

Human rights in Kashmir: Self-determination and the Rule of Law"

*International Commission of Jurists.*

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## INTERNATIONAL COMMISSION OF JURISTS

### HUMAN RIGHTS IN KASHMIR: SELF-DETERMINATION AND THE RULE OF LAW

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In accordance with its usual procedures, the International Commission of Jurists has authorised the publication of this report. Necessarily, the report expresses the findings and opinions of its authors. They are all most distinguished jurists, chosen for their integrity, learning and independence of mind. The Executive Committee of the ICJ has determined that the report should be published.

The report contains, in chapter 5, an analysis of the concept of self-determination. There are few topics in international law today which are more controversial. One distinguished jurist (Professor Richard Falk) has declared that self-determination of peoples is a concept "variable in content, resistant to generalisation, dependent on context and intensely contested."<sup>1</sup> So it has proved in the case of Kashmir.

The existence of the people's right to self-determination in international law cannot be denied. It is reflected in the *Charter* of the United Nations,<sup>2</sup> recognised in the common first articles of the *International Covenants*,<sup>3</sup> accepted

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<sup>1</sup> R Falk "The Content of Self-determination" in R McCorquodale and N Orosz (eds), *Tibet: The Position in International Law* 1994, Serindia, London, 81 at 82.

<sup>2</sup> *Charter* of the United Nations, Article 1. See also Article 76.

<sup>3</sup> *International Covenant on Civil and Political Rights*, Article 1; *International Covenant on Economic, Social and Cultural Rights*, Article 1.

in opinions of the International Court of Justice<sup>4</sup> and reflected in the theory and practice of international law.<sup>5</sup>

Nevertheless, there are many controversies about the right which remain to be settled. Who is a "people" for the purposes of this peoples' right?<sup>6</sup> How is the "self" defined by reference to territorial boundaries or other criteria? How does the right find expression in the context of international law and practice where its exercise may endanger peace and security,<sup>7</sup> disturb the international community<sup>8</sup>, present a risk of secession or the questioning of settled international boundaries?

A glance at the world today will disclose the importance of this issue, both for international law and for international peace and security. Many of the missions of the International Commission of Jurists in the past (and others now in prospect) have concerned complaints about the unfulfilled promise to the peoples' right to self-determination.

This report on Kashmir makes another important contribution, on the part of the ICJ, to the elucidation of the elusive concept of self-determination. It is

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<sup>4</sup> See International Court of Justice, *Opinion on Namibia*, International Court of Justice Reports, 1971, 16, 31 and *Opinion on Western Sahara*, International Court of Justice Reports, 1975, 12, 31ff.

<sup>5</sup> See eg H Hannum, "Rethinking Self-determination" 34 *Virginia J Int L* 1 (1993); C Tomuschat, "Self-determination in a Post-Colonial World" in C Tomuschat (ed) *Modern Law of Self-Determination*, 1993, Kluwer, 1; M Koskenniemi, "National Self-determination Today: Problems of Legal Theory and Practice" (1994) 43 *ICLQ* 241.

<sup>6</sup> See eg UNESCO, Meeting of Experts on Further Study of the Rights of Peoples, Paris, February 1990, Report. Cf *Mandla (Sewa Singh) v Dowell Lee and Ors* [1983] 2 AC 548 (HL), 562.

<sup>7</sup> A Etzioni, "The Evils of Self-determination" in *Foreign Policy*, 89: 21 (1992-3); R S White "Self-determination, Time for a Re-assessment?" (1981) 28 *Netherlands Int L Rev* 147; C Mindersma, "Legal Issues Surrounding Population Transfers in Conflict Situations" (1994) *Netherlands Int L Rev* 31.

<sup>8</sup> Boutros Boutros-Ghali, *An Agenda for Peace*, UN Doc A/47/277/S24111 (17 June 1994), 5, Paris.

the intention of the ICJ, in the near future, to convene a high level international conference of legal experts to throw further light upon the concept of self-determination of peoples. The conference will examine the ways in which the emancipatory features of the concept can be realised whilst avoiding the disruptive and sometimes even destructive features that have sometimes accompanied the rhetoric of self-determination. In due course, therefore, the ICJ will contribute further to this debate. In the meantime, this report, along with the discussion of the concept in the ICJ report *Countdown to 1997* (Report of the Mission to Hong Kong, 1992) is put forward as a useful contribution to one of the most important debates in contemporary international law and politics.

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