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Human Rights Are Not Skin Rashes:
The Illegality of the DEIS' suggestion that new U.S. arrivals to Guam can participate in a self-determination referendum in Guam

For the reasons set out below, I recommend the **No Action** alternative.

The DEIS erroneously suggests that the thousands of new arrivals coming to Guam from the continental United States as part of the military buildup can, and will, participate in a self-determination referendum to determine the political status of the island, should one be had. One particularly problematic provision provides:

> Guam's indigenous Chamorro population has strong concerns about whether incoming military populations would recognize them as both American by nationality and also as a unique ethnic culture worthy of respect and preservation. This could be mitigated by orientation programs designed in cooperation with the Department of Chamorro Affairs. However, an expansion in non-Chamorro voting population could eventually affect the proportion of Chamorro office-holders and government workers; thereby affecting the current government budgets and activities dedicated to cultural issues and practices. It could also affect outcomes of any future plebiscites about Guam's political status.

DEIS, Vol. 7, Mitigation, Summary Impacts, Cumulative, chapter 3, page 64. The same erroneous suggestion is repeated elsewhere in the DEIS. *See*, *e.g.*, DEIS, Vol. 2, Marine Corps – Guam, chapter 16, page 96 ("Chamorro concerns involves political autonomy are impacted by the potential increase in non-Chamorro populations due to the buildup, increasing the likelihood of more non-Chamorro local political office-holders. More non-Chamorro voters would decrease the possibility of Chamorro political self determination. They would also decrease the possibility of successful plebiscites to achieve greater independence from U.S. control, although at present there is little evidence that a majority would support such moves at any rate."); *see also id.* at 91 ("Another goal of Chamorros has been political self determination, and for some Chamorros, total sovereignty. While it is by no means certain that Guam residents would ever vote for full independence even if the military buildup does not take place, the addition of more non-Chamorro voters may make efforts at sovereignty less viable.").

This suggestion is illegal under any principled construction of international law. But because the United States, through its military mouthpiece, seems to be suffering from amnesia—the following is a brief recounting of the relevant international law applicable to Guam as a non-self-governing territory.

After the founding of the United Nations at the end of World War II, the international community recognized that colonized peoples and territories around the world deserved to be freed from colonialism. The U.N. Charter, ratified by the United States in 1945, recognizes in Article 1(2) and Article 55 the "principle of equal rights and self-determination of peoples." Article 73 of the Charter explicitly governed non-self-governing territories, like Guam, from 1946 to 1960, when it was supplemented by the 1960

Declaration on the Granting of Independence to Colonial Countries and Peoples. Article 73 states that "Members of the United Nations who administer territories whose peoples have not yet attained a full measure of self-government" have a "sacred trust obligation . . . to promote . . . the well-being of the inhabitants of these territories, and . . . to develop self-government," taking into consideration "the political aspirations of the peoples." Since 1946, Guam has remained on the U.N. list of non-self-governing territories; her people eligible under international law for self-government from 1946 to 1960, and thereafter for full independence.

In 1960, the U.N. General Assembly adopted two resolutions to give greater form and substance to the principles articulated in Article 73 of the Charter. The first, Resolution 1514 (XV), also known as the "Declaration on the Granting of Independence to Colonial Countries and Peoples", declares: "[A]ll peoples have the right to self-determination" and that "immediate steps shall be taken . . . to transfer all powers to the peoples of [non-self-governing] territories . . . in accordance with their freely expressed will and desire." The second, Resolution 1541 (XV), also known as the "Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for in Article 73e of the Charter of the United Nations", sets out three political status options that the United Nation recognizes as a full measure of self-government for the non-self-governing territories: independence, free association, or integration with an independent State.

Resolution 1514 proclaimed self-determination to be more than a principle, and declared it a right. It states: "All peoples have the right to self-determination." Although the General Assembly in Resolution 1514 failed to define "peoples," its adoption on the following day of Resolution 1541 acted to "fill in some of what Resolution 1514 left unsaid." Resolution 1541 was intended to clarify the reporting duty of the colonial rulers of the non-self-governing territories required to report to the Secretary-General on the status of the peoples of those territories until such time as self-governance was realized. The resolution's ninth principle states that a *prima facie* duty to submit said information exists "in respect of any territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it." From this language emerged a legal thesis known as the "blue-water" or "salt-water" thesis, which holds that only those peoples "separated by a sea . . . from their subjugators are entitled to self-determination. In contrast, the other major decolonization thesis takes its cue from language in the earlier resolution, 1514, which identified the holders of the right to self-determination in the decolonization context as those under "alien domination." This second theory, known as the "Belgian thesis," holds that all peoples, including those in independent states, are entitled to the remedy of decolonization. While in theory the latter thesis reflects the more principled approach, in the case of Guam, one need not entertain the distinction, as Guam would meet the test of either thesis.

