland had approved the change, the U. N. declared the action a free exercise of the right to self-determination. Res. 849 (IX).

The Resolution noted that Greenland's constitutional status was now equal to that of other parts of Denmark.

In 1955, the General Assembly approved a change in the Netherlands charter that gave Surinam and the Netherlands Antilles complete internal autonomy and representation in the Netherlands government. Res. 945 (X). The resolution seems to reflect an almost grudging affirming of the action; there is none of the usual language on self-determination, and it is pointed out that the U. N. approval is without prejudice to the position taken in Resolution 742.

In 1959, Resolution 1469 (XIV) proclaimed that the people of Alaska and Hawaii had exercised their right to self-determination in choosing integration with the United States and had attained a full measure of self-government.

When the original list of factors was drawn up in 1953, there had perhaps been an assumption that member states would freely acknowledge the existence and status of their dependencies, and thus the main consideration had been to determine when the voluntary transmission of information should be discontinued. Within a few years, however, the concern became the refusal of some countries, especially Portugal, to recognize the character of their territories. UNITAR, Small States & Territories 18-19 (1971). In 1960, the General Assembly adopted principles to determine whether a territory was self-governing, no matter what the

view of the metropolitan country. Res. 1541 (XV). The Resolution again recognized that:

"A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State."

It went on to identify essential characteristics of free association and integration.

"Principle VII:

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

Freedom to modify status

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Freedom to determine internal constitution

Principle VIII: Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination;

Complete equality between the peoples

What about no representation?

both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX: Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes."

This careful and conservative list was, however, overshadowed by a resolution drawn up by 43 African and Asian states and adopted by the Assembly the day before the passage of 1541. Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, heralded an all-out attack on colonialism and a push toward self-determination resulting in immediate independence for all non-self-governing areas. It proclaimed that:

"1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation;

2. All 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;

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence;

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected;

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom;

6. Any 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;

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."

The Assembly created the Committee of 24 (full title, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) to assume the work of the Committee on Information, which was dissolved in 1963. Every year since its creation the Committee has approved resolutions, which are subsequently adopted by the General Assembly, proclaiming the

rights of peoples of Non-Self-Governing Territories to "self-determination and independence" and calling for "a deadline for the accession to independence of each Territory in accordance with the wishes of the people." See, e.g., Res. 2105 (XX). These statements do not mention the principles of Resolution 1541 and its alternatives to independence; instead, the emphasis is on a denunciation of colonial rule and a linking of colonialism with racial discrimination.

Observers have noted that Resolution 1514 has become a de facto amendment to the Charter and a quasi-theological text for the anti-colonialist majority in the U. N. de Smith, at 38. Indeed, since 1960, the U. N. has approved only one free association arrangement of a former non-self-governing territory and has withheld approval from other changes in status not amounting to independence. In a U. N.-supervised election in 1965, the people of the Cook Islands voted to establish a free association with New Zealand. Although the General Assembly determined that the Islands had attained full self-government, it specifically reaffirmed "the responsibility of the United Nations, under General Assembly resolution 1514 (XV), to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wish, at a future date." Res. 2064 (XX).

Thus, while the people of the Cook Islands may be said to have exercised their right to self-determination in 1965,

they must be allowed continuing access to that right until they have chosen the ultimate goal of complete independence.

In 1967, the British government sought approval of an associated statehood arrangement with six small Caribbean islands, Antigua, Dominica, Grenada, St. Kitts-Nevis-Anguilla, St. Lucia, and St. Vincent. The agreement was described by the United Kingdom's representative in the Committee of 24 as "not strictly speaking ... an alternative to independence but rather a status of self-government which includes the open option of independence." UNITAR, at 96. Each of the islands would be able to terminate the agreement and become fully independent if it fulfilled certain conditions, including a two-thirds referendum approval of the action. The Committee of 24, however, refused to approve this change of status and continued to assert its jurisdiction over the islands. Its objections centered around the lack of referenda to approve the constitutional change and the absence of U. N. involvement in the decision-making process. While one study claims that there is nothing to indicate that the Committee would not go along with a status other than independence if the U. N. were a witness to the exercise of the right to self-determination, UNITAR, at 26-27, another author credits the adverse reaction to the mid-1960's mood toward colonialism and to the particularly bad position in which Great Britain found itself as a result

13

of Rhodesia, its support of Israel, and its alliance with the United States on the issue of Viet Nam. de Smith, at 80. 5]

The Committee's bias toward independence is also apparent in its reactions to situations in which a plebiscite was held. In 1966, the General Assembly called upon France to arrange with the U. N. for the holding of a referendum in French Somaliland (now called the Territory of the Afars and the Issas). The referendum was held, but without U. N. supervision, and a majority of voters favored continued association with France. The General Assembly subsequently "expressed regret" that France had not yet implemented Resolution 1514. Res. 2356 (XXII). The Committee discussed placing Puerto Rico on the list of territories to which Resolution 1514 would apply, even though such action would have been of questionable validity in view of the General Assembly's 1953 Resolution on the creation of the Commonwealth. Such discussion seems to have been tabled without decision. Whiteman, 13 Digest of International Law 714-15 (1968). The General Assembly refused to accept the outcome of a 1967 referendum in Gibraltar, in which 99% of the voters chose to remain under British rule. Res. 2353 (XXII).

The Committee's 1970 Resolution spoke of "the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppress their aspiration for freedom and independence."

It again stated that "[t]he question of territorial size, geographical isolation and limited resources should in no way delay the implementation of [Resolution 1514]." Res. 2621 (XXV). At the same time that the Committee has been waging its battle against colonialism, other forces within the U. N. have begun to question the wisdom of the creation of large numbers of "ministates." The Sixth Committee's 1970 report to the General Assembly may reflect some of this feeling, or it may simply be a more rational view of the situation. In the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Sixth Committee declared that while "the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security", it recognized that colonialism could be ended by alternatives to independence.

"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."

Res. 2625, Annex (XXV).

It would seem, however, that those bodies charged with dealing with non-self-governing countries will continue to reflect the liberationist views of the new U. N.

majority. Any administering country seeking approval for a territorial status less than independence will risk the disapproval of the General Assembly, even in the face of popular support from the people of the territory.