# From Cold Case to Hot Case

## Why and How the United Nations Can and Must Free the Moluccan People

To the Human Rights Council
of the United Nations in Geneva
on 12 April 2020

By the
Federalism for Peace Foundation

**Colofon**



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## PROLOGUE

The title of this report is clear. It is about the liberation of the South Moluccas. Its people has been oppressed and exploited since 1950. Ongoing violation of human rights by Indonesia fills a part of the annual reports of Amnesty International and Human Rights Watch.

Many publications on the history of the South Moluccas conclude that they declared their rightful independence on 25 April 1950. Our report confirms the correctness of that conclusion. From a legal point of view, however, this is of little relevance. To be an independent sovereign state requires more than just a self-declaration of independence.

A classic method is to fight for freedom. If the occupying forces are defeated, the international legal community is prepared to recognise the freedom fighters as the new legitimate government. This is how the United States of America came into being at the end of the 18th century. After the Second World War, almost all the colonies of the British Empire fought free in the same way. By force. The Moluccan people tried to do the same. But after the execution on April 12, 1966 of their leader - Dr. Chris Soumokil - the active guerilla fight for freedom was replaced by passive resistance. By the way, not without risk for their own lives. Today, when a Moluccan is waving the Moluccan flag, imprisonment waits - contrary to the 'habeas corpus' principle.[1]

Another method is to fight the political obstacles by legal means. The aim is to give an occupied and oppressed people their own independent state by handing over the sovereignty of the occupier to that people. That too is difficult. Exerting political pressure did not produce success, so far. And the legal means deployed have proved too weak to have led to a transfer of sovereignty.

This report continues the path of political fight with legal means. But it goes beyond the documents submitted over the past seventy years. It contains a series of analyses of trickery, deceit, lies and political manipulation of the occupier, made possible by the legal tampering and political cowardice of parties that could and should have prevented such misconduct. In this way, the Moluccas were handed over from one colonizer to another.

Within the international legal community, the Moluccan issue is a cold case. However, this report offers new insights into what was done wrong in 1949-1950: avoidable and culpable mistakes. What happened in the context of the transfer of sovereignty from the Netherlands to Indonesia in 1949-1950 is such a violation of the values and norms of the treaty system of the United Nations

[1] The 'habeas corpus' principle means something like: 'the body is yours'. It implies that a person suspected of a crime should not be imprisoned illegally and within a certain period must be brought before a judge, alive and unharmed, after which imprisonment may only take place by virtue of a conviction by the judge. It presupposes, of course, that the judge is independent - in accordance with the principle of trias politica. Much more about this later in this report.

that the UN must reopen this cold case in order to do justice to the Moluccans.

Just as the United Nations forced the Netherlands to transfer sovereignty over Indonesia to the Federal Republic of the United States of Indonesia on 27 December 1949 in The Hague, so - in accordance with the 'actus contrarius' principle - the United Nations should force Indonesia to transfer sovereignty over the Moluccas to the Moluccan people. And in this way - as a representative of the international legal community - to establish the sovereignty of the Moluccas by right. And to guard that sovereignty with the deployment of the UN instruments of peacemaking, peacekeeping and peacebuilding. The facts and arguments for this - partly intended as support for other oppressed peoples such as the Papuan people - can be found in this report.

With the proclamation of Moluccan independence on 25 April 1950 the Republik Maluku Selatan (RMS) was established. The word 'Selatan' stands for South and suggests that the declaration of independence would only concern the South Moluccas. However, there are also North, East and West Moluccans, all together under the 'adat' which connects all Moluccans.

The official documents exchanged under the auspices of the United Nations in the context of the transfer of sovereignty by the Netherlands to the Federation of the Republic of the United States of Indonesia often refer to South Moluccas. In order not to create misunderstandings in the relationship with the United Nations about the formal designation, we cannot write anything other than South Moluccas in this report. However, the aspiration of the Moluccan people for freedom is not limited to the southern part, it concerns all parts of the Moluccan territory. Where for formal reasons we use the term 'South Moluccas', this should be understood as the striving for freedom of the united Moluccas, expressed as the Republic Maluku Serikat (= United).

The reference to the 'adat' has another meaning for this report.[2] The 'adat', as a concept from the customary law of the archipelago of Indonesia, includes everything that can be understood by one's own culture, traditions, morals, manners, agreements, commandments and prohibitions, which are passed on and kept by tradition. The 'adat' is older than established laws or religious beliefs. Thus, centuries before Charles de Montesquieu (1689-1755) launched his famous 'trias politica' (= the separation of the three branches of the state) the Moluccas already anchored these concepts in their 'adat'. Their Sama'Suru (= the division of functions) speaks of:
o Saniri: the legislative power.
o Latu Patty: the executive power.
o Upu Hena/Latu Nusa: judicial power.

Because of the flagrant violation of the trias politica by Sukarno c.s. in 1949-1950, knowing that the Moluccas were ruled by these principles, is an important reason for us to write this report.

[2] D. Sahalessy, 'An Isolated War', Assen, juli 2002.

In addition, the 'adat' is also important for another aspect of this report. At that time, the Moluccas already knew the term Hena (= municipality). This is comparable to the Greek 'polis' (= city state), a self-governing community. Whereby 'Henaja' as a group of such communities looks after common interests that individual 'Henas' cannot look after. So, the Moluccas already had in their 'adat' the most important building block of what only around 1600 was developed in Europe as the doctrine of federal state formation. That was an extra argument for the Federalism for Peace Foundation to investigate this Moluccan case.

A third aspect of the 'adat' concerns the words 'Mena, Muria'. It means: the beginning and the end, alpha and omega. In the symbolism of shipping, it means 'we are ready to sail: ready from stem to stern'. In combat situations the vanguard calls 'Mena' to indicate 'we are ready to go', waiting for the 'Muria' of the rearguard to indicate 'we are ready too'. On behalf of the Moluccan community this report is a 'Mena' addressed to the UN. We are waiting for a 'Muria' as a sign that after 70 years the UN decides to restore the sovereignty of the Moluccan people by right. In legal terminology: 'de iure'.

At the end of this Prologue, we note that in order to approach the Moluccan case as objectively as possible, we have not held any substantive consultations with representatives of the Moluccan people.

Federalism for Peace Foundation
The Hague, 15 February 2020

## PART I THE RISE AND FALL OF THE FEDERATION OF THE REPUBLIC OF THE UNITED STATES OF INDONESIA

The first six chapters sketch how, after centuries of exploitation, the Moluccan people were finally offered the perspective of freedom, sovereignty and self-determination, only to be re-occupied in a few months. After which the oppression and exploitation continued to this day.

The reader sees analyses of the root causes of what went wrong in 1949-1950, who was responsible for it, and how, as a result, the promised perspective of sovereign freedom gave way to the destruction of oppression, exploitation and violation of human rights.

The emphasis is on analysing the root causes. That is why we quote - with the perhaps most important citation in this report - a statement by former Secretary-General of the United Nations, Kofi Annan:

> "While United Nations efforts have been tailored so that they are palpable to the population to meet immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future."[3]

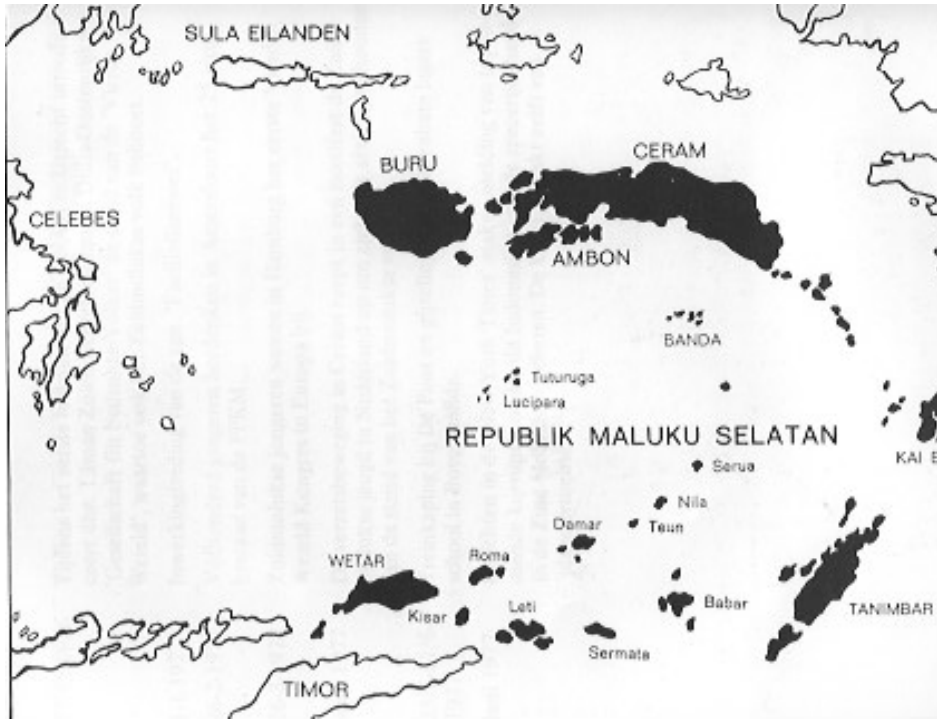
The question we as authors of this report should ask is:

> "If - after seventy years of 'unaddressing of the root causes' of the Moluccan tragedy - it is recognized and acknowledged that this report exposes correctly and convincingly these root causes, will the United Nations apply the treaty system to finally give the Moluccas their freedom? Or will they abandon the Moluccas again?"

The answer to that question will become apparent after we have submitted the report to the Human Rights Council of the United Nations.

[3] The Secretary-General, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', delivered to the Security Council, U.N. Doc. S/2004/616, August 23, 2004.

## 1. The South Moluccas




Uit: Bung Penongon, De Zuidmolukse Republiek. p. 234.

| | |
|---|---|
| Location | Group of about a thousand islands in the east of the Indian Archipelago, between Sulawesi, Timor and Irian Jaya (Papua). Capital Ambon. |
| Geography | Part of Melanesia. |
| Surface area | Approximately 75,000 km2. |
| Inhabitants | Over two million. |
| Ethnicity | Melanesian-Austronesian. |
| Languages | Over a hundred different languages with Polynesian, Ambonese, West Papua and Malay as the main languages. |
| Religion | Christian and Islam (Sunni). |
| Status | Suppression. In 1950 annexed by Indonesia. |
| Resistance | Guerilla resistance from 1950 to 1966. Nonviolent resistance from 1966 to the present day. |
| Wish | Freedom by restoring their own sovereignty. |



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## 2. SUMMARY CONSIDERATIONS

### 2.1 The character of this report

Since 1950 the South Moluccas have been occupied, oppressed and exploited by Indonesia. Many publications have been devoted to this. Most of them in the form of historiography. Within these historical reflections a small number of writings deal with the Moluccan struggle for self-determination, in the sense of sovereign independence. However, seventy years of resistance - partly active, partly passive - have not been able to put an end to this annexation and violation of human rights.

This report by the Federalism for Peace Foundation is a new attempt to convince the international legal community - organised within the United Nations - of the legitimacy to restore the South Moluccas to their right to sovereign independence. It analyses how - under the auspices of the United Nations - the Federal Republic of the United States of Indonesia was liquidated by abuse of rights within eight months of its establishment. But it also describes how the United Nations can restore the sovereign independence of the South Moluccas through federal state formation.

Contrary to the large number of publications of the past seventy years, it contains analyses of what went wrong in the period 1949-1950 when the Netherlands transferred sovereignty over the territory of Indonesia to the Federal Republic of the United States of Indonesia. As far as we know, such analyses of the serious shortcomings of that process - under the auspices of the United Nations - have not been made before.

The legitimacy for submitting this report to the United Nations is based on the root causes of various forms of abuse of rights. This was carried out using military force, made possible by an apparent lack of legal expertise and political negligence in the period 1949-1950. A sad mixture of tampering that led to systematic oppression and exploitation that had been going on for seventy years.

The report does not suffice with offering these analyses, but also contains the building blocks for the construction of a safe sovereign Moluccan state, based on a correct constitution and with the building blocks for the realization of a sustainable policy. As such, it is partly intended to strengthen the UN's toolbox of peacemaking, peacekeeping and peacebuilding with the instrument of federal state formation.

### 2.2 The method used

This report is based on scientific insights on constitutional, institutional law and federal state organization, on principles of international law, on autocratic government above the rule of law, on principles of cybernetics and system theory. History merges with politico-philosophical cornerstones of popular sovereignty, justice and self-determination, embedded in reflections on the foundations of constitutional and international law, elementary aspects of federal state organization, geopolitical positioning and policy contours, guided by analyses of structural errors that still

need to be rectified in order to give the Moluccan community its own sovereign independence.

It describes how the desire for independence of Indonesia, colonized for centuries by the Netherlands after the Second World War in a politically difficult and partly violent process of five years (1945-1950) led to the creation of the Federation of the Republic of the United States of Indonesia. It was the result of - often antagonistic - cooperation between:

- Leaders in Indonesia, who proclaimed independence immediately after Japan's capitulation.

- The Netherlands, which reluctantly and only slowly realised that colonial rule was no longer accepted by the international political community.

- The United Nations, which in its first years of existence had to define its position with the help of regulations, structures and procedures that had barely been tested; a period in which new insights in the field of international law developed. They needed to gain international prestige by rapidly integrating as many states as possible as members of the UN community.

- And America, which interfered emphatically in the decolonizing federalization process:
  (a) from the historical realization that it had declared its own independence in 1776;
  (b) that it had composed the world's first federal constitution in 1787;
  (c) and that it wanted to channel the revolt of groups in Indonesia against the Netherlands in order to prevent such groups from falling into the hands of communism.

We show how abuses of justice were used to liquidate the federal state - with the guarantee of self-determination for the South Moluccas - within eight months in favour of establishing an autocratically governed centralized unitary state that eliminated that right to self-determination.

The abuse of rights could take place:
(a) by qualifying the federal constitution as a constitutional mess;
(b) allowing Indonesia to use the federal constitution for a purpose other than that for which it was established, with politically motivated lies and deceit, plus military force;
(c) while the United Nations - through its organs of the United Nations Commission for Indonesia (UNCI)I, the Security Council and the General Assembly - looked away and subordinated the right to self-determination, guaranteed by the federal Constitution and the UN treaty, to the UN's interest in welcoming Indonesia as its sixtieth member;
(d) and the Netherlands, after initial protests against the abuse of rights by Indonesia, considered the political and economic importance of its Dutch-Indonesian Union more important than standing up for the rights of the South Moluccas.

This report establishes that the federal Constitution of December 1949 was not a federal Constitution because, on the one hand, it contained articles that may never appear in a federal Constitution

and, on the other hand, it lacked vital articles in order to be entitled to be called a federal Constitution.

On the basis of the international law entrusted to the United Nations, this report presents the course of justice that should lead to the United Nations instructing Indonesia to restore the constitutional reality to the constitutional situation on 27 December 1949, the day on which the transfer of sovereignty took place and the federation came into force. The report provides the facts and arguments for the position that Indonesia - if it does not fulfil this mandate - should be expelled from the UN under Article 6 of the United Nations Charter.

Based on the assumption that after seventy years the United Nations is willing and able to undo this black page in its own history, this report provides insight into standards of popular sovereignty, self-determination and federal state formation. Among other things by presenting a correct federal Constitution and a procedure to have it ratified by the people of the South Moluccas. A Constitution that does not contain articles that - as was the case on 27 December 1949 - can be misused to liquidate the federation.

### 2.3 Federal State formation as an instrument for peaceful conflict resolution

This report makes it clear that federal state formation - as a unique form of popular sovereignty - is a perfect instrument for resolving conflicts within states and between states. Indeed, the federal organisation of state has a characteristic that nation states do not have: it offers transnational governance to states and peoples who wish to preserve their own sovereignty, but entrust some interests that they are unable to look after themselves to a body that can look after the general interest of those states.

History has shown that over the centuries nation-states have fallen into the so-called 'anarchy of nation-states'. With indescribable violence, murder and manslaughter. Federal state institutions can prevent this.

Today, 40% of the world's population lives in twenty-seven federal states.[4] Almost all of them are born out of the need to resolve conflicts. The first federation in the world, that of the United States of America in 1787-1789, found its birth certificate in the need of the thirteen newly established states that had separated from England as colonies in 1776 to resolve conflicts between three groups of those states - North, South and Central. The newly established federation of Belgium - a far-reaching political transformation of the unitary state into a federal state - was the solution to the century and a half of economic oppression by Wallonia of Flanders.

[4] See the list: Argentinä, Australiä, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Germany, Ethiopia, India, Iraq, Malaysia, Mexico, Micronesia, Nepal, Nigeria, Austria, Pakistan, Russia, Saint Kitts and Nevis, Sudan, Somalia, Venezuela, United Arab Emirates, United States, South Sudan, Switzerland.

Federal state formation would also be the best answer for Europe. Since 1800, many attempts[5] have been made to give the necessary unity between European states a federal form of state such as that of the United States of America. Still in vain, even though the treaty basis of European cooperation appears to be showing more and more cracks: the European Union is disintegrating due to many systemic flaws in its intergovernmental operating system.

Federalism is also the only good answer to conflicts that threaten the world order, such as the problems between Israel and Palestine and those in Ukraine. In Europe, it would be a workable and reconciliatory response to the separatist movements in Spain by transforming autonomous regions of Catalonia and the Basque Country with Spain into a federal form of state. Just as in the United Kingdom, the devolution is only one step away from a federal state form in which constituent regions Scotland, Wales and Northern Ireland can realise their own sovereignty[6]. Cyprus with its Greek and Turkish parts would also benefit from a federal organisation. In African Cameroon it could contribute to the recovery of the disintegrated federation. It could also give binding strength to five countries in the Sub-Sahara: Mali, Mauritania, Burkina Faso, Chad and Niger. Not to forget how it could finally provide a humane solution for the Kurds, who are spread over no less than four countries, apart from the stay of many Kurds in the diaspora.