The DEIS suggests that the massive wave of U.S. expatriates coming soon to Guam can participate in a self-determination plebiscite. This is erroneous because the international law governing the decolonization of non-self-governing territories indicates that decolonization is a remedy available only to the colonized. To be sure, Resolution 1514 instructs that the right to self-determination belongs to peoples who are subjected to "alien subjugation." Resolution 1541 further instructs that the right to self-determination in the decolonization context is a right available to the people of those territories "geographically separate" and "distinct ethnically and/or culturally from the country administering it." Moreover, in the 1970 Declaration on Principles of International Law Concerning Friendly

Relations and Cooperation Among States, or Resolution 2625 (XXV), the U.N. General Assembly unequivocally instructs:

> [T]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter, and particularly its purposes and principles.

These resolutions indicate that, as far as the right to self-determination is concerned, the United States cannot treat Guam as its domestic soil, nor exploit its control over immigration into Guam to flood the territory with its own non-Chamorro expatriates. By the time a Chamorro self-determination referendum would occur, if it does in fact occur, the enormous outside settler population would have increased exponentially. As stated in Volume 2 of the DEIS, the huge demographic change incident to the buildup will necessarily result in a "reduction in Chamorro voting power." DEIS, Vol. 2, Marine Corps – Guam, chapter 16, page 91.

Perhaps the strongest legal argument against the participation of U.S. expatriates in any future self-determination referendum in Guam is the most obvious one. A settled principle in both international and U.S. domestic law is that legal principles ought not be construed to lead to an absurd result. Indeed, this principle is so well settled that American jurists typically refer to it as the Golden Rule of statutory construction. Here, because decolonization is about curing a wrong (i.e., colonization), construing the right to self-determination in the decolonization context as belonging to those who were not harmed leads to a plainly absurd result. Arguably, to approve a conclusion to the contrary would be tantamount to a re-imposition of colonization by legal means.

To silence this position, the United States will no doubt proffer Puerto Rico as an example of how every U.S. citizen residing in a non-self-governing territory gets to vote in that territory's self-determination referendum. There, such referendums enfranchised all in the territory—Puerto Ricans and U.S. expatriates alike. In 1953, after the United States had reported that its international obligations as Puerto Rico's Administering Power had been in effect fulfilled by virtue of an increased measure of self-governance for Puerto Ricans, Puerto Rico was removed from the U.N. colonies list. The international community, however, has roundly rejected the U.S.' argument: Puerto Rico was deemed wrongly removed from the colonies list and has, since 2007, enjoyed a *sui generis* legal status, being kept under "continuous review" by the General Assembly itself so as to guarantee the people of that territory their legitimate right to self-determination. Further still, the example of New Caledonia shows us that, when the fundamental right to self-determination is concerned, the international community does not let Administering Powers so easily off the hook. There, though France had unilaterally removed New Caledonia from the colonies list, the General Assembly re-inscribed the territory on the list because of a self-determination plebiscite that failed to conform to international standards for decolonization.

Finally, almost immediately after its curt analysis (if it can be called analysis) of this colossal issue (the U.S.' taking for granted that all U.S. citizens residing in the territory of Guam can lawfully participate in a self-determination referendum for Guam when and if one is had), the DEIS then flippantly dismisses this issue as belonging to a lower order. It states: "The negative interactions related to incoming new population discussed here do not rise to

the level of major issues previously discussed under 'Crime and Disorder,' but are more likely to be *irritants* that may undermine a sense of mutual respect between groups." (emphasis added). Adding insult to injury, the document goes on to state, absurdly: "Also, the arrival of new populations can bring positive benefits that infuse communities with opportunities for more meaningful interactions."

Irritants? Sounds like a skin rash. Red ants, maybe?

Will someone please inform the United States (and all its agents) that the corpus of international human rights (to which self-determination not only belongs but enjoys a pre-eminent status) are principles which have crystallized into rights because as a world we have recognized that human beings are food to no one—no man, no state, no institution, no god? To be sure—to be crystal clear—self-determination is an inalienable, fundamental right of all peoples. And despite what the U.S government imagines, makes up, wants—it is not, can never be, a thing to go gently to its grave.

The final EIS must address the international legal points made herein. It must articulate with specificity the international legal authority for this buildup and, in particular, address how this buildup 1) does not violate the international law(s) on decolonization, 2) is not contrary to the U.N. Charter and the more specific rules that have crystallized around the right to self-determination, and 3) does not constitute denial of the right to external self-determination of the people of Guam arising out of both the colonial context and the foreign military occupation context. Further, in light of the above-articulated points of international law, and in light of the international mandate that the U.S. ensure that the people of Guam exercise self-determination in accordance with U.N. standards for decolonization, what international legal authority does the U.S. government and U.S. federal agencies, including the U.S. Defense Department, proffer in support of the contention that this buildup is even legal? Any response to this query must be reconciled with the well-settled principle of international law that one country's so-called "national security" does not trump the right to self-determination of peoples, which is already generally accepted as a *jus cogens*, or peremptory norm from which no derogation is allowed.