This report therefore recommends that 'Federalism for Peace' be added by the United Nations as an organisational instrument to the complex of powers of the Human Rights Committee or Human Rights Council, as overseers of the right to self-determination of all peoples, under the International Covenant on Civil and Political Rights (ICCPR 1966).

### 2.4 Explanation of failure of the Federation of the Republic of the United States of Indonesia

Because the standards of federal state formation were not always respected when the aforementioned twenty-seven federations were established, they are not all equally strong. Some have even disintegrated over the years. One of them is the federation of the Republic of the United States of Indonesia, founded on December 27, 1949 at the transfer of sovereignty from the Netherlands to Indonesia in The Hague. After eight months that federation ceased to exist, exchanged for the centralized unitary state of the Republic of Indonesia. Cause: the federation was built on a poor federal Constitution that made it possible to liquidate the federation in favour of the establishment of absolute, autocratic power that continues to this day.

[5] See Andrea Bosco, 'The Round Table Movement and the Fall of the 'Second' British Empire', Cambridge Scholars Publishing 2017. Bosco Andrea, 'June 1940. Great Britain and the First attempt to Build a European Union', Cambridge Scholars Publishing 2016. See also Leo Klinkers, *Sovereignty, Security and Solidarity*, Lothian Foundation Press 2019.

[6] Keir Starmer, 'Only a federal UK 'can repair shattered trust in politics', The Guardian, 26 January 2020.

This report offers the way to correct the mistakes made - and thus to solve the oppression, exploitation and violation of human rights by Indonesia in the South Moluccas - by restoring their right to external sovereign self-determination and still giving them the choice to opt for that external self-determination between establishing a unitary state or a federal state based on correct federal state formation.

The report recommends - based on a geopolitical approach - to choose to establish a federal state along with other peoples, such as those of Papua, West Papua and Aceh. And perhaps also for the Republic of Vanuatu and the Independent State of Papua New Guinea.

### 2.5 An opportunity for the United Nations to prove its existence

It is up to the United Nations - as the body representing the international legal community in the fight against injustice - to turn this cold case into a hot case. For more reasons than just the restoration of the rights of the people of the South Moluccas.

Firstly, there is the fact that in the year 2020 an ever-increasing number of peoples in the world see reasons to oppose - populist/nationalist driven - autocratic governance.[7] Like no other, the Moluccan people understand the motives behind such rebellious actions and draw from them the courage to bring the Moluccan cause back to the attention of the UN. In the hope and expectation that the UN will realise that serious mistakes were made around 1950 which the then still young international body under the name of the United Nations was unable to prevent or solve. But now, as a mature body with a greater knowledge of international law and the structures and procedures set up to deal with it, it is deemed capable of recognising, acknowledging and reversing the mistakes of 1950. In 1946 the United Nations considered itself legitimized to place the decolonization of Indonesia under its care. That legitimation is still valid today. It only comes down to political courage.

Secondly, the special circumstance that the mistakes of 1950 had to do with the improper use of an excellent instrument for resolving conflicts, namely federal state formation. This report makes clear to the United Nations why and how the application of what was then the federal state structure of Indonesia falls under the heading of abuse of law. And how the UN, with a correct application of the basic concepts of federalism, can still correct the mistakes of the past.

[7] Contrary to already existing violent resistance to autocratic governance in many places around the world, we now also see more and more peaceful forms of resistance to political views - certainly in Europe - that encourage large groups of citizens to protest. In Italy, for example, the anti-fascist group Sardines was recently formed in protest against the right-wing populist, xenophobic action of the Lega Party. See Lorenzo Sparviero's 'Open letter on federal Europe for sardines and other European movements' in: Europe Today Magazine of 19 February 2020 (https://www.europe-today.eu/2020/02/19/open-letter-on-federal-europe-for-sardines-and-other-european-movements/). Sparviero (Federal Alliance of European Federalists) explains that the typical intergovernmental form of governance of the European Union is responsible for the rise of right-wing nationalist populist governance. And that only a federal Europe based on a federal Constitution can be the solution.

Thirdly. A violently oppressed people usually have three kinds of people: one part co-operates with the oppressor; another resigns in his fate and a third part continues to cherish resistance. Sometimes passive, sometimes active. Active resistance against oppression and exploitation to break that resistance alternate as causes of victims and destruction. But there is one constant cause: if a people feels oppressed, resistance will continue to exist. It can take a long time, but only when a people regain its freedom does it come to an end. For example, in the 16th and 17th centuries the then Netherlands had to wage an eighty-year war to finally free themselves from Spanish domination with the Peace of Westphalia in 1648.

Fourthly. Resistance against the oppression by Indonesia is not limited to the Moluccas. Elsewhere within Indonesia there are peoples who would like to see an end to Indonesian domination in order to do justice to one of the basic principles of federal state formation under the auspices of the United Nations at the time, namely the right to self-determination.

These four aspects should convince the United Nations of the need to make provisions for effective peacemaking, peacekeeping and peacebuilding by establishing a moratorium on the South Moluccas.

**2.6 The Complaint**

In accordance with the Human Rights Council Complaint Procedure, the report ends with a Complaint in Chapter 16. Preceded in Chapter 15 by a detailed Requisitory about Indonesia's illegal and inhumane conduct. That Requisitory concludes with a request to the Human Rights Council of the United Nations to start a process that will lead to Indonesia restoring the Moluccas to their sovereign independence and putting an immediate end to the violation of human rights. Under penalty of expulsion of Indonesia from the United Nations ex Article 6 of the UN's Charter.

## 3. IN A SLOW FIVE-YEAR PROCESS TOWARDS SOVEREIGN FREEDOM

Although we do not do historiography, a brief chronological overview is indispensable for a good understanding of the complicated aspects of this dossier. Chapter 17 contains the timeline of the process we describe in this report.

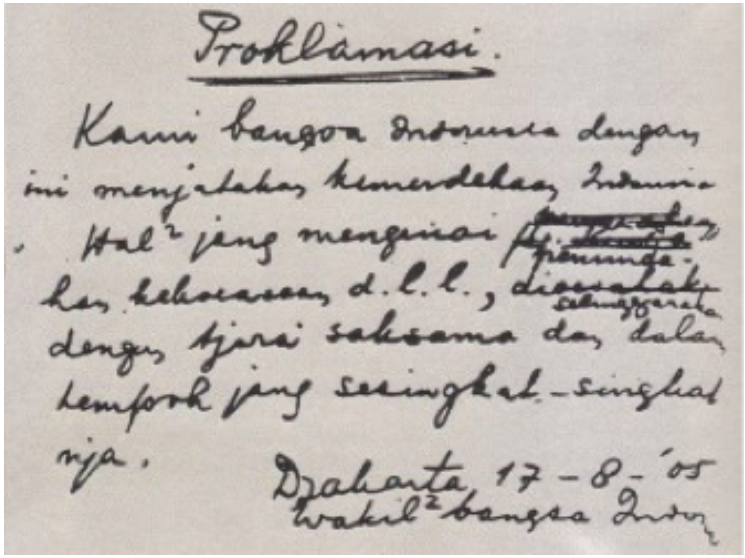
### 3.1 The period from 1511 to 1945

Already a few centuries before Christ the Moluccas were visited by other peoples to collect spices. The influence of European countries began in the 16th century. From 1511 to 1600 Portugal


and Spain occupied the Moluccas. From 1599 to 1796 the Moluccas were under Dutch rule. From 1796 to 1803 there was a short English interim administration after which France, together with the Netherlands, dominated from 1803 to 1810. Immediately followed by - again - a short English interim government from 1810 to 1817. After which the Netherlands took over the Moluccas from 1817 until the Japanese occupation in 1942. The Japanese occupation ended with the capitulation of Japan on 15 August 1945.

### 3.2 The proclamation of the Republic of Indonesia on 17 August 1945

Two days after Japan's capitulation, Sukarno proclaimed independence from the Republic of Indonesia (RI) on 17 August 1945. With Sukarno and Hatta as President and Vice President. The proclamation consisted of reading a few sentences in Malay. A photo of that paper has been preserved.


Proklamasi.

Kami bangsa Indonesia dengan ini menjelaskan kemerdekaan Indonesia. Hal² jang mengenai pemindahan kekoeasaan d.l.l., diselenggarakan dengan tjara saksama dan dalam tempoh jang sesingkat-singkatnja.

Djakarta, 17-8-'05
Wakil² bangsa Indonesia

The Netherlands did not recognise that proclamation. This was followed by a period of struggle and consultation. It was not until 27 December 1949 that the Netherlands transferred sovereignty to the Republic of the United States of Indonesia. In order to understand what happened in 1949-1950, a brief overview of events between 1945 and the end of 1949 follows.

### 3.3. The Linggadjati Agreement of 15 November 1946

The refusal of the Netherlands to give Soekarno's declaration of independence a legal basis - i.e. 'de iure' - after Japan's departure led to unrest. In order to end the bloodshed, both parties concluded the so-called Linggadjati Agreement on 15 November 1946. They agreed the following:

- The Netherlands recognised the Republic's – 'de facto' - authority over part of Indonesia, mainly Java plus Sumatra.
- This was the Dutch interpretation of the Agreement on this point. Because Indonesia maintained the position that its proclamation of 17 August 1945 also implied legal sovereignty - i.e. 'de iure' - the Agreement, as it turned out later, did not last long.
- The Netherlands and the Republic of Indonesia would work together to establish a sovereign, democratic state on a federal basis[8], under the name of the United States of Indonesia (VSI). That federal state would encompass the entire territory of the then known Dutch East Indies. The federation would consist of three states: the Republic of Indonesia, Borneo and the Great East.
- In that intended federation, the Republic of Indonesia would therefore 'only' be one of the member states. It agreed to this for tactical reasons, because behind the scenes the United States of Indonesia to be formed was seen as an intermediate step towards the establishment - ultimately - of the Republic of Indonesia as a centralized unitary state, as explicitly referred to in the proclamation of independence by Sukarno on 17 August 1945. Here lies the motive to use the articles of the federal Constitution a few years later (from January to August 1950) in such a way that the federation could be liquidated and converted into a unitary state with autocratic supremacy over the entire territory of Indonesia.
- In order to maintain the ties between the Netherlands and Indonesia a Netherlands-Indonesian Union would be established, consisting of the Kingdom of the Netherlands (thus including Suriname, the Netherlands Antilles and Dutch New Guinea) and Indonesia with the Dutch Queen as head of state.

[8] Schermerhorn writes in his diary [translated from Dutch to English-LK&PH]: "The Linggadjati Agreement - as embodied in the political agreement of 25 March 1947 - had been terminated by Van Mook on the eve of the military action. However, the principle of Linggadjati - a federal Indonesia associated with the Netherlands in a Dutch-Indonesian Union - remained the guiding principle of the Dutch government, to which it held fast until the transfer of sovereignty. In: W. Schermerhorn, 'The diary of Schermerhorn' (2 dln) (ed. C. Smit). Nederlands Historisch Genootschap, Utrecht 1970, p. XXVI.

- The Netherlands-Indonesian Union isn't further discussed here except that later on it will be briefly mentioned that the economic interests of the Netherlands in this Union was one of the deciding factors not to intervene when it appeared that Sukarno c.s. was going to abuse the federal constitution in order to liquidate the federation and establish the unitary state. As a result, the South Moluccas were at the mercy of a totalitarian regime.

- The establishment of the federal state should have been realised before 1 January 1949.

All in all, the Linggadjati Agreement turned out to be an antagonistic agreement. Liberal interpretations of the Agreement by both parties led to divisions. Both between the two parties, as well as within Dutch and Indonesian political organisations. Nevertheless, a month later - on 23 December 1946 - the state of East Indonesia (Negara Indonesia Timur, NIT) was established. With the South Moluccas as one of the peoples of that state in the east of Indonesia. Note: 'states' are political components – member states - of a federal state. Thus, began with the Linggadjati Agreement the composition of a federal constitutional system.

On March 25, 1947 the Netherlands ratified this establishment of the NIT. But the increasing conflicts with Indonesia, added to political divisions in the Netherlands and Indonesia over its implementation, led the Netherlands to terminate the Linggadjati Agreement on July 20, 1947. Consequence: on July 27, 1947 the first of the two so-called police actions began, a bloody conflict between the Netherlands and Indonesia striving for independence.[9]

For the record: from that moment on, part of the territory of Indonesia was controlled by the Republic of Indonesia (RI) proclaimed by Sukarno, and another part remained occupied by the Netherlands.

### 3.4 The Renville Agreement of 17 January 1948

*3.4.1 Intervention by the United Nations*

The first police action after the collapse of the Linggadjati Agreement led to an intervention of the United Nations; one of the first profound interventions in the early existence of the UN, founded in 1945. It forced a ceasefire. The relevant agreement was reached on 17 January 1948 aboard the American naval

[9] The so-called 'police' actions are still the subject of discussion today. In politics, in the armed forces and in science. The core of this discussion concerns the information that the Netherlands committed war crimes during that period. In order to clarify this, Cees Fasseur wrote 'De Excessennota' [The Note on Excesses] in 1995, commissioned by the government. This did not cause the attention for this subject to slacken. On 2 December 2016 the Dutch government decided to finance (but not commission) an in-depth research programme. This is led by Professor Gert Oostindie of the Royal Institute for Language, Land and Ethnology (KITLV) at Leiden University. In collaboration with the Netherlands Institute for Military History (NIMH) and the NIOD Institute for War, Holocaust and Genocide Studies.

vessel USS Renville, docked in the port of Jakarta and acting as the headquarters of the UN Ceasefire Commission.

The Renville Agreement added a few fundamental building blocks to the composition of the intended federal state structure for Indonesia. For a good understanding of these, we briefly sketch how things went.

*3.4.2 The sequence of developments*

Action by Australia and the United States of America in the Security Council

Preceded by a discussion in the UN Security Council in February 1946 on the security problems in Indonesia, the Renville ceasefire was the result of a Resolution 27 submitted by Australia to the Security Council to call on the warring parties to establish a ceasefire. That Resolution was adopted by the Security Council on 1 August 1947 (S/459). Although the Netherlands was not a member of the Security Council at that time (unlike in 1946), on 5 August 1947, after some protest - it saw the conflict as an internal matter that it wanted to resolve without outside interference - the Netherlands responded to that call, after which, on 25 August 1947, the Security Council accepted a resolution submitted by the United States of America (S/525, I) to establish a Commission of Good Offices (CGO) of three persons to bring about a peaceful solution. The Commission began its work on 27 October 1947 (S/RES/31; S/525, I, 1947).

The international attention for the conflict weakened the position of the Netherlands. It could not maintain that this was an internal matter in which the UN had to remain outside. Furthermore, the international intervention strengthened Indonesia's position because the UN offered representatives of Indonesia the space to raise their profile. Among other things by holding speeches within the UN organisation.

The United Nations Commission of Good Offices

The Commission of Good Offices actively sought information about the conflict itself. It obtained this information from the consuls of Australiä, Belgium, China, France, Great Britain and the United States, based in Batavia (Jakarta). At the request of the Security Council, they formed a Consular Commission, which went out into occupied and unoccupied areas of the Netherlands to find out what was really going on. And reported to the Security Council.

Offer by America
The Security Council had already held several debates on Indonesia in October 1947 in response to the report of the Consular Commission. In order to break the deadlock on where the warring parties could discuss the call for a ceasefire, America offered to hold the consultations aboard the USS Renville.

The Renville Principles
In order to prevent the Renville talks from failing - with damage to America's image - America actively intervened. Partly by convincing the representatives of the Indonesian side of the need to accept a sketch of principles offered by the Netherlands for a good discussion.

In doing so, America supported the position of the Netherlands that sovereignty over the whole of Indonesia - i.e. 'de iure' - would remain with the Netherlands until the establishment of the intended federation. This remained a major stumbling block for the delegation of the Republic of Indonesia (RI). Nevertheless, the Renville Agreement was concluded on 17 January 1948. Both parties signed a few principles [10] as a basis for the political discussions.

If one were to summarise these principles in a single sentence, it would read as follows:

> *"All sovereignty rests with the people, with the inalienable right to self-determination."*

Perhaps this explains why the United States urged the Indonesian delegation to accept those principles put forward by the Netherlands. After all, that one sentence is the alpha and omega of the Declaration of Independence with which the thirteen colonies of 1776 in America separated themselves from England.

*3.4.3 The Netherlands as the cause of the failure of the Renville agreement*

The Netherlands established more member-states on its own authority
Even during the Renville Agreement, the Netherlands had already started to establish more than the previously agreed three member-states for the eventual federal United States of Indonesia. Politically, this was contrary to the third principle of the twelve principles proposed and signed by the Netherlands. Principle 3 (see paragraph 5.4.2) stipulated that changes in the form of administration of territories should only take place with the full and free consent of the population concerned. However, for the Netherlands it was enough to secure the support of the traditional feudal elite who advocated an independent status for their region - i.e. against domination by the Republic of Indonesia (RI) - and thus constituted member-states in the areas of the Indonesian archipelago controlled by the Netherlands.

The Netherlands established a Provisional Federal Government on its own authority.

[10] These principles are set out in paragraph 5.4.2.

The Dutch delegation went even further. On 9 March 1948 it transformed its own government into a Provisional Federal Government. But this naming did not cover the corresponding federal form of government. It remained centralistic and thus contrary to the essence of federal state organisation, in which the federal states remained sovereign and only entrusted interests that they could not look after themselves to a federal body.

The Netherlands gained more influence

Nevertheless, federalisation to achieve independent status as a region increased the influence of the Netherlands. In this way, the regional elite was able to acquire state posts and thus erect an obstacle against a seizure of power by the Republic of Indonesia. This alleged federalisation therefore appealed to the Netherlands' sympathy. At least in areas where the Republic was not in control.

The Netherlands adhered to a federal principle

With this support, the Netherlands allowed itself to adopt an increasingly hostile attitude towards the supporters of the Republic of Indonesia. Among other things by violating several Renville principles. The relationship with the Republic was further threatened by the Dutch position that upon joining a federal state - as a state alongside other states - the Republic had to relinquish a number of powers of its own, including having its own armed forces, its own currency and its own foreign relations. Incidentally, the Dutch position on this point was correct under constitutional law. At least in the context of characteristics of a federal state: all states have the same sovereign powers[11], and that does not include having its own armed forces and its own currency.

The Netherlands clamped down on the Republic

But because this demand from the Netherlands essentially meant that the Republic had to relinquish its identity and power base before it was allowed to participate in talks about the establishment of the intended federal state, another breaking point arose that caused the Renville agreement to fail within a year. Any attempt by the Republic to get these demands off the table was rejected by the Netherlands, because it was feared that otherwise the Federation would become part of the Republic of Indonesia instead of the Republic as part of the Federation. The fact that in the end it turned out this way - all member-states under the authority of the Republic - will be discussed later.

The Netherlands organised a Federal Conference

The Dutch delegation maintained momentum in the process. On 27 May 1948, a Federal Conference, organized by the Provisional Federal Government, took place. With representatives of the federated states established by the Netherlands in the areas controlled by the Netherlands. This Federal Conference was intended as a body of the Provisional Federal Government to

[11] The fact that federated states have the same powers is an aspect of the so-called symmetrical federation. There are also asymmetric federations. Within these, not all member-states have the same powers. But in no symmetric federation does a member-state have the power to have its own army. An example of asymmetry can be found in the Belgian federation. It consists of three member-states: Wallonia (French-speaking), Flanders (Dutch-speaking) and a German-speaking area. The latter does not have the same powers as the other two and is partly led in its decision-making by Wallonia.

consult with the federated states on the establishment of the future federal state structure. The UN Commission of Good Offices was involved in this. The Republic was not. This gave room to the idea that it might be possible to establish the federation without the Republic of Indonesia as a member-state of that federation. This informally gave the Federal Conference the status of forerunner of the 'Constituante'[12] of the final federation. Of course, under protest of the Republic of Indonesia (RI) to the UN Security Council.

The Netherlands sidelined by a Federal Consultation Meeting

As a result, the consultations with the Republic came to a standstill. Crisis. Premiers of some member-states then took the unexpected initiative to invite the leaders of the states to a Federal Consultation Meeting on 8 July 1948. Without the presence of the central Dutch authority. This meeting produced a strong resolution which meant that there had to be a Federal Interim Government, led by a three-member directorate consisting of Indonesians. Assisted by a Dutch High Commissioner with limited powers. The members of this Meeting decided to submit this resolution to the Netherlands and to the Republic of Indonesia.

The Federal Consultation Meeting as the third political factor

In this way, the Federal Consultation Meeting manifested itself as a third political factor alongside the Republic and the Netherlands. The motive was: agreeing to work on a federal state structure, but not agreeing to place that ambition in an obligation for the member-states to turn against the Republic of Indonesia. The member-states did not want to act as pawns on the chessboard of the Republic and the Netherlands. Although the Federal Consultation Meeting was intended to be a one-off event, it grew into a permanent body that would leave its own mark on the federalization process during the concluding Round Table Conferences in The Hague in November and December 1949.

Intervention by America

While the stalemate continued, the Netherlands was preparing a legal regime for the governance of Indonesia during a transitional period that should precede the actual establishment of the federal state: the sovereign United States of Indonesia. At the Linggadjati Agreement it was agreed that that federal state should be in place on 1 January 1949. But that deadline had become obsolete. The Netherlands wanted to use it before the start of the transition period. The most important aspects were the composition of the federal Interim Government during that transition period, the powers of the Netherlands during that period and the length of that period. Strictly speaking, this way of working competed with the Interim Government referred to by the Federal Consultation Meeting, which would consist entirely of Indonesians, without direct powers from any Dutch authority.

The way in which the Netherlands thought about the transitional period was not shared by the UN Commission of Good Offices. Nor by America. On September 10, 1948, the U.S. Department of

[12] A 'Constituante' is a Constituent Assembly. Her function in this process will be discussed later in this report.

Foreign Affairs allowed itself to make an informal contribution to the delegations from Indonesia and the Netherlands, which met with great resistance from the Netherlands. The memorandum included a plan for elections throughout the archipelago and the establishment of a parliament for the interim federal government to be formed. With a very tight timeframe: the Netherlands would then be obliged to transfer sovereignty already on 31 July 1949, thus ending the transitional period and the federal state would enter into force. Serious protest from the Netherlands was not honored by America. By America's pressure to hurry played into the background the motive to take the wind out of the sails of communist movements. This pressure went so far that America threatened to stop the Marshall Aid[13] if the Netherlands did not commit.

The end of the Renville Agreement and the second police action

Irreconcilable contradictions between the delegations of the Netherlands and Indonesia, the entry of a third political factor in the form of the Federal Consultations Meeting, the ignoring of this new body by the Netherlands, the growing differences of opinion between the Netherlands on the one hand and the Commission of Good Services and America on the other, put an end to the Renville Agreement. Thus, began the second police action on 19 December 1948. Despite very serious warnings from America to refrain from a new wave of military violence.

The reaction of the United Nations

Contrary to the expectations of the Netherlands, Australia, America and the UN Commission of Good Offices already demanded an emergency session of the Security Council on the first day of the second police action. The Netherlands argued that it was still aiming for the independence of the people of Indonesia and that the military violence was only intended to eliminate extremist elements. On the Indonesian side it was argued that the military action was aimed at the destruction of the Republic. The Security Council Resolution of 24 December 1948 called on both parties to cease fighting and release political prisoners (including Sukarno). The Netherlands ignored the resolution. The strongly irritated Security Council called on the Netherlands in an even stronger tone to stop fighting and to release Sukarno and other political prisoners immediately. The Netherlands still did not comply.

## 3.5 The run-up to the Round Table Conference (RTC) of November and December 1949

*3.5.1 Tactical maneuvers of the Netherlands*

The Netherlands realized that in the end it could not withstand the pressure of the UN Security Council, the UN Commission of Good Offices, America and Australia and decided to comply, but with the most important goal in mind: the creation of the alliance of the

[13] The Marshall Aid was a multi-billion-dollar investment from America to help the post-war devastated Europe get back on its feet. Striking is one of the motives that indirectly played a role in that aid, namely, to make European countries decide - after more than a hundred years of talking about the federalization of Europe - to finally create a federal Europe. Which to this day has not succeeded.

Netherlands-Indonesian Union. In the Security Council, the Netherlands put the following on the table:

- Let the intended Federal Interim Government come into being before 14 February 1949.
- Hold general elections for an Indonesian representative body in the third quarter of 1949.
- Have that body adopt a Constitution through the federal member-states.
- Then have a Round Table Conference of the Netherlands and Indonesia, draw up a Statute of the Dutch-Indonesian Union, preferably before 1950.
- And only then let the transfer of sovereignty from the Netherlands to Indonesia take place.

This tactic of subordinating the federalization process to safeguarding Dutch economic interests in Indonesia in advance failed. Partly irritated by the fact that the Netherlands was still holding a few political prisoners, on 28 January 1949 the Security Council adopted Resolution S/RES/67,1949 (S/1234) in which the Netherlands was placed under international guardianship. This included the following:

- Release all prisoners.
- Transfer of sovereignty no later than 1 July 1950.
- Establishment of a strengthened Commission of Good Offices in the form of a United Nations Commission for Indonesia (UNCI) with such extensive powers, composition and decision-making system that the representatives of America and Australia in that UNCI could take the lead.

Thus, 28 January 1949 marked a decisive defeat for the Netherlands on the international political scene. The institution and role of the UNCI will be discussed in detail in Chapter 6.

*3.5.2 Development from the perspective of Indonesian federalists*
With the start of the second police action, including the capture of the Republic's key figures in December 1948, the Netherlands intended to place the Republic of Indonesia outside the federal state. But this also failed due to the actions of Indonesian federalists from the territories occupied by the Netherlands.

The Netherlands wanted to have the Federal Interim Government put together with federalists based on an arrangement designed with federalists under the name of Regime Indonesia in Transition Time. Just before the start of the second police action, the Netherlands put it into effect. Pro forma, some of the top figures of the Republic of Indonesia would be included, but not as representatives of the Republic, because it was thought that, due to the police action, it would no longer exist. However, when the Netherlands launched its attack on the Republic on 19 December 1948, several state governments resigned, as a result of which no Federal Interim Government could be established. This led to a deliberation of the Federal Consultation Meeting on 10 January 1949, in which it was decided that the Republic should be part and parcel of the talks on the establishment of the intended

Federal Interim Government. And thus, also of the further federalisation process.

So, on 13 January 1949, the Federal Consultation Meeting's decision established a new consultation framework on the future of Indonesia. With the Netherlands as the losing party. It had tried everything from May to December 1948 to keep the Republic out of the talks. It also held talks with the Republic without involving the federalists. Then it had to accept that representatives of the federalists and of the Republic – no one from the Netherlands - would sit down to discuss the Federal Interim Government to be established.

At the end of January 1949, this was the result of the second police action: externally placed under guardianship in the international political arena and internally placed out of order in the national arena.

## 3.6 The establishment of the Federation of the United States of Indonesia on 27 December 1949

*3.6.1 The roles reversed*
Until 1949, in varying degrees of cooperation with representatives of the Republic and of member-states in the area controlled by the Netherlands, the Netherlands sought to transfer sovereignty to a federal Indonesia with a federal state of the Republic of Indonesia (RI) without its own power apparatus. But at the end of December 1949 this transfer of sovereignty took place with the leaders of the Republic of Indonesia 1945 - Sukarno and Hatta - as President and Vice President and with the army of the Republic of 1945 as the apparatus of power. Both politically and militarily, the Netherlands had gambled wrong. Politically, because it had underestimated the increased influence of the United Nations on the subsequent federalization process. And with an attempt to eliminate the Republic of Indonesia by means of the second police action, the federalists were in fact motivated not to sever their ties with that Republic. Militarily misguided because the Republic's army, plus guerrilla troops, were increasingly difficult to fight.

*3.6.2 The Netherlands took a different course*
Maintaining its protest against the Security Council resolution of 28 January 1949, the Netherlands proposed at the end of February 1949 to transfer sovereignty within a few months and to invite the leaders of the Republic to a Round Table Conference (RTC) in The Hague to discuss the conditions for the transfer. At that time the Netherlands also released the prisoners, though without allowing them to travel to their place of residence in Jogja on Java. Soekarno and the others decided to ignore a visit to The Hague as long as they were not allowed to go to Jogja and as long as the new UNCI was not able to effectively exercise the extensive powers for this successor to the Commission of Good Offices, as laid down by the Security Council. The consultative body of federalists supported Soekarno's position. Under the leadership of the UNCI, negotiations were held for some time, leading to an agreement that allowed Sukarno c.s. to join the government in Jogja on the condition that they would make every effort to stop guerrilla activities. At the end of June 1949, the

Netherlands left Jogja. In July Sukarno c.s. returned. In August the Republic and the Netherlands declared an armistice. And on 23 August 1949 the first of the two Round Table Conferences began in The Hague. With the objective of transferring sovereignty before the end of the year.

*3.6.3. Negotiations in November and December 1949*
With the commitment and pressure of the UNCI, the parties agreed on several important issues. For example, on the name: 'Republic of the United States of Indonesia'. And a complete departure of the Dutch armed forces; the army of the federal republic would become the armed forces of the federation. Incidentally, the talks were beneficial for the higher goal that the Netherlands had in mind all these years: the conclusion of a Netherlands-Indonesian Union in order to maintain the ties between the two countries and thus the economic benefits for the Netherlands. At the end of the second RTC on 2 November 1949, the Republic and the federalists began preparing for the transfer of sovereignty, which was ratified with the necessary signatures in The Hague on 27 December 1949. At that time Indonesia became – 'de iure' - a sovereign federal state.

*3.6.4 Documents in the context of the transfer of sovereignty on 27 December 1949*
In November and December 1949, three parties (the government of the Netherlands, the government of the Republic of Indonesia and the Federal Consultation Meeting) discussed in The Hague many documents. The documents relating to the establishment of the Netherlands-Indonesian Union, so coveted by the Netherlands, will not be discussed here. We will concentrate on the documents relating to the constitutional aspects of the federation. It should be mentioned, however, that Indonesia unilaterally dissolved this Netherlands-Indonesian Union in 1956. Just as it had liquidated the federation of the United States of Indonesia in 1950; the signing of the transfer of sovereignty on 27 December 1949, plus the establishment of the Union, was only a pretext for acquiring one's own sovereignty and thus achieving the actual goal: a centralized unitary state.

<u>Charter of Understanding of 29 October 1949</u>
A special meeting took place on 29 October 1949 in Scheveningen (Netherlands). At that occasion only two of the three parties - a delegation of the Republic of Indonesia (RI) and a delegation of the Federal Consultation Meeting - decided to adopt a Charter of Understanding. Based on talks they had previously held in Indonesia in July and August 1949, they decided to agree to the text of the Transitional Constitution, called 'Constitution of the Republic of the United States of Indonesia'. They wrote in the Declaration preceding the text of the Constitution:

> "Furthermore, in evidence thereof, we, both Delegations, have signed this Charter of Understanding as God Almighty witnessing the pure mind and serious desire of the Indonesian People and Country to make the draft Constitution of the Republic of the United States of Indonesia a reality".

This was followed by the signatures of Mohammad Hatta on behalf of the Republic and fifteen signatures on behalf of the federal member-states and autonomous regions.

The special character of this is the fact that the draft of the federal Constitution had already been discussed in Indonesia's own circle in July and August and was adopted by the same two parties in Scheveningen on 29 October 1949, without input from the United Nations, America, Australia and the Netherlands. So, it was a home-grown product, even though the UN, America, Australia and the Netherlands had contributed content in previous phases.

Note: if the UNCI, America, Australia and the Netherlands had conscientiously studied the 197 articles of that federal Constitution, they would have seen that it contained articles that should never have been included in such a Constitution, and that other articles, which should have been included per se, were missing. If they had read the Constitution carefully, they should have raised alarm.

From the literature it cannot be deduced who drafted the Constitution. The Netherlands? The Republic of Indonesia? The Federal Consultation Meeting? America? We can only suppose that an original draft of the federal constitution was mainly made by the Netherlands and was adjusted and refined during various consultations in such a way that on October 29, 1949 in Scheveningen it was concluded by the Republic of Indonesia (RI) and the (also consisting of Indonesians) Federal Consultation Meeting.

Herman Burgers says about this:

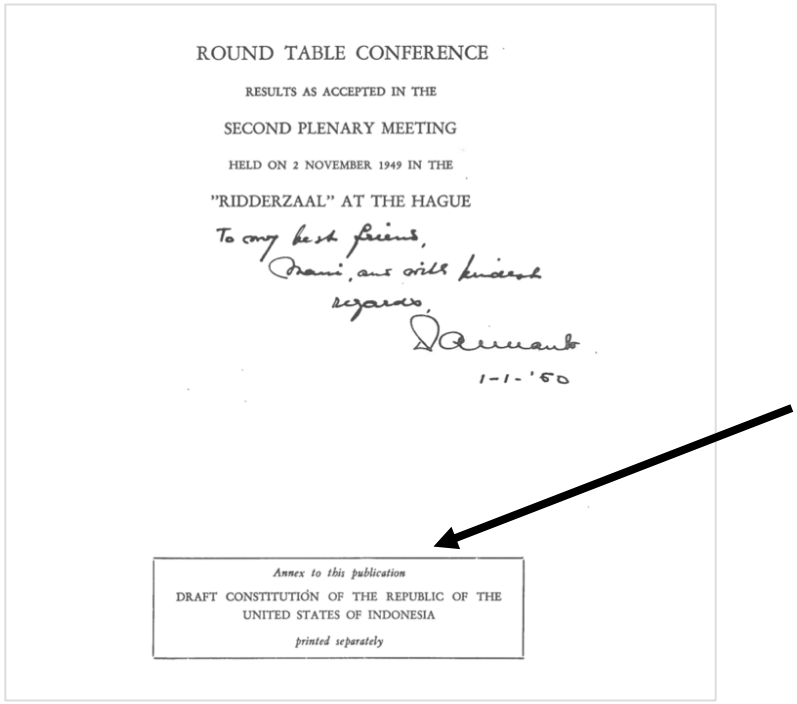
> "The delegations of the Republic and of the BFO [Federal Consultation Meeting] often acted together. This was the case for the provisional constitution of the RVI [Republic of the United States of Indonesia], among other things. The agreement of 22 June contained some provisions on this, but otherwise this was no longer a matter for negotiations with the Netherlands. During their stay in The Hague, the delegations of the Republic and the BFO jointly adopted the text of the Constitution and communicated it to the Netherlands and the UNCI on 31 October; this text was appended to the RTC agreements".[14]

Two things stand out:

1. The provisional federal Constitution is not tested by the Netherlands, nor by the UNCI for its constitutional quality. A serious mistake. A Constitution is the foundation of a state. An incorrect Constitution is the root cause of injustice.

[14] See 'The Garuda and the Stork. Indonesia from colony to state', Treatises by the Royal Institute for Language, Land and Ethnology, 266, KITLV Publishers Leiden, 2010, p. 654.

2. It is an Annex to the documents for the Round Table Conference of 2 November 1949. An Annex! How seriously can one be mistaken? Moreover, it appears that this Annex is published separately, making it virtually untraceable. Malicious intention? Sloppy? No respect, nor awareness for the fundamental value of a Constitution? See the bottom of this picture of the page in question.


ROUND TABLE CONFERENCE

RESULTS AS ACCEPTED IN THE

SECOND PLENARY MEETING

HELD ON 2 NOVEMBER 1949 IN THE

"RIDDERZAAL" AT THE HAGUE

To my best friend,
Hani, and with kindest
regards,
1-1-'50

*Annex to this publication*

DRAFT CONSTITUTIÓN OF THE REPUBLIC OF THE UNITED STATES OF INDONESIA

*printed separately*

This is one of the serious mistakes made in the context of the transfer of sovereignty: the Federal Constitution as the most important document for the life and quality of life of a people is not tested on its constitutional quality. It is mentioned as an appendix to documents (122 pages) that are far from being of the same importance, but it is not attached to those documents. Anyone who would like to study the Constitution awaits a long search. This is a form of culpable negligence. The cruel consequences of this will be explained in detail later in this report.

The Covering Resolution of 2 November 1949[15]

The three parties met again together on 2 November. They agreed on how a 'genuine, complete and unconditional' transfer of sovereignty to the Republic of the United States of Indonesia would take place, in accordance with the Renville principles. Noting that the United Nations Commission on Indonesia (UNCI) had provided valuable assistance in this regard, they adopted the following documents:

- A Charter of Sovereignty Transfers.
- A Union Statute.
- A Transitional Agreement.
- Many exchanges of letters between the parties.
- A Protocol.
- An Act of Transfer of Sovereignty.

[15] This document (122 pages) 'Round Table 2 November 1949' can be studied online in the Appendices to this report.

It was also decided that an official English text would be decisive in case the Dutch and Indonesian versions had different meanings. The ratification of the Covering Resolution was a ratification of all the documents contained therein. These would then enter into force immediately at the time of the transfer of sovereignty.

Note: for a proper understanding of this report, it is important to remember that the aforementioned Transitional Agreement of 2 November 1949 thus had legal force.

Finally, it was decided that the UNCI or any other United Nations body in Indonesia would monitor the implementation of the agreements reached at the Round Table Conference (RTC). More on this in Chapter 6. We will now discuss the Act of Sovereignty of the Covering Resolution.

Transfer of Sovereignty Act of 21 December 1949

In order to make the transfer of sovereignty from the Netherlands to Indonesia constitutionally correct, the Sovereignty Transfer Act was adopted in the Netherlands on 21 December 1949. The three articles of this law confirmed the will of the Netherlands to transfer 'real, complete and unconditional' sovereignty on the basis of the Covering resolution (with all its draft agreements and exchanges of letters), in accordance with the Renville principles. In addition, it was underlined that either the UNCI, or another body on behalf of the United Nations, should supervise the exercise of the right to self-determination under the Constitution.

It should be noted that the federal Constitution of late December 1949 was a Constitution in force but had provisional status. During a transitional period for the establishment of a definitive constitution, the various Indonesian peoples had the right to self-determination under Article 43. Under the supervision of the UNCI. With the special feature that the UNCI - in addition to that article 43 - was the designer of the Transitional Agreement in which the right to 'external self-determination' was laid down[16].

The Deed of Transfer of Sovereignty of the Covering Resolution

In accordance with the aforementioned law amending the Dutch Constitution, the transfer of sovereignty to the Federal State of the Republic of Indonesia took place by means of a simple Deed. The relevant part of the Deed reads:

> "Understanding
> that if then on this day, the seventh and twentieth December nineteen hundred and forty-nine:
> the transfer of sovereignty in accordance with the Transfer of Sovereignty Charter annexed to the abovementioned Resolution acquires legal force; (-)'.

[16] The ethnologist Prof. Dr. Gesina van der Molen describes it as follows: "The external right of self-determination in an active sense relates to the right of a people or a people's group to join a particular state or to declare independence. Here, therefore, the consent of the people is not requested for an act of third parties (transfer of territory), but the people or group acts independently. (-) In principle, this right is recognised almost universally." In: 'Enkele opmerkingen over het zelfbeschikkingsrecht der volken', ARS 1962, p. 75.

The text marked with (-) refers to the Dutch-Indonesian Union and other subjects that are not relevant in this context.

The federal Constitution

And so, on 27 December 1949, the federal Constitution came into force. From that moment on, independence 'de iure', with a Constitution of no less than 197 articles, paragraph 1 of which reads: "This Constitution shall enter into force at the time of the assumption of sovereignty". And that was the time of the Deed of December 27, 1949, just mentioned.

At that time, the federal state of the Republic of the United States of Indonesia consisted of seven states and nine independent political units. With the Moluccas as part of the state of East Indonesia (Negara Indonesia Timur). And with Sukarno as President and Hatta as Prime Minister of the federal government. The federal Constitution contained guarantees for self-determination of the peoples on the territory of the federal Republic. That is internal self-determination. In addition, the Transition Agreement guaranteed external self-determination. So, an independent status outside the federation. But from January 1950, a systematic dismantling of the federal state, in favour of the establishment of a unitary state, began, the original aim of Sukarno's proclamation of independence on 17 August 1945.

The right to external self-determination and the question whether that right also belongs to a nation within a state is dealt with in detail in Chapter 5.

See here pictures of the Round Table Conference of December 1949 and of the signing of the transfer of sovereignty to Indonesia on December 27, 1949 in The Hague.

## 4. IN AN EIGHT-MONTH FAST-TRACK TO REPRESSION

### 4.1 The reservations of the South Moluccas between 1946 and December 1949

From the moment the Netherlands sat down with leaders of the – 'de facto' - Republic of Indonesia, the Moluccas had adopted a cautious attitude. After the foundation of the Negara Indonesia Timur (NIT) on 24 December 1946 - the so-called Den Passar Agreement - a few months later, on 11 March 1947, they had provisionally and conditionally joined this state of East Indonesia. From that moment on they were therefore part and parcel of the process of adjusting the constitutional relations between the Netherlands and Indonesia. But their accession to the NIT took place with a reservation. The Moluccas reserved the right to leave the NIT if the government of the NIT did not take enough account of the interests of the South Moluccan people. Despite increasing fears of domination by the Republic of Indonesia, they remained within the NIT and thus became part of the Federal Republic of the United States of Indonesia at the transfer of sovereignty on December 27, 1949.

Incidentally, the reservation with the character of a resolutive condition had a legal basis. It was structured as follows.[17] On 20 August 1946 (i.e. just before the foundation of the NIT on 24 December 1946), the Netherlands had made the South Moluccas Unit Regulations. Article 12, paragraph 1 of that decree gave a South Moluccas Council (ZMR), elected by and from the people, the power to "express the wishes of the people in its area concerning further constitutional organisation, the submission of proposals in this respect, as well as the promotion of the interests of the South Moluccas in the broadest sense to all competent authorities". The second paragraph of Article 12 gave the ZMR the power to make a reservation regarding aspects of political organisation. And the ZMR exercised this right to make a reservation - through the College of Commissioners as its executive committee - when the Moluccas temporarily and conditionally joined the state of East Indonesia (Negara Indonesia Timur). With the right to leave that state if the government of the NIT would not take enough account of the interests of the South Moluccan people.

In addition to the statutory right of reservation granted to the ZMR, Article 5 of the Den Passar Agreement also applied, whereby the various peoples of the East Indonesia founded the NIT in December 1946. This stipulates that this member state of the federation was given the opportunity for self-determination to the various autonomous people's communities, including the South Moluccas. This issue, the right to self-determination by making use of the legally acquired power to make a reservation with regard to the political organisation, added to the legal basis of the Den Passar Convention for the establishment of the state NIT, will be discussed again later in this report when discussing

[17] Bung Penonton, The South Moluccan Republic, Buijten & Schipperheijn, Amsterdam 1977, p. 35.

the legality of the Moluccan declaration of independence on 25 April 1950.

### 4.2 The manipulation of powers to liquidate the Federal United States of Indonesia on 17 August 1950

Soon the fears of the South Moluccas were confirmed. After the transfer of sovereignty, it became clear that the cooperation of the Republic of Indonesia in the federal state structure had only been instrumental in advancing towards the actual goal, the establishment of the centralized unitary state of the Republic of Indonesia. They wanted to give this mid-Javanese state total power over all the peoples of Indonesia.

The federal government consisted not only of federalists, but also of unitarists who had never made a secret of the fact that they aspired to the formation of a unitary state. On 15 January 1950, just two weeks after the federation came into force, Soekarno already announced his intention to dissolve the federation and to establish the centralized unitary state of the Republic of Indonesia. On March 7, 1950, he issued an Emergency Law in which he authorised himself to place some important member states under the rule of the Central Javanese state called Republic of Indonesia. With the help of those unitarists and his own army, President Sukarno began the liquidation of the federation by dissolving autonomous units in May 1950 and definitively dissolving the federated states on 17 August 1950, including the Negara Indonesia Timur, i.e. East Indonesia of which the South Moluccas were part.

Although it is only in Chapter 5 that we show which articles of the federal Constitution were abused to such an extent that Sukarno was able to dissolve federal structures and procedures that had already been developed, it is important to declare the unlawful use of this Emergency Law now. That is as follows. The power to enact an Emergency Law can be found in Article 139 of the Federal Constitution. The first paragraph reads:

> "The Government on its own authority and responsibility has the right to enact emergency laws for the regulation of such matters of federal governing power which demand immediate provisions on account of urgent circumstances."

Let's focus on the words 'matters of federal governing power'. What's that? Well, the Appendix[18] to the Federal Constitution lists an exhaustive list[19] of subjects that fall exclusively within the competence of the federal body of the federation. Those are the 'matters of federal governing power'. They fall under the authority of the federal body. And therefore, not under the powers of federated states. There's nothing wrong with that. In fact, later in

[18] In the Appendices that can be consulted online, see the text of the Federal Constitution, at the very end where the Appendix is included.

[19] Strict vertical separation of powers between federated states on the one hand and a federal body on the other is the essential reason for states to enter federal state formation. The powers of the federal body are defined exhaustively. All other powers remain with the citizens and the federal member-states. For this reason, the concept of 'subsidiarity' coincides with the concept of 'federation'. A federal body has no competence on a subject that is not set out in the exhaustive list.

Chapter 9 we explain that it is an elementary aspect of federal state organisation that states remain sovereign in their own house but entrust a handful of interests that they themselves cannot take care of to a federal body. And so, in this context, they are included in that Appendix of exclusive 'matters of federal concern'.

However, that Appendix says nothing about dissolution of federal structures and procedures. None of the matters in that Appendix relates to federal structures and procedures. With the use of the Emergency Law to place some important states already under his Republic of Indonesia, Sukarno made use of a power that he did not have. The subject (i.e.: being able to intervene in the already existing constitutional structure) is not included in the fixed list of 'Subjects of Governmental Care the Exercise of which has been entrusted to the Republic of the United States of Indonesia pursuant to Article 51 of the Constitution'. And therefore does not fall within the scope of an Emergency Law under Article 139. Sukarno should therefore not have invoked Article 139 for the promulgation of the Emergency Law mentioned above. But he could do so with impunity because he was placed above the law by virtue of Article 118: 'The President is inviolable'. Judicial review - an indispensable aspect of checks and balances, was excluded under Section 130: 'Federal laws are inviolable. This means that federal laws such as the unlawfully enacted Emergency Law could not be subject to constitutional review. We will return to the shortcomings of the federal Constitution in detail in Chapters 5 and 7. The article from the Leidsch Dagblad of 8 March 1950, published herein, demonstrates that attention was also paid to this subject in the Netherlands.

Before the final dissolution of the federation on 17 August 1950, the East-Indonesian state had made it clear that it had no intention of resigning itself to the power-driven actions of Sukarno et al. For this reason, Sukarno - with the aid of the Emergency Law of 7 March 1950 - intervened with military force at an early stage. On 5 April 1950, troops - albeit under a federal flag - landed in the capital Makassar of this state in order to take over power, but this was thwarted for the time being. Soldiers of the former Royal Dutch Indonesian Army (KNIL), supported by the police, resisted and prevented that military operation.

**Soekarno tekent Noodwet wijziging staatkundige structuur**

**PROCEDURE-REGELINGEN VOOR AANSLUITING GEREED.**

**President Soekarno heeft heden de noodwet tot wijziging van de staatkundige structuur van het grondgebied der R.I.S. ondertekend.**

**De Indonesische minister van Binnenlandse Zaken, Anak Agoeng, verklaarde, dat binnen enkele dagen bij presidentieel besluit in overeenstemming met de noodwet kan worden overgegaan tot definitieve vaststelling van de status van Pasoendan — (men zie de beschouwing hierover elders, Red. L.D.) — overeenkomstig de uitspraak van een college dat thans te Bandoeng bijeen is en dat men de „locale constituante" zou kunnen noemen.**

De minister zette uiteen, dat de zittingsperiode van het oude parlement van Pasoendan reeds verstreken was, doch dat deze werd verlengd. Daar thans te Bandoeng moet worden beslist over de status van de Negara en tot voldoening aan de procedure van de noodwet, volgens welke een vertegenwoordigend college moet beslissen over de status van een deelstaat, heeft de Commissaris der RIS voor Pasoendan, Sewaka, in overleg met de regering der RIS besloten een speciaal daartoe aan te wijzen College bijeen te roepen. De aanwijzing waarmede Zondag begonnen werd, geschiedde in grote lijnen overeenkomstig de richtlijnen, die golden voor de samenstelling van het oude parlement, waarbij autonome rechtsgemeenschappen vertegenwoordigers aanwezen. Vanavond of morgen verwacht de minister de uitspraak van dit college.

**Voorts verklaarde de minister, dat de procedure-regelingen voor de aansluiting van Padang, Sabang, Midden-Java en Madoera bij de Republik Indonesia (Djokja) gereed gekomen zijn. De besluiten tot toevoeging van deze gebieden aan de Republik Indonesia zijn reeds voor ondertekening naar president Soekarno.**

Subsequently, Dr. Chris Soumokil - minister and vice-president in the NIT government until March - proposed to step out of the alleged federation and declare NIT's own independence as the state of East Indonesia. The state government did not dare to do so and bowed its head to Jakarta's threat that 'rebels' would be dealt with with great military force.

Meanwhile, in April the federal government was already in the process of disbanding the independent administrative units, after which talks began on 19 May 1950 which were intended to lead to the federal member states joining the intended unitary state. And on 17 August 1950 (i.e. exactly five years after the proclamation of independence on 17 August 1945) President Sukarno announced that the federation of the Republic of the United States of Indonesia no longer existed and had been transformed into the centralized unitary state Republic of Indonesia.

### 4.3 The constitutional vacuum which led to the proclamation of Independence by the South Moluccas on 25 April 1950

When on 5 April 1950 government troops landed in Makassar to forcibly bring the state of East Indonesia under the regime of the Republic of Indonesia and Chris Soumokil was not heard by the President of the state of NIT to declare independence, the Moluccas understood that they would be a losing party if they were drawn into the unitary state as part of the state of NIT. This was quickly followed by several far-reaching events.

On 18 April 1950 thousands of Moluccans gathered at Ambon to - in support of Soumokil - ask the leadership of the state NIT to declare its own independence. Because that state government did not dare to do so, in the night of 24 to 25 April 1950 a 'lightning congress' convened that decided to separate the Moluccas' own territory from the state of East Indonesia (Negara Indonesia Timur) and from the supposed federation of the United States of Indonesia.

The proclamation of the free and sovereign Republic of the South Moluccas (Republik Maluku Selatan, RMS) reads as follows[20]:

> "In satisfaction of the 'true will, demand, and insistence of the People of the South Moluccas, we hereby proclaim the de facto and de iure independence of the South Moluccas with the political form of a republic, independent of any political affiliation with the State of the East Indonesia and the Republic of the United States of Indonesia, on the grounds that the State of the East Indonesia is unable to maintain itself as a state in accordance with the arrangements of the Den Pasar Conference[21], which are still legally in force, as well as in accordance with the decision of the South Moluccan Council of 11 March 1947, while furthermore the Government of the United States of Indonesia has acted in violation of the R.T.C.-agreements and its own constitution.
>
> The Government of the South Moluccas
> w.g. J.H. Manuhutu and A. Wairisal
> Ambon, April 25, 1950"

Immediately after this declaration of independence, the following steps were taken: the appointment of Manuhutu as President of the Republic of Maluku Selatan (RMS); the composition of the government with members of the South Moluccan Council and representatives of various population groups and parties; the

[20] Bung Penonton, ibid. p. III.

[21] On the Den Passar Conference, the state of East Indonesia (Negara Indonesia Timur, NIT) was established.

unveiling of a national flag; the formation of its own army; the organisation of external relations; the adoption on 16 October 1950 of a Provisional Constitution; and the sending of a delegation to the United Nations to deal with the UNCI report on the South Moluccan issue in the Security Council.

Another salient detail: the Moluccan declaration of independence hardly made it to the United Nations because the three-year Korean war began in July 1950.

### 4.4 Aspects of the Moluccan struggle for freedom from 1950 onwards

Thus, began in April 1950 the struggle for freedom[22] of the South Moluccas. It lasted until 1966. However, the desire to be a free, sovereign state remained. After 1966 mainly as a resistance that no longer had the form of a guerrilla struggle. Very succinctly now follows a list of crucial moments in that struggle for freedom:

- After the declaration of independence on 25 April 1950 and attempts to stop the battles through mediation, on 9 May 1950 the Minister of Defence of the federal republic was given the task of solving the matter with military commitment. Including an almost complete blockade of the RMS.

- Various attacks took place, even using Dutch planes and ships. On 28 September 1950 the Moluccan capital Ambon was attacked. On November 15, 1950, the city was entirely in the hands of the army of the Republic of Indonesia.

- Erik Hazelhoff Roelfzema - in the Netherlands known as The Soldier of Orange - authorized by the RMS to provide diplomatic services, flew in December 1950 with a small plane loaded with weapons and ammunition to the RMS to support the struggle for freedom.

- In the end, the army of the Republic of Indonesia succeeding in gaining power on Ambon, the fight continued in the form of guerrilla warfare in the mountains of Ambon and on other islands such as Ceram, Haruku, Saparua and Nusalaut. Civilians who supported the RMS and officials who worked for the RMS were imprisoned in concentration camps.

- South Moluccans living on Java joined forces and advocated in November 1950, at both the authority of the Republic and the UN Commission - the UNCI – to recognise the legitimate aspirations of the South Moluccan people. Their demonstrations were suppressed.

- The guerrilla war was led by the aforementioned Dr. Chris Soumokil. He was captured on the island of Ceram on 2 December 1963, sentenced to death by a military court in April 1964 and (crucified) executed by firing squad on 12 April 1966.

[22] For the course of that guerrilla war, see Bung Penonton, ibid., passim.

- This marked the end of the guerrilla war. However, the resistance - mainly passive - continued to exist, partly fueled by excesses committed by Indonesian soldiers against the Moluccan people.

- In the meantime, a large part of the Moluccan soldiers in Dutch military service had been transferred to the Netherlands. Poorly treated and left to fate by the Dutch authorities[23], resistance to the Dutch authority increased in their circles. This resulted in several violent actions to draw attention to their fate in the Netherlands, and that of their families and relationships in the Moluccas. This statue was erected for them in the Moluccan town of Vaassen around the year 2000. A small but fine attempt to do justice to the sacrifices of these Moluccan soldiers.

[23] The way in which the Dutch government left the Moluccans in the Netherlands to their fate gave rise to several violent actions on the part of Moluccans in the 1970s, including a raid on the residence of the ambassador of Indonesia, train hijackings and a school hostage. This subject, and the role played by the government in it, is not considered further in this report.

## 5. ABUSE OF RIGHTS WON FROM LEGALITY

This chapter discusses the issue of abuse of rights by the leaders of the federation versus the legality of the proclamation of Moluccan independence on 25 April 1950.

### 5.1 The status of the federal Constitution as a provisional Constitution

As far as the status is concerned, a complexity immediately arose. It was a Constitution, but with a provisional status. In other words, although it did have full effect as a Constitution, territories within the federal member states were given the opportunity to decide to join the federation (internal self-determination) or to remain outside it (external self-determination) and to enter into their own relationship with the federation, or with the Netherlands. The process accompanying that decision making would then be led by a so-called Constituante, a Constituent Assembly.

In the aforementioned 'Charter of Agreement' of 29 October 1949 in Scheveningen, in which the delegations of the Republic of Indonesia and those of the Federal Consultation Meeting - without a Dutch delegation - adopted the draft Constitution, that provisional constitution was written in the Declaration as the 'Transitional Constitution, called Constitution of the Republic of the United States of Indonesia'.

In short, the federal Constitution was a working Constitution, with a provisional character that had to realize the transition to a definitive Constitution because there were still things to be arranged within the member-states, under the leadership of that Constituent Assembly.

### 5.2 The erroneous articles of the Federal Constitution

Some of the 197 articles[24] of the Federal Constitution require literal mention here. These are wrong articles that in their combination could be used to liquidate the federation. They should not have been included in the Constitution. Worse still is the absence of articles that should have been included in the Constitution as constitutional defence mechanisms against abuse of rights. The purpose of this paragraph is to show the reader which articles of constitutional law, meant for federalization, were in fact used in order to acquire absolute power in a centralized unitary state. In section 5.3 we penetrate to the core of the abuse of articles of the federal Constitution. In Chapter 7 we elaborate further on this abuse of rights.

We realize that this observation of 'abuse of rights' anticipates our summary assessment of the quality of the behaviour of the then leaders of the Republic of Indonesia. But without a clear indication of these erroneous articles one cannot properly understand - when reading Chapter 7 later - how those articles in their context were ultimately abused to dismantle the federation.

[24] In the Appendices that can be studied online, the Dutch text of the federal constitution of 27 December 1949 is included.

Before dealing with the individual wrong articles we have a preliminary remark: the text of the federal Constitution was the result of consultations between only two parties: a delegation from the Republic of Indonesia and a delegation from the Federal Consultation Meeting in Scheveningen on 29 October 1949. There was no representation from the Netherlands.

*5.2.1 The Constitution analysed in detail*

The following articles need to be studied in order to understand the legal means offered to the leaders of the Republic of Indonesia to dismantle the federation, exchanging the federal state for a unitary state.

Note: please read every detail, knowing that it was no secret that Soekarno cooperated with the drafting of this federal Constitution for one reason only: to become head of state of a legally recognized sovereign state. His objective was to begin liquidating the federal character of that state immediately after the transfer of sovereignty on 27 December 1949 in favour of the creation of a unitary state. This makes this federal Constitution a shameless display of an accumulation of erroneous and misleading articles.

| Article 1, section 1 | Side note |
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| The independent and sovereign Republic of the United States of Indonesia is a democratic state of federal structure, governed by justice. | The federal democratic character of the constitution is immediately visible in the first sentence. So, there should be no doubt about that. But as will become clear, articles will follow with which that federal democracy could be destroyed. |

| Article 2 | Side note |
|---|---|
| The Republic of the United States of Indonesia comprises the whole territory of Indonesia, i.e. the territories of:<br>*a.* *the Negara Republic Indonesia*, being the territory in accordance with the status quo as defined in the Renville-Agreement of 17 January 1948;<br>*the Negara Indonesia Timur;*<br>*the Negaras ….. (-)*[25];<br>*b.* *the autonomous constitutional units (-);*<br>*a and b.* which participant territories unite in the federal relationship of the Republic of the United States of Indonesia in free self-determination and on the basis of the provisions of this Constitution and also:<br>*c.* the other territories of Indonesia not being participant territories. | The Moluccas were an autonomous people - an independent self-governing Daerah - within the Negara Indonesia Timur (NIT).<br><br>See under a and b the words 'free self-determination' for sub-territories. Linking this 'free self-determination' to a and b implicitly indicates that it would also apply to autonomous self-governing territory such as those of the Moluccas. This is supported by Article 43.<br><br>Incidentally, this 'free self-determination' is not only guaranteed in this Article 2 but was previously laid down by law in Article 2 of the so-called Transitional Agreement of 2 November 1949. This article is of eminent importance and will be discussed several times in this report. |

[25] By (-) we mean that the following text is irrelevant in this context.

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| | Point c is essential in the light of the Republic of Indonesia's ultimately revealed goal: every square meter, with whatever status, was to come under the authority of the Republic. |

| Artikelen 7 - 33 | Kanttekening |
|---|---|
| Section V: Fundamental Human Rights and Freedoms.<br>(-). | Because President Sukarno began dismantling the federation immediately after the transfer of sovereignty on 27 December 1949, no one, not even the Moluccan people, could invoke those rights and freedoms of Section V of the Constitution. And that continues to this day. |

| Article 34 | Side note |
|---|---|
| The will of the people is the basis of public authority; this will is expressed in periodic and genuine elections which are held by universal and equal suffrage and by secret vote or by equivalent free voting procedure. | The 'will of the people' here is a variant of the concept of free self-determination. Read articles 34, 42 and 43 in each other's context.<br><br>Those 'periodic fair elections' were never held. Soon after 27 December 1949, Soekarno began to dismantle the federation, using an emergency law for which he was not competent (see Article 139) and using military power that |
| | overruled the authority of the civil authorities. |

| Article 42 | Side note |
|---|---|
| Pending the completion of the structure of the Republic of the United States of Indonesia as a federation of participant states with equal status and rights, the participant territories referred to in article 2 have mutual and equal rights. | The Constitution - although fully effective - was provisional in nature as a transitional Constitution until the final federal state formation was completed.<br><br>Furthermore, it is stated that the Republic of Indonesia, proclaimed by Sukarno et al. on 17 August 1945, has the same powers as other federated states. This implies, among other things, that that state may not have its own army, because in a federation having a military force is a matter for the federal government, not for the member states of the federation.<br><br>Nevertheless - as appears in the period from 27 December 1949 to 17 August 1950 - the intended state of the Republic of Indonesia does not relinquish its own army and will instead use - even with the help of Dutch military planes and boats - the federal structures and procedures already created |

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| | to pave the way for the proclamation of the unitary state. |

| Article 43 | Side note |
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| The fundamental principle for the completion of the federal structure of the Republic of the United States of Indonesia shall be that the through democratic means in freedom expressed desires of the population of the territories concerned shall be conclusive for the ultimate status of these territories in the Federation. | See in articles 34, 42 and 43 the words: 'the will of the people', 'periodic fair elections', 'leading principle', 'wishes expressed freely', 'decisive', 'ultimate status to be adopted in the federation'.<br><br>They suggest that it is constitutionally guaranteed that the size and structure of the federal state is determined by the basis of society, the wishes of the various peoples. And that peoples themselves may determine the status of their political position. In the end, it turns out that none of this happened in the period between 27 December 1949 (the transfer of sovereignty) and the establishment of the unitary state on 17 August 1950. None of the federated states, nor the independent autonomous territories including that of the Moluccas were asked for their will or desire, nor were any constitutionally prescribed plebiscites or elections held. |

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| | In fact, other articles give the Government the power to eliminate federal structures and procedures already created during that eight-month period, after which, on 17 August 1950, a federal law (see Article 190) exchanged the federal establishment for a unitary state.<br><br>Article 43 strengthens the 'free self-determination' referred to in Article 2 (a) and (b). As mentioned, a number of times in this report the basis for this was laid down in Article 2 of the Transitional Agreement of 2 November 1949. More specifically, Article 2 stipulates the right to external self-determination of a state, while other articles also grant this right to peoples within a state. This means that a people may choose its own political position outside the federation.<br><br>However, these rights under Article 43 of the Constitution and Article 2 of the Transition Agreement were not recognised or granted during the period from |

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| | 27 December 1949 to August 1950. Any attempt by peoples from autonomous territories to exercise constitutional rights was thwarted under the threat of military force. |

| Article 44 | Side note |
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| Alteration of the territory of any participant territory and the acceding to or association with an existing participant territory by any other territory – whether or not being a participant territory – can only be effectuated in accordance with regulations to be established by federal law, in compliance with the principle set forth in article 43. The above mentioned accession or association of territories requires the approval of the participant territory concerned. | Here is a crucial aspect in the light of the question whether the Moluccas, by declaring independence on their own authority (i.e. not based on a federal law), could have removed themselves from the NIT sub-territory, thereby altering the territory of that sub-area.<br><br>The Moluccas had provisionally and conditionally joined this federal state of East Indonesia on 11 March 1947, subject to the right to resign if the NIT government did not take enough account of the interests of the South Moluccan people.<br><br>The NIT was already threatened with dissolution by the Republic of Indonesia in the first months of 1950. The Moluccas therefore asked the NIT government to |

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| | declare its own independence before the Republic liquidated this member state. When the government of the NIT rejected this request to declare its own independence as a state, the Moluccas considered themselves insufficiently protected by the government of that member state and decided to activate the provisional accession, formulated as a resolutive condition, and withdrew from the member state. In doing so, they were empowered by the essence of Articles 34, 42 and 43. In the proclamation of independence, quoted in full earlier in this report, the invocation of the resolutive condition refers to this phrase in the proclamation: "... on the grounds that the Land of East Indonesia is unable to maintain itself as a State ...".<br><br>But the Moluccas were also authorised to do so by the fact that the reservation (is resolutive condition) had a legal basis. See paragraph 4.1. |

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| | By way of an aside, we refer to the words 'federal law'. Article 130, paragraph 2 (see later) makes federal laws inviolable. They are therefore not verifiable against the Constitution. And so, any federal law that would regulate anything about the Moluccas was inviolable. As a result of which that people could effortlessly be placed in a state of powerlessness. |

| Article 50 | Side note |
|---|---|
| 1. The government over regions outside the territory of any participant territory and also over the federal district of Djakarta is exercised by the organs of the Republic of the United States of Indonesia in accordance with regulations to be established by federal law.<br>2. (-) | This article made it possible to bring a people such as that of the Moluccas under the rule of the federation after possible resignation from a federal member state and thus later under the authority of the intended unitary state.<br>Mind you, a federal law was inviolable. |

| Article 51 | Side note |
|---|---|
| 1. The governing powers concerning the subjects enumerated in the appendix to this Constitution are exclusively entrusted to the United States of Indonesia.<br>2. (-). | This first paragraph of Article 51 is of particular importance in the context of what we discussed in paragraph 4.2: Soekarno appropriated the power to enact an Emergency Law to eliminate federal structures and |
| 3. (-).<br>4. (-). | procedures. However, this is not an issue included in the list of powers exclusive to the federal authority. We will come back to that later. |

| Article 64 | Side note |
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| The existing self-governing territories are recognised. | This article confirms and acknowledges the already existing independent, self-governing status of the Moluccas. |

| Article 65 | Side note |
|---|---|
| Regulating the position of self-governing territories is the task and competency of the participant territories concerned, with the proviso that the regulations shall be established by contract, between the participant territory and the Self-governments concerned, and that thereby the special status of the Self-governments shall be taken into account and that none of the existing self-governing bodies can be abolished or reduced unless for the general benefit and after authorisation to this effect is given to the Government of the participant territory concerned by a federal law declaring that the general | Before the proclamation of their own independence on 25 April 1950, the Moluccas had the status of an internal self-governing territory within the federal member-state of Negara Indonesia Timur. After that proclamation, in accordance with the literature on self-government, the Moluccas had the status of external self-government of a people who, in self-proclaimed independence, sought to form their own state.<br><br>Even if the Moluccas had relied on internal self-government as part of the federal state of NIT, the government of the federation was allowed, with the combination of |

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| interest requires this abolition or reduction. | articles 50, 65 and 130(2) (inviolability federal laws), even to abolish that internal self-government in the context of 'the general interest'. Which happened when the unitary state was established in August 1950. This cut off any possibility for peoples wishing to make use of the constitutionally guaranteed right to external self-determination. |

| Article 111 | Side note |
|---|---|
| 1. Within a year after the Constitution becomes valid, the Government shall arrange to hold free and secret elections all over Indonesia for the composition of a generally elected House of Representatives.<br>2. (-) | There were no elections. President Sukarno was going to rule on the basis of emergency laws. The first of these dates from March 7, 1950 and should have been submitted to the House of Representatives for approval/rejection under Article 140 of the Constitution. But that House did not exist. |

| Article 118 | Side note |
|---|---|
| 1. The President is inviolable.<br>2. (-). | This article puts the President above the law and is the epitome of all the wrong articles in this federal constitution.<br>As authorized by paragraph 2 of Section 130 ('Federal laws are inviolable'), the judiciary does not have the authority to annul an erroneous federal law such as the Emergency Law (see Section 4.2).<br><br>Why the Americans, involved in the text of this federal Constitution, did not sound the alarm is a big question. It was precisely in order to prevent the inviolability of the President that the Philadelphia Convention (1787) formulated the now famous impeachment article. |

| Article 130 | Side note |
|---|---|
| 1. (-).<br>2. The federal laws are inviolable. | In conjunction with Article 118, the President as Head of State, who is also the Head of Government, is inviolable. Thus, above the law. The fact that federal laws are inviolable means that they cannot be tested against the Constitution and thus the absence of a judicial blockade against dictatorship. |

| Article 139 | Side note |
|---|---|
| 1. The Government on its own authority and responsibility has the right to enact emergency laws for the regulation of such | An Emergency Law may only be enacted in relation to the subjects listed exhaustively in the Appendix to the |

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| matters of federal governing power which demand immediate provisions on account of urgent circumstances.<br>2. Emergency law has the force and the authority of federal law, subject to the provisions of the following article. | Constitution. As already mentioned, several times: President Sukarno used the Emergency Law of March 7, 1950 to dismantle federal structures and procedures although that subject is not included in the exhaustive list. See further under Article 140. |

| Article 140 | Side note |
|---|---|
| 1. Immediately after their enactment the regulations contained in the emergency laws are presented to the House of Representatives which deals with these laws in the manner prescribed for the treatment of bills of the Government.<br>2. If a regulation as referred to in the preceding paragraph is rejected in the House of Representatives after having been dealt with in accordance with the provisions of this section, the regulation lapses ipso iure.<br>3. (-).<br>4. (-). | Articles 139 and 140 - partly in combination with the inviolability of the President and federal laws - make it clear that the Moluccas, after their proclamation of independence on 25 April 1950, could not legally oppose this combination of powers based on emergency laws. They found themselves in a constitutional vacuum, powerless to oppose this injustice with the help of the articles of the Constitution and therefore only in a position - legitimately - to proclaim their own independence on 25 April 1950.<br><br>Paragraph 6.3 of Chapter 6 explains how the elimination of |
| | the already existing federal structures and procedures began with the deployment of the Emergency Law of March 7th, 1950. |

| Article 184 | Side note |
|---|---|
| 1. In the manner and in the instances to be defined by federal law, the Government can declare the territory of the Republic of the United States of Indonesia or parts thereof in a state of war or in a state of siege insofar and as long as the Government considers this state necessary for the safeguarding of external and internal security.<br>2. The federal law regulates the consequences of such a declaration and can equally stipulate that the constitutional powers of the civil authorities on public order and the police shall wholly or partly be transferred to other organs of civil authority or the military authorities and that the civil authorities become subordinate to the military authorities. | It is highly unusual and in the United States of America even forbidden to use the federal army to fight internal disturbances, let alone to declare war on (part of) one's own people. In exceptional cases the army can be used to support the police.<br><br>In America they use the National Guard, reservists, having a normal job, who, when deployed, are controlled by both the authority of the state concerned and the federal authority. Why the Americans involved in the text of this federal constitution did not raise the alarm is a big question. |

| Article 185 | Side note |
|---|---|
| 1. The participant territories shall not have their own armed forces.<br>2. At the request of the government c.q. authority of a participant territory, the Government of the Republic of the United States of Indonesia can render military assistance to the participant territory for the safeguarding of public law and order and security.<br>The federal law shall establish regulations for this purpose. | See the comments on Article 42. |

| Article 186 | Side note |
|---|---|
| The Constituent Assembly together with the Government shall enact as soon as possible the Constitution of the Republic of the United States of Indonesia, which shall replace the provisional Constitution. | The words 'as soon as possible' turn out to be highly misleading: no Constituent Assembly has been set up to adopt a draft of the final federal constitution. Instead, the dissolution of the federation began immediately after the transfer of sovereignty. It was not until 1955, five years after the establishment of the unitary state, that a Constituent was set up to examine the Constitution of the unitary state, established in August 1950. |

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| | The meaning of this article must also be understood in the context of articles 187 and 189.<br><br>The question of who part of the Constituent is is answered in Article 188 (2): "The united assembly of the Constituent Assembly and the Senate, both in double numbers, shall be the Constituent." |

| Article 187 | Side note |
|---|---|
| 1. The draft Constitution shall be drawn up by the Government and presented by Presidential message to the Constituent Assembly for consideration as soon as the Assembly convenes.<br>2. The Government shall provide that the draft Constitution be based on a composition of the Republic of the United States of Indonesia as such negaras as conform to the will of the people, as this will shall be democratically expressed on the basis of the provisions in articles 43-46 inclusive. | Paragraph 2 confirms that, in accordance with Article 43, the will of the people will determine the final composition of the structure of the federal state. But other articles gave Sukarno the powers to dismantle that structure.<br><br>The plebiscites referred to in paragraph 3 were never carried out. The people of the South Moluccas were not given the opportunity to express themselves by means of a plebiscite organised by the federal government in the sense of self-determination based on |

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| 3. The federal law shall make such provisions in respect of the execution of the provisions of the articles referred to in the preceding paragraph in order that the required expression of the will of the people may be obtained within one year after this Constitution becomes valid. | this Constitution and Article 2 of the Transitional Agreement of 2 November 1949.<br><br>All in all, an illegally created situation of a - for the Moluccas - constitutional vacuum. |

| Article 189 | Side note |
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| 1. The Constituent Assembly cannot hold discussions or take a decision on the draft of the new Constitution unless at least two-thirds of the members in session are present at the meeting.<br>2. The Constituent Assembly has the right to make alterations in the draft. The new Constitution becomes valid when the draft has been passed by at least a two-third majority of the votes of the members present and has subsequently been ratified by the Government.<br>3. The draft of the Constitution, when passed by the Constituent Assembly, shall be presented by the Assembly to the President for ratification by the Government.<br>The Government is bound to ratify the draft immediately.<br>The Government solemnly proclaims the Constitution.<br>4. Each participant state shall be given the opportunity to accept the Constitution. In case a participant state does not accept the Constitution that state shall have the right to negotiate concerning a special relationship towards the Republic of the United States of Indonesia and the Kingdom of the Netherlands. | Article 186 confirms that a Constituent (Constituent Assembly) will be set to work to draw up a draft final Constitution. But it does not make that draft independent of the ruling powers.<br><br>Article 187 makes it clear that it is not the Constituent but the Government that draws up the draft of the final constitution and then presents it to the Constituent.<br><br>Paragraph 4 of Article 189 affirms the right to self-determination, in the sense that states may decide to remain outside the Indonesian state context. That right was not recognised in practice and was eliminated by the dismantling of already existing federal structures and procedures. |

| Article 190 | Side note |
|---|---|
| 1. Without prejudice to the provisions in article 51, second paragraph, changes in this Constitution or deviations from its provisions can only be made by virtue of a federal law. Any bill on this subject can only be discussed or decided upon in either the House of Representatives or the Senate at meetings | Paragraph 1 of Article 190 is the blow with which the door to a final federation was closed and the door to the establishment of the unitary state was opened. The inviolable federal law of this Article eliminated all federal structures and procedures in the period from 27 December 1949 to 17 August 1950, to finally use it in the preamble to the 1950 |

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| attended by at least two-thirds of the respective members in session.<br>2. (-).<br>3. (-). | Constitution to establish the unitary state. Furthermore, we reiterate that, due to the absence of elections, there was no House of Representatives to assess such draft federal laws. |

| Article 197 | Side note |
|---|---|
| 1. This Constitution becomes valid at the moment the sovereignty is taken over. The text of this Constitution shall be solemnly proclaimed that day in a manner to be determined by the Government.<br>2. If and insofar as steps have been taken for the formation of organs of the Republic of the United States of Indonesia and for the preparation required to take over the sovereignty before the moment referred to in paragraph one and on the basis of the provisions of this Constitution, these provisions shall be retroactive from the day on which these steps have been taken. | As regards paragraph 1, the transfer thus took place on 27 December 1949.<br><br>Due to the absence of an Explanatory Memorandum, the purpose of paragraph 2 is not clear. We interpret it as follows:<br>- Before the transfer of sovereignty on 27 December 1949, measures were already taking place which in one way or another fitted in with the legal system which the federal Constitution was to provide.<br>- A dominant aspect of that Constitution was the guarantee to peoples to determine their own status. This guarantee was partly based on the Renville-principles and the Linggadjati Agreement.<br>- When the Moluccas provisionally joined the state of |

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| | the East Indonesia in 1947, they retained (and were allowed to retain, see paragraph 4.1) the right to leave if the member state did not take sufficient account of the interests of the Moluccas.<br>- When, after the transfer of sovereignty in the first months of 1950, it became apparent that Sukarno was starting to abolish states and the government of the state of the East Indonesia did not comply with the Moluccas' request to arm themselves against this by proclaiming the state's own independence in accordance with the provisions of the constitution, the Moluccas allowed the resolutive condition to take effect and withdrew from the member state.<br>- Since the reservation made was a valid legal reservation, we interpret paragraph 2 of Article 197 as meaning that the reservation made by the Moluccas prior to 27 December 1949 was confirmed by that paragraph 2 of Article 197 because of the retroactive effect of paragraph 2. As a result of which it must be concluded that |

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| | the declaration of independence of 25 April 1950 was - also - in accordance with the Federal Constitution a valid constitutional step. |

*5.2.2 The result of the analysis: this is a fundamentally flawed constitution*

In the table, we analysed only a limited number of articles from the federal Constitution. There are more that point to deception and abuse. But we limit ourselves to this series. What does that teach us? The shortest possible summary is as follows:

- For Sukarno's pursuit of a centralized unitary state - announced at the proclamation of independence in August 1945 - the intermediate step of creating a federal state was a welcome gift.
- He left it to the Netherlands to propose the idea of a federal state in 1946, and when it was apparently well received, he had various parties, led by organs of the United Nations, do all the work needed to establish the federation.
- Thus, he became Head of State as well as Head of Government of a federation with a federal Constitution that gave him absolute, totalitarian power.
- He was inviolable. His federal laws were inviolable. Thus, he was above the law, impossible to call him legally to account.
- He was able to liquidate the federal structures and procedures immediately after the transfer of sovereignty on 27 December 1949, with a federal Emergency Law, without there being a House of Representatives to which he should have submitted this Emergency Law. Furthermore, the Emergency Law was illegal because it dealt with a subject to which the Emergency Law did not apply.
- He could and did ignore all constitutional obligations to consult the people - both by means of elections and by organizing plebiscites.
- He could and did defeat any resistance by military force because the Constitution gave him the right to declare war on resisting population groups.
- He could and did annex every square meter of land that he thought belonged to Indonesia.
- He could and did ignore all constitutional articles concerning fundamental human rights and constitutional principles.
- And what did the parties that had made that possible do? They stood there and looked at it. The Netherlands protested for a moment (as explained later) but considered the economic interests of the Dutch-Indonesian Union to be more important. And the UNCI took its hands off it and denied

having any responsibility for the blatant deception and abuse of the federal Constitution. We will also discuss this later in Chapter 6.

- In this way, Sukarno was able to realise in eight months what he had failed to do in the previous five years: proclaim the centralized unitary state in mid-August 1950 and then apply for membership of the United Nations. This was granted after only one month.

This information is in stark contrast with the mantra always expressed by representatives of Indonesia in the UN General Assembly, namely that the establishment of the unitary state was carried out entirely according to the rules of the Constitution.

The question naturally arises as to who made the most important contribution to the drafting of this abominably poor Constitution. Was it the Netherlands, or the Republic of Indonesia, or the Federal Consultation Meeting, or the UNCI? The literature on the subject is ambiguous. But it is certain that the final text was made in any case by the delegation of the Republic of Indonesia and the delegation of the Federal Consultation Meeting – working together without the Netherlands - on 29 October 1949 in Scheveningen. Those two parties determined the final text of this federal Constitution in accordance with the Charter of Agreement of 29 October 1949 in Scheveningen.

## 5.3 Taking a closer look at the abuse of the Federal Constitution of December 1949

We begin with the Constitution of the Unitary State of 15 August 1950. Once again, we ask the reader to study carefully the literal text of the preamble to this Constitution which, two days later, on 17 August 1950, brought into force the unitary state. Here are the relevant passages.

### *5.3.1 The preamble to the 1950 Constitution of the unitary state Indonesia*

THE PROVISIONAL CONSTITUTION
of the
REPUBLIC OF INDONESIA [26]

Promulgated on 15th of August 1950 (Act No. 7, 1950, Gazette No. 37, 1950)
The President of the Republic of the United States of Indonesia

Considering:

That the people of the component States throughout Indonesia desire the formation of a Unitary Republic;
That sovereignty is in the hands of the people;
That this unitary State is actually identical with the State of Indonesia whose independence was proclaimed by the people on August 17, 1945, which was originally a unitary Republic and which subsequently became a federal Republic;
That in order to carry out the will of the people in regard to the

[26] Published by the Ministry of Information, Djakarta, 1953, and kindly supplied by the Indonesian Embassy in Canberra.

unitary Republic, the component States, the Negara Indonesia Timur and Negara Sumatra Timur, had empowered the Government of the Republic of the United States of Indonesia to negotiate with the Government of the component State the Republic of Indonesia;
That now Agreement has been reached between the two parties in said negotiations with a view to carrying out the will of the people, the time has come for the transformation, in accordance with said Agreement, of the Provisional Constitution of the Republic of the United States of Indonesia into the Provisional Constitution of the State which shall be a Unitary Republic by the name of Republic of Indonesia;

Taking into consideration:

Article 190, Article 127 paragraph a, and Article 191 paragraph 2 of the Constitution;

Taking also into consideration:

The Charter of Agreement between the Government of the Republic of the United States of Indonesia and the Government of the Republic of Indonesia of May 19, 1950;

With the approval of the House of Representatives and of the Senate;

Resolves

to draw up:

The Act on the transformation of the Provisional Constitution of the Republic of the United States of Indonesia into the Provisional Constitution of the Republic of Indonesia.

Art. 1. The Provisional Constitution of the Republic of the United States of Indonesia must be transformed into the Provisional Constitution of the Republic of Indonesia, as follows:

PREAMBLE

SINCE independence is inherently the right of every nation, any form of colonialism in this world is contrary to humanity and justice, and must therefore by eradicated.
Our struggle for an Independent Indonesia has reached a stage of glory and the Indonesian people are on the very threshold of a free Indonesian State-independent, united, sovereign, just and prosperous.
Having, through God's blessings and by His mercy, arrived at this blessed and sacred moment in our history, we hereby ordain our independence and, by this Charter, establish our Unitary Republican State, based on the recognition of the Divine Omnipotence, Humanity, National Consciousness, Democracy and Social Justice.
In order that we may enjoy happiness, prosperity, peace and freedom in society and in the completely sovereign, constitutional State of Free Indonesia.

CHAPTER I
THE STATE OF THE REPUBLIC OF INDONESIA

Section I
*The nature of the State and sovereignty*

Art. 1. 1. The independent and sovereign Republic of Indonesia is a democratic, constitutional State of unitary structure.
2. The sovereignty of the Republic of Indonesia is vested in the people and is exercised by the Government together with the House of Representatives.

Section II
*The territory of the State*

Art. 2. The Republic of Indonesia comprises the whole territory of Indonesia.

*5.3.2 Main points of the abuse committed*

(a) The title of the 1950 Constitution of the unitary state makes it clear that it is a provisional Constitution. In other places we have already mentioned that in the provisional federal Constitution of December 1949 the assignment was to make – through a Constituante (Constituent Assembly) - a definitive federal Constitution, but this did not happen. It was not until 1955 that Constituante was set up to make this provisional Constitution of the unitary state - after amendments - definitive.

(b) The first sentence of the section 'Considering', that the people of the component states wanted a unitary state, is a lie.[27] The South Moluccas had already declared their independence in opposition to that unitary state, federal state structures and procedures had been dismantled with the aid of the unlawfully appropriated Emergency Law [28], and the only remaining state of East Indonesia (Negara Indonesia Timur, of which the South Moluccas had been a part) was forced to agree to the establishment of a unitary state with a knife on its throat and then abolished altogether when this provisional Constitution was adopted in August 1950.

(c) The third consideration confirms that since the proclamation of independence of Indonesia on 17 August 1945, the establishment of a unitary state has always been the objective, and that the signing of the provisional federal Constitution of December 1949 was only an intermediate step to subsequently liquidate the federation through the legal acquisition of sovereignty and proclaim the unitary state.

(d) The final consideration contains the lies that (a) the entire people of Indonesia want the unitary state and that (b) the parties would have agreed that the federation should be exchanged for a unitary state. The Netherlands, through the UNCI, had resisted this unlawful transition from federation to a

[27] Noelle Higgins writes: "A plebiscite to determine the wishes of the Moluccan people never occurred however, as the President of the Republik Indonesia, Sukarno, began moves to unite all peoples of Indonesia, against the wishes of those who preferred Indonesia to stay as a federal state. When the Jakarta government of Republic Indonesia began to incorporate regions in the other federal states into the Republik by means of decrees and indeed the use of force, the idea of the establishment of a unitary state was met with much resistance in many regions, including the South Moluccas. By this time, it became more and more clear that the Amboinese people of the South Moluccas had a very definite and strong preference for federalism over unitarism." Noelle Higgins, 'Regulating the Use of Force in Wars of National Liberation – The Need for a New Regime'. A Study of the South Moluccas and Aceh, Martinus Nijhoff, Leiden, Boston 2010, p. 161.

[28] As simple as Sukarno was able to misappropriate the use of the Emergency Law, so complicated was the parliamentary decision-making in the Netherlands when accepting the Indonesia Emergency Law in 1948. This law was necessary to create room in the Dutch constitution for the new constitutional relationship between the Netherlands and Indonesia, after the intended transfer of sovereignty in December 1949. For the question whether this Emergency Law Indonesia 1948 was constitutionally correct, see Thom de Graaf, 'Een nutteloze noodwet, Een studie naar de constitutionality en de noodzaak van de Noodwet Indonesia 1948', in: P.F. Maas et al. (edit.), Politiek(e) opstellen, 1982, Centre for Parliamentary History, Nijmegen, 1983, pp. 20-37.

unitary state and only gave up this resistance when the UNCI withdrew its hands from the trial and started playing the role of Pontius Pilate. More about this later.

(e) During the period from 27 December 1949 to 17 August 1950, abuse of rights took place by using articles of the provisional federal Constitution, which were intended to make a definitive federal Constitution, to demolish federal structures and procedures. However, an essential aspect of the abuse of justice can be found in the text:

"Taking into consideration: Article 190, Article 127 paragraph a, and Article 191 paragraph 2 of the Constitution;"

This sentence suggests that the said articles are from this Constitution 1950 of the unitary state. But they come from the provisional federal Constitution. They are therefore used here as a means of achieving exactly the opposite of what was intended by the provisional federal Constitution. To round it off with legal jargon: quod erat demonstrandum. The aforementioned articles 127 and 191 are of no further relevance to our context.

(f) Where further:

"Resolves
to draw up
The Act on the transformation of the Provisional Constitution of the Republic of the United States of Indonesia into the Provisional Constitution of the Republic of Indonesia'.

this is a federal law as referred to in Article 190 (1) discussed above. Thus, a law that could not judicially be tested against the federal constitution.

Chapter 7 is devoted to the legal substantiation of our view that we are dealing with serious abuse of law:

- a President above the law,
- uses a power (Emergency Law) that does not belong to him,
- in the form of a federal law that may not be judicially tested against the constitution,
- to dissolve the federation instead of making it permanent,
- in the absence of articles that, as checks and balances, should form the required defence mechanism against the usurpation of total power by the executive branch of the trias politica.

### 5.4 The legitimacy of the proclamation of the Moluccan independence

We are now going to compare this abuse of rights with the question whether the declaration of independence by the Moluccas on 25 April 1950 was lawful.

*5.4.1 What do we find in the literature?*

We examine how the question of legality can be approached through sources outside the Constitution. Lawfulness is a diffuse concept. What is lawful is determined by the applicable articles of a law. And that will be determined by the judge. A judge can use the so-called 'teleological interpretation' to determine what the applicable law is in a specific case. This means that in the documents underlying the law in question he deducts what the

original intention of the law was. In order to then reach a decision based on that information.

In the event of a dispute about the meaning or objective of the articles of law, the court can apply this method of 'teleological interpretation' by examining the Explanatory Memorandum (EM) on that law, and its parliamentary treatment. In doing so, the court examines the original purposes of a law. However, the federal Constitution of 27 December 1949 does not have an Explanatory Memorandum. Therefore, a teleological interpretation of the purposes of the Constitution cannot be made based on that official government document, because it does not exist. Nor a parliamentary treatment.

This was also the case with the first federal Constitution in the world, designed in 1787 by the Convention of Philadelphia in America. That Constitution did not have an Explanatory Memorandum either. However, much has been preserved of the deliberations of the fifty-five members of the Convention. The most important information about the goals of that American Constitution can be found in the 'Federalist Papers' by Alexander Hamilton, James Madison and John Jay. These Papers explain what the founding fathers of the Convention meant by the Constitution. To this day, the judiciary in America resorts to these Papers in constitutional questions.

The Indonesian federal Constitution of December 27, 1949 was applicable law. In order to assess whether the Moluccan declaration of independence was lawful within that applicable law, we must make use of sources such as:

(a) The Renville Principles as a follow-up to the Linggadjati Agreement.
(b) The Transitional Agreement of November 2, 1949.
(c) Documents that have an undisputed eternal value in the light of concepts like sovereignty, freedom, independence, self-determination, such as the Magna Carta (Britain 1215), the Placard of Abandonment (Netherlands 1581), the Declaration of Independence (America 1776) and the Charter of the United Nations (1945).

*5.4.2 The Renville-principles*

As mentioned above, the twelve Renville principles (of which principles 9 to 12 originate from the Linggadjati Agreement) were designed by the Netherlands. But subsequently complemented by the UN Commission of Good Offices with six subsequent principles and supported by America aboard the Renville in such a way that the delegation of the Republic of Indonesia accepted them as basic principles for the federal constitution to be drawn up. They read as follows[29].

> "The Commission of Good Offices has been informed by the Delegation of the Kingdom of the Netherlands and the Delegation of the Republic of Indonesia that, following the signing of the armistice,

[29] See also Herman Burgers, The garoeda and the stork: Indonesia from colony to national state. Brill 2010, p. 567-569.

its Governments accept the following principles as a basis for political discussions:

*"A. The Principles Proposed by the Netherlands and accepted by the Parties on January 17, 1948:*

1. That the assistance of the Committee of Good Offices be continued in the working out and signing of an agreement for the settlement of the political dispute in the islands of Java, Sumatra and Madura, based upon the principles underlying the Linggadjati Agreement.
2. It is understood that neither party has the right to prevent the free expression of popular movements looking toward political organizations which are in accord with the principles of the Linggadjati Agreement. It is further understood that each party will guarantee the freedom of assembly, speech and publication at all times, provided that this guarantee is not construed so as to include the advocacy of violence of reprisals.
3. It is understood that decisions concerning changes in administration of territory should be made only with the full and free consent of the populations of those territories and at a time when the security and freedom from coercion of such populations will have been ensured.
4. That on the signing of the political agreement provision be made for the gradual reduction of the armed forces of both parties.
5. That as soon as practicable after the signing of the truce agreement, economic activity, trade, transportation and communications be restored through the co-operation of both parties, taking into consideration the interests of all the constituent parts of Indonesia.
6. That provision be made for a suitable period of not less than six months nor more than one year after the signing of the agreement during which time uncoerced and free discussion and consideration of vital issues will proceed; at the end of this period free elections will be held for self-determination by the people of their political relationship to the United States of Indonesia.
7. That a constitutional convention be chosen according to democratic procedure to draft a constitution for the United States of Indonesia.
8. It is understood that if, after signing the agreement referred to in item 1, either party should ask the United Nations to provide an agency to observe conditions at any time up to the point at which sovereignty is transferred from the Government of the Netherlands to the Government of the United States of Indonesia, the other party will take this request in serious consideration. The following four principles are taken from the Linggadjati Agreement:
9. Independence for the Indonesian peoples.
10. Co-operation between the peoples of the Netherlands and Indonesia.
11. A sovereign State on a federal basis under a constitution which will be arrived at by democratic processes.
12. A union between the United States of Indonesia and other parts of the Kingdom of the Netherlands under the King of the Netherlands."

*"B. Six Additional Principles Submitted by the Committee of Good Offices and accepted by the Parties on January 19, 1948:*

1. Sovereignty throughout the Netherlands Indies is and shall remain with the Kingdom of the Netherlands until, after a stated interval, the Kingdom of the Netherlands transfers its sovereignty to the United States of Indonesia. Prior to the termination of such stated interval the Kingdom of the Netherlands may confer appropriate rights, duties and responsibilities on a provisional federal Government of the territories of the future United States of Indonesia. The United States of Indonesia, when created, will

be a sovereign and independent State in equal partnership with the Kingdom of the Netherlands in a Netherlands Indonesian Union, at the head of which shall be the King of the Netherlands. The status of the Republic of Indonesia will be that of a State within the United States of Indonesia.

2. In any provisional federal Government created prior to the ratification of the constitution of the future United States of Indonesia, all States will be offered fair representation.
3. Prior to the dissolution of the Committee of Good Offices, either party may request that the services of the Committee be continued to assist in adjusting differences between the parties which relate to the political agreement and which may arise during the interim period. The other party will interpose no objection to such a request. This request would be brought to the attention of the Security Council of the United Nations by the Government of the Netherlands.
4. Within a period of not less than six months or more than one year from the signing of this agreement, a plebiscite will be held to determine whether the populations of the various territories of Java, Madura and Sumatra wish their territory to form part of the Republic of Indonesia or another State within the United States of Indonesia, such plebiscite to be conducted under observation by the Committee of Good Offices, should either party in accordance with the procedure set forth in paragraph 3 above request the services of the Committee in this capacity. The parties may agree that another method for ascertaining the will of the populations may be employed in place of a plebiscite.
5. Following the delineation of the States in accordance with the procedure set forth in paragraph 4 above, a constitutional convention will be convened through democratic procedures to draft a constitution for the United States of Indonesia. The representation of the various States in the convention will be in proportion to their populations.
6. Should any State decide not to ratify the constitution and desire, in accordance with the principles of Articles 3 and 4 of the Linggadjati Agreement, to negotiate a special relationship with the United States of Indonesia and the Kingdom of the Netherlands, neither party will object."

The Commission's principles 4 and 6, annexed to 3, 6 and 9 of Renville, are the most important. Together, they represent the essence of the purpose of these principles:

> "Guarantee for the federal states, and for the peoples living within them, during the transition period from the provisional federal Constitution to the definitive federal Constitution, to decide in freedom and thus without coercion which status they wish to have: join the federation or stay outside the federation and choose a different relationship with the Indonesian federation, or with the Netherlands."

They all were violated.

Within these principles there was a lack of clarity from the beginning. This led to repeated discussions. Not only in this mainly political process, but also later in the (academic) literature. The lack of clarity concerns the following questions:

(a) Who has the authority to decide whether or not to join the federation? Is that right reserved to a state (Negara) or also to a people as an autonomous community (Daerah) within a Negara?
(b) Is a decision not to join a federation a form of external self-determination?
(c) Does external self-determination imply independence?

These questions should have been answered in an elaborated Explanatory Memorandum to the federal Constitution. In the absence of such an Explanatory Memorandum, we shall examine these questions in more detail ourselves.

*5.4.3 Did a people (Daerah), not being a member state (Negara), have the right to external self-determination?*
We quote again the ethnologist Prof. Dr. Gesina van der Molen. She describes[30] the external right of self-determination as follows:

> "The external right of self-determination in an active sense relates to the right of a people or a people's group to join a particular state or to declare independence. Here, therefore, the consent of the people is not requested for an act of third parties (transfer of territory), but the people or group acts independently. (-) In principle, this right is almost universally recognised."

This recognition is confirmed by Matthew Saul with the sentence with which he opens an article in the Human Rights Law Revue: [31]

> "The right of self-determination has been identified by the International Court of Justice (ICJ or 'the Court') as 'one of the essential principles of contemporary international law".

We also quote from the English version of the Handbook 'International Law in the Netherlands', Volume III, p. 150, of the T.M.C Asser Institute-The Hague the following description of external self-determination:

> "External self-determination (-) is the right of a group, which considers itself a nation, to form a State by its own."

Next, on page 151, the authors of this Handbook say that this description raises at least the following questions:

> "1. What is the nature of the concept? Is it merely a political maxim, or is it a legal principle to be applied to States or even a legal right accruing to certain groups under certain conditions?
> 2. What is the scope of self-determination? And in particular, does it include only a choice for self-government in internal affairs, or also for secession? (-)
> 3. Which groups are entitled to self-determination?
> 4. Which conditions, if any, are to be satisfied before a group may raise a legitimate claim for self-determination? (-)
> 5. What are the means with which, and the conditions under which the act of self-determination has to be performed? Is this a matter of exclusive jurisdiction of the State concerned?
> 6. If a legitimate claim for self-determination is denied to a certain group, does international law allow for, or condone the use of force on the part of such group or on the part of third States?"

[30] In: 'Enkele opmerkingen over het zelfbeschikkingsrecht der volken', ARS 1962, p. 75. Zie voorts Noelle Higgins, ibid. paragraaf 5.3.2, getiteld: The right of the People of the South Moluccas to Self-Determination under International Human Rights Law, p. 173, e.v.

[31] Saul Matthew, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', Human Rights Law Revue II:4, Oxford University Press, 2011, p. 610.

Unlike the UN International Covenant on Civil and Political Rights (ICCPR) of 1966 (more on this later), the Charter of the United Nations (1945) deals with the issue of self-determination only indirectly in Chapter XI, entitled 'Declaration on Non-Self-Governing Territories', Article 73b:

> "Article 73
> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
> a. (-);
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
> c. (-);
> d. (-);
> e. (-)."

Note 1: The South Moluccas are such a 'Non-Self-Governing Territory' as referred to in Article 73b of the Charter.

Note 2: The unitary state of the Republic of Indonesia has been a member of the United Nations since September 1950 and is deemed to implement this Article 73b.

Note 3: During the drafting of the UN Charter in San Francisco in 1945, the question arose whether the concept of self-determination in 73b included independence (p. 154):

> "A Chinese proposal to add 'independence' was not accepted at the San Francisco Conference in 1945 though it gained considerable support, It was understood, however, that 'self-government' should not rule out 'independence' as a possible goal in appropriate cases."

We further quote the Handbook mentioned (p. 156):

> "Summing up the various aspects of the official Dutch views expressed at the San Francisco Conference as to the application of the principle of self-determination to non-self-governing territories we may say that such an application was accepted once certain conditions of stability, maturity and unity were met, even if self-determination would lead to secession".

These 'certain conditions' refer to the above-mentioned question 4.

Note 4: The considerations that the UN will make when the South Moluccas claim their right to external self-determination - including the right to independence - will undoubtedly address the pre-conditions of 'stability, maturity and unity'.

Specific developments in the years 1946 and 1947 left their mark on the independence course of the South Moluccas. A bird's-eye view:

- It was in the course of 1946 that the Netherlands launched the idea of the inevitable transfer of sovereignty to Indonesia in the form of a federation. The representatives of the Republic of Indonesia proclaimed by Sukarno on 17 August 1945 were not unwilling to do so.

- Before this idea had been properly discussed, in December 1946, during the conference in Den Passar (Bali), the Netherlands already established the Negara of East Indonesia (East Indonesia/Negara Indonesia Timur) as a member state within the intended federation of the United States of Indonesia.

- The scheme by which this Negara was established included the right to regional self-determination within the Negara Indonesia Timur, for all communities, leading to autonomy.

- In the course of 1947 other Negara's were formed and autonomous territories, Daerahs, including the Daerah of the South Moluccas within the state of Negara Indonesia Timur.

- In March 1947, the South Moluccas formally joined the Negara Indonesia Timur, although, subject to the reservation discussed earlier, the Negara would represent the interests of the South Moluccas well. For the assessment of the course of justice, this reservation in the sense of a resolutive condition is an important element in determining the legitimacy of the Moluccan proclamation of independence on 25 April 1950. That is why we repeat that element briefly here.

That caveat was as follows. After the foundation of the Negara Indonesia Timur on the Den Passar Conference on 24 December 1946, the Moluccas had provisionally and conditionally joined this state of East Indonesia on 11 March 1947. From that moment on they were part and parcel of the federalization process. But they reserved the right to resign if the NIT government did not take enough account of the interests of the South Moluccan people. Despite fears of domination by the Republic of Indonesia, they remained within the NIT and thus became part of the Federal Republic of the United States of Indonesia at the transfer of sovereignty on 27 December 1949. After four months it became clear that the federal state structure for the leaders of the Republic of Indonesia was only an intermediate step towards the establishment of a unitary state, in which independence and free decision making of peoples had no place. Their request to the government of the NIT based on the constitutionally acquired right to determine their own status as a state - that of independence - was not granted by the NIT government because it was afraid of repercussions on the part of Sukarno and others. That is why on 25 April 1950 the Moluccas put into effect the reservation they had made at the provisional accession to the NIT as a resolutive condition, stepped out of the state of Negara Indonesia Timur and proclaimed their own independence.

Note 5: The Netherlands and the Negara East Indonesia considered that the aforementioned formal accession to the Negara Indonesia Timur was superfluous because the Moluccas were located within the territory of the Negara and when the



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Negara was established, they formed a Daerah within the Negara. Retrospectively, we consider this formal accession under the resolutive condition of proper representation of interests by the Negara to be an essential element for the legitimacy of the Moluccan declaration of independence on 25 April 1950. By making the resolutive condition legally effective, the South Moluccas were able to free themselves from the constitutional vacuum that Sukarno had created by eliminating all provisions, structures and procedures of a federal nature immediately after the transfer of sovereignty.

We go on to refer to the twelve Renville principles that had been supplemented by the Commission of Good Offices with six principles as the basis for the negotiations to reach a political solution. Here we refer explicitly to the last of the six principles formulated by the Commission, which we quote again:

> "Principle 6 Commission for Good Offices
> Should any state [i.e. Negara] decide not to ratify the Constitution [of the United States of Indonesia] and desire, in accordance with the principles of Articles 3 and 4 of the Linggadjati Agreement, to negotiate a special relationship with the United States of Indonesia and the Kingdom of the Netherlands, neither party will object."

Although this sixth principle concerns the right to external self-determination of a member state (Negara), the reference to Articles 3 and 4 of the Linggadjati Agreement suggests that this right also belongs to the 'population of any territory'. So, to Daerahs such as those of the South Moluccas. For the record, we quote those Articles 3 and 4:

> "Agreement of Linggadjati
> Article 3 - The United States of Indonesia shall comprise the entire territory of the Netherlands Indies with the provision, however, that in case the population of any territory, after due consultation with the other territories, should decide by democratic process that they are not, or not yet, willing to join the United States of Indonesia, they can establish a special relationship for such a territory to the United States of Indonesia and to the Kingdom of the Netherlands.
>
> Article 4 - The component parts of the United States of Indonesia shall be the Republic of Indonesia, Borneo, and the Great East without prejudice to the right of the population of any territory to decide by democratic process that its position in the United States of Indonesia shall be arranged otherwise."

The Netherlands took advantage of the vagueness of the combination of these articles to establish more Negaras and Daerahs on the territory of the Republic of Indonesia, which was controlled by Sukarno. This naturally led to more discussions about what external self-determination meant and who was entitled to it.

With the Charter of Transfer of Sovereignty (the Transitional Agreement) of 2 November 1949, the UNCI put an end to the discussion about whether a state was entitled to external self-determination: this right was granted to the member states. But this did not put an end to the question whether this right also

belonged to a nation within a state. See the wording of Article 2(2):

> "Article 2, lid 2
> Each component state shall be given the opportunity to ratify the final Constitution. In case a component state does not ratify that Constitution, it will be allowed to negotiate about a special relationship towards the Republic of the United States of Indonesia and the Kingdom of the Netherlands."

Anyway, the question of whether the right to external self-determination also accrued to a people within a Negara became irrelevant within two months. This compelling right (ius cogens) of the Transition Agreement of 2 November 1949 became a nonexistent right as of 1 January 1950, when Sukarno – disregarding any agreed Principle - began dismantling the federation. At that time, the South Moluccas only had their own legal form of government - established with the support of the Netherlands - with the South Moluccas Council as the representative body of the people. And they also had their reservations about joining the Negara Indonesia Timur, added to the various articles that also gave a people the right to external self-determination, or at least suggested that right.

*5.4.4 The UNCI and the right to self-determination*

For a good understanding of the importance of this process of dismantling the federation, we will add a few more aspects. Within the federal constitution, the right to self-determination was structured as follows.

Article 43 of the federal constitution granted the right to self-determination in the words:

> "... that the democratically expressed wishes of the peoples of the territories concerned are decisive for the status ultimately to be adopted by those territories in the federation".

The phrase 'the populations of the areas concerned' suggests that the right to internal or external self-determination also belonged to peoples within a member state. But it was not clear how this related to the formulation of the right to self-determination in the Transitional Agreement of 2 November 1949 - prior to article 43 of the constitution - which also had the force of law.

This right to self-determination had been expressed more strongly during the negotiations on the federal Constitution by the UNCI, which had taken the lead especially in supervising the right to self-determination in order to have the following provisions included in article 2 of the Transition Agreement of 2 November 1949[32]:

> "Article 2
> 1. The division of the Republic of the United States of Indonesia into component states shall be established finally by the Constituent Assembly in conformity with the provisions of the Provisional Constitution of the Republic of the United States of Indonesia with the understanding that a plebiscite will be held

[32] All agreements concluded separately on 2 November 1949, including the Transfer Agreement, were, as of the transfer of sovereignty on 27 December 1949, strict provisions of the overall legal package. They can be studied online in the Appendices to this report.

among the population of territories thereto indicated by the Government of the Republic of the United States of Indonesia upon the recommendation of the United Nations Commission for Indonesia or of another organ of the United Nations, under supervision of the United Nations Commission for Indonesia or the other United Nations organ referred to, on the question whether they shall form a separate component state.

2. Each component state shall be given the opportunity to ratify the final Constitution. In case a component state does not ratify that Constitution, it will be allowed to negotiate about a special relationship towards the Republic of the United States of Indonesia and the Kingdom of the Netherlands."

See the words in paragraph 1:

- 'constituent assembly': it was not held after the transfer of sovereignty on 27 December 1949. This Constituent was only established in 1955 in preparation for the first elections for the unitary state already established in August 1950; the Emergency Law, illegally issued in March 1950, which should have been presented to the House of Representatives for its assessment, was therefore not offered to that House because that House erroneously did not yet exist due to the absence of the prescribed Constituent Assembly;
- 'plebiscite': no plebiscites were held after the transfer of sovereignty;
- 'under the supervision of the UNCI': supervision points to responsibility; in Chapter 6 we show how the UNCI denies having any responsibility. Remember that the UNCI's text of this Transfer of Sovereignty of November 2, 1949 had the force of law.

We repeat here that paragraph 2 grants the right to self-determination exclusively to federated states, while the UNCI does not clarify the ongoing discussion, which had been going on for some time now, on the question of the right of external self-determination of peoples within a federated state claimed by other parties.

There is more that raises questions here about the functioning of the UNCI. Although the UNCI was entitled to call itself the owner of the explicitly guaranteed right to external self-determination for federated states, after the establishment of the unitary state in August 1950 - and thus by ignoring the provisions on external self-determination - it never condemned the violation of the federal Constitution. Neither of the Renville and attached UNCI Principles. Infringement in the sense of total dismantling of the federal member states, which made self-determination completely illusory. In Chapter 6 we will elaborate the UNCI's statement that it does not wish to take responsibility for active action against Indonesia's violation of the cited paragraphs 1 and 2 of the Transition Agreement.

The course of history between 1945 and the end of December 1949 shows:

(a) that the parties themselves were not able to formulate a conclusive answer to the question whether external self-determination rightfully belongs to a people within a (sub)state;
(b) but that immediately afterwards, from January 1950, this also became an irrelevant question;

(c) because in fact there was never any room for external self-determination of the federated states, let alone of federated peoples. Everything that had to do with self-determination was destroyed.

The actual observance of what had been laid down in law could therefore not take place, creating a constitutional vacuum within which the South Moluccas had to choose their own legal path. A path that they could base on being a Daerah anchored in law, added to the reservation they had made when joining the Negara Indonesia Timur.

For constitutional legislators, this is an instructive case study to understand the misery of the absence of an Explanatory Memorandum that clearly explains how essential rights should be understood, who is responsible for what and with what powers that responsibility can be fulfilled. It is one of the many aspects of the legal mess of the overall legal framework in the context of the transfer of sovereignty at the end of 1949.

*5.4.5 Self-determination in accordance with the 1966 International Covenant on Civil and Political Rights*
But there's light on the horizon. This legal mess can still be undone. Provided the United Nations takes itself seriously.

In Chapter 7 we will extensively discuss the significance of the International Covenant on Civil and Political Rights (ICCPR) for the legal status of the South Moluccas. Now it suffices to quote Article 1, paragraph 1 of that treaty:

"Article 1
1) All peoples possess the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development.
2) (-)
3) (-)."

In the light of years of discussion as to whether the right to self-determination belongs solely to a State or also to a People, this is clear language. How could it be otherwise If a People first must become a State in order to acquire sovereign independence, it will be prevented by all means by the authority of the State in which it is a People. This article is the UN-treaty basis of the inalienable right to self-determination in the sense of what we quoted earlier in section 5.4.3 as: "External self-determination (-) is the right of a group, which considers itself a nation, to form a State by its own.

Again, we will return to this in detail in Chapter 7.

*5.4.6 Some remarkable examples of expressions of self-determination in history*
History has three remarkable interventions by peoples against dictatorial behaviour. We mention them very briefly.

<u>The Magna Charta of 1215</u>
Throughout all the centuries, peoples have been oppressed by autocrats. When a people no longer accept that oppression, it rebels. Far-reaching events in history mark the inalienable right of

a people to free themselves from oppression. On 15 June 1215, English feudal men forced King John Lackland to sign a charter guaranteeing freedoms that the king violated. He abused his power so severely that they felt it necessary to lay down in detail why and how the king's absolute power should be curtailed. If he did not sign, the people would no longer recognise him as king. The document is so important that UNESCO placed the Magna Charta on the World Heritage List in 2009.

Placard of Abandonment 1581

On 26 July 1581 the then Netherlands, led by William of Orange, decided to secede from Spain. They were already at war with the Spanish Philip II, a war known as the Eighty Years' War, which only ended with the Peace of Westphalia in1648. In the so-called Plakkaat van Verlatinghe (Placard of Abandonment) the authors listed the atrocities, excesses and arbitrariness of the reign of Philip II as the basis for the decision to no longer recognize him as king and to declare its own independence.

The Declaration of Independence 1776

On 4 July 1776, twelve of the thirteen English colonies in America issued a declaration of independence. The thirteenth colony, New York, joined on July 9, 1776. The English king had exploited them for years and suppressed them with disproportionately high taxes. With plain words - partly borrowed from the English Magna Charta and the Dutch Placard of Abandonment - they made it clear that they wanted to secede from England. To make clear the power of their striving for freedom we quote the following passage from this Declaration of Independence [underlining LK&PH]:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. - That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying out its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

Each of the thirteen colonies founded its own - confederal – state. It didn't work. They converted their state into a federal member state, together thirteen member states, that would grow to fifty states over the years, based on this first federal Constitution – drafted by the Convention of Philadelphia in 1787.

The essence of the three mentioned documents was laid down in the Charter of the United Nations in 1945.

The Charter of the United Nations

Article 1 of the Charter reads:

> "The Purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of

international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."

Everything that could do justice to the people of the South Moluccas is in that article. After 70 years of waiting, hopefully soon the application will follow.

*5.4.7 The Moluccan declaration of independence was legitimate, as was the right to external self-determination*

In short, seen from:

(a) the twelve Renville principles and the six principles added to them;
(b) the Transitional Agreement of 2 November 1949;
(c) documents such as the Magna Charter, the Placard of Abandonment, the Declaration of Independence and the UN Charter;
(d) the reservation made by the Moluccas on accession to the NIT;
(e) the articles of the Constitution which guaranteed free decision making on one's own status, but essentially aimed at giving an autocrat total power over the entire territory of Indonesia;
(f) literature in the field of international law;
(g) the Charter of the United Nations;
(h) the International Covenant on Civil and Political Rights,
(i) Article 73b of the UN Charter,

the legitimacy of the Moluccan declaration of independence and the right to external self-determination cannot be denied.

The correctness of this finding has been confirmed on several occasions in later years. Among others by the Association for International Law on 24 June 1950[33]. By virtue of Article 2 of the aforementioned Transition Agreement of 2 November 1949, the Association came to the following statement:

> "Whereas the right of self-determination to which the Ambonese people are entitled under the abovementioned provision of international law could no longer be exercised in the manner described in that provision .... (etc);
> That although in the international legal order self-determination is usually unlawful, at least in private law, such a prohibition is by

[33] Derived from Bung Penonton, ibid. p. 33 and 34. The International Law Association was founded in Brussels in 1873. According to its statutes, its objectives are "to study, clarify and develop international law, both public and private, and to promote international understanding and respect for international law". The ILA has consultative status, as an international non-governmental organisation, with a number of United Nations specialized agencies.

no means applicable in the international legal order, which is still so imperfect, not protected by means of judicial coercive measures ...'.
(considered) that the Republic of South Moluccas has rightly declared independence and is therefore entitled to maintain that independence in relation to everyone, whereas the Republic of the USI and the Kingdom of the Netherlands are obliged to recognise the competence of the Republic of South Moluccas to negotiate in full freedom its special relationship with those two States".

Bung Penonton further mentions: "This position was adopted by the Dutch judiciary on 10 February 1954 when it concerned a 'de facto' as well as 'de iure' recognition of the RMS as a plaintiff against the Koninklijke Pakketvaart Maatschappij and the Gouvernement of New Guinea in connection with the seizure of the Moluccan ship Hoa Moa".

Karen Parker[34] added the following court judgments confirming the Moluccan right to self-determination pursuant to Article 2 of the Transfer Agreement:

- A judgment of the President of the Court of Appeal in Amsterdam on 2 November 1950.
- A judgment of the Court of Appeal in Amsterdam on 8 February 1951.
- A decision of the Supreme Court for New Guinea on 7 March 1952 stating that parties who have signed the right to self-determination are also responsible for making legitimate efforts to implement the right to self-determination.

Noelle Higgins formulated it as follows:

> "It has been established that the RMS was a legitimate and recognized state upon proclaiming its independence in 1950. Central to the discussion of the legitimacy of the right to independence of the islands is the fact that the RMS proclaimed its independence before the establishment of the Republic of Indonesia as a unitary state. This leads to the conclusion that the consequent use of force by the Indonesian government against the RMS was illegal and a violation of international law, more specifically Article 2(4) of the UN Charter."[35]

*5.4.8 The federal Constitution was not a federal Constitution*

Prior to what we will present in Chapter 7 on fundamental shortcomings of the federal Constitution, we will now look at some of its elements.

The problem is it wasn't a federal Constitution. It was called a provisional federal Constitution which, through work by a Constituante (Constituent Assembly), was supposed to lead to a definitive federal Constitution, but it never got that far. There were certainly people who thought they were dealing with a federal Constitution, but the word 'federal' was just a meaningless label. Nevertheless, Indonesian representatives in the UN General

[34] Parker, ibid. p.15-17. Karen Parker's report is included in the Appendices, which can be studied separately online.

[35] Noelle Higgins, ibid. p. 190.

Assembly regularly claim that the federal Constitution was a correct document and that the occupation of the Moluccas took place entirely in accordance with the law in force at the time. Quod non.

To our amazement, in our investigation into the causes of the failure of the federation, we found nowhere an analysis of the wretchedly poor constitutional quality of this federal Constitution. A Constitution that aims to be the constitutional basis of a federal state should not contain articles that can be used to make it a centralized unitary state. However, how it should be will described in PART III, Chapter 9 of this report using standards of federal state formation.

Again, and perhaps superfluously:

- The Provisional Federal Constitution was intended to establish a definitive federal form of state.

- In the decision making to establish that federal form of state, the peoples of Indonesia had the right of self-determination to freely decide which political position they would like to get: within or outside the final federation.

- A combination of articles in the provisional federal Constitution gave an inviolable autocrat a free hand to nullify – by military force - that right of self-determination and to use it to do exactly the opposite, i.e. to establish a unitary state instead of a definitive federal state.

- With this we establish that the provisional federal Constitution of 27 December 1949 was not a federal constitution, because it contained articles that are essentially alien to a federal Constitution If one calls a certain animal 'cat', but that animal has all the characteristics of a 'crocodile', then it is better to call it 'crocodile' and then run away.

- Which also establishes that the dismantling of the federation in favour of the establishment of the unitary state was based on illegal acts.

- Unable to pronounce the constitutionally guaranteed right to external self-determination by means of a constitutionally promised plebiscite before declaring themselves independent, the Moluccas could do nothing but declare themselves independent in the spirit of all the articles on external self-determination. Dutch people and Americans who would like to dispute this should take another look at their own history.

The transitional period never resulted in a definitive federal Constitution, because this was not the intention of the Indonesian signatories of the Constitution either. They wanted only one thing: as an Indonesian state legally – 'de iure' - to acquire its own independence. And they could only obtain it by accepting the federal Constitution, and then dismantling it by means of articles in the Constitution that should not have been there - and articles that should have been there but were missing - in order to create the intended centralized unitary state. In this context, it seems worth mentioning once again that the Constituent Assembly who

should have drafted the definitive federal Constitution during the transitional period was not established until 1955. At that time, the unitary state had long since been established.

Even if one does not find all the preceding quotations and articles strong enough to establish that on 25 April 1950 the Moluccas - as a people - were legally entitled to claim their own external self-determination, the International Covenant on Civil and Political Rights states that they have had this right since 1966.

# 6. THE ROLE OF THE UNITED NATIONS COMMISSION FOR INDONESIA (UNCI) IN 1950-1951

## 6.1 Setting up the UNCI

On 28 January 1949[36] (S/RES67, 1949; S/1234) the UN Security Council established the United Nations Commission for Indonesia (UNCI)[37]. It replaced the Commission of Good Offices. The reason was the behaviour of the Netherlands[38]. Despite agreements, the Netherlands did not cease hostilities, nor was it prepared to release the imprisoned leaders of the Republic of Indonesia. With the establishment of the UNCI, the Netherlands was placed under guardianship, because the mainly diplomatic mandate of the Commission of Good Offices was extended with extra powers for the UNCI. Extras in the sense of being allowed to make coercive statements in order to accept the right to - external - self-determination, to bind the warring parties to agreements made on ceasefire and demobilisation of armed forces. The UNCI ceased to exist on 3 April 1951.

## 6.2 The UNCI's Interim reports

In addition to several reports to the Security Council on the progress of the decolonisation process, the United Nations Commission for Indonesia has submitted three interim reports on its work to the Security Council. We briefly describe some of the issues that are important in this context.

*6.2.1 Interim-report 1, August 4th, 1949 (S/1373)*

The first report covers the period from 28 January to 3 August 1949. It mainly deals with the implementation of the Security Council Resolution of 28 January 1949, which ordered the Netherlands to cease hostilities, to release the prisoners, and to allow the Government of the Republic to return to Yogyakarta (also known as Jogjakarta or Yogja). The role of the UNCI was not limited to diplomatic matters such as setting up subcommittees to enable parties to cooperate, maintaining mutual communication by ensuring that letters were exchanged, agreements recorded, and arrangements made for the demobilisation of Dutch troops. But the UNCI was also able to decide on impasses and force the parties to reach agreement. And all this in the light of the Security Council's demand that the transfer of sovereignty from the

[36] For a comprehensive account of events surrounding the Security Council's decision of 28 January 1949, see C. Smit, 'De Indonesische Quaestie. De Wordingsgeschiedenis der Souvereiniteitsoverdracht', Chapter 15.

[37] See this message from the Security Council: "The United Nations Commission for Indonesia (UNCI) was established on 28 January 1949, replacing the Committee of Good Offices on the Indonesian Question in order to perform all the functions mandated to the Committee as well as additional functions. UNCI was responsible for assisting the parties to achieve a just and lasting settlement of the dispute between the Netherlands and Indonesia, which was seeking independence. UNCI ceased functioning on 3 April 1951". The Appendices that can be studied online provide a brief overview of the discussion in the Security Council when the UNCI was set up. See the appendix 'Subsidiary organs of the Security Council, Case 5'.

[38] Already on 31 January 1949, i.e. three days after its establishment, the UNCI reported to the Security Council that the Dutch delegation had received no orders from the Netherlands to comply with the Security Council's decision of 28 January 1949 and thus opted for a delaying tactic (S/1235).

Netherlands to Indonesia be dealt with expeditiously: the UNCI had to deliver.

Incidentally, the UNCI was not only in discussion with the delegations of the Netherlands and the Republic of Indonesia, but also held consultations with representatives of areas outside the territory of the Republic of Indonesia. These areas could take part in the consultations. In this way, the aforementioned Federal Consultation Meeting ended up as a partner in the negotiations.

The UNCI concluded that it had succeeded in making good contributions to achieving the objective of the Resolution of the Security Council of 28 January 1949: the return of the Government of the Republic to its capital city of Yogyakarta, the gradual cessation of hostilities and the withdrawal of troops, and the determination of the timing and conditions for the holding of the Round Table Conference in The Hague in order to reach final arrangements for the transfer of sovereignty. Quite subtly, the UNCI reports that it was nevertheless concerned about the problems that would undoubtedly arise in connection with the ceasefire and the organisation of the Round Table Conference.

*6.2.2 Interim-report 2, January 16th, 1950 (S/1449)*
The second UNCI Interim Report covers the period from 5 August to 28 December 1949. Thus, up to and including the transfer of sovereignty to Indonesia on 27 December 1949 and the role played by the UNCI in its preparation. Hostilities were still not over, nor had the political prisoners been released. However, the Commission reports to the Security Council that it is keeping the parties together. Mainly by setting subcommittees to work on the implementation of the resolution of 28 January 1949.

In this second report, the UNCI is more satisfied with the progress of discussions on the organisation of the Round Table Conference, which was to take place no later than 30 December 1949. It lists in detail which parties concluded agreements between October and the end of December 1949 and when. These included the agreement of the delegation of the Republic of Indonesia referred to above and that of the Federal Consultation Meeting held in Scheveningen on 29 October 1949, at which those two delegations had adopted the text of the Federal Constitution.

The UNCI do not, however, make any comment with doubt or concern about the federal quality of that Constitution. It welcomes the fact that the Round Table Conference definitively put an end to the fighting between the Netherlands and the Republic but could not or would not foresee that new battles would break out immediately after the transfer of sovereignty. Now internally, between the federal government and the Moluccas. Because her task was to stay on in 1950 to guide the implementation of the decision-making of the Round Table Conference, she was confronted with this internal war.

*6.2.3 Interim-report 3, April 13th,1951 (S/2087)*
The third Interim Report covers the period from 28 December 1949 to 13 April 1951. On the latter date the UNCI ceased its activities.[39]

The first chapter describes how the hostilities were finally stopped. Chapter 2 deals with the issue of the right to self-determination. The Commission states that the federal Constitution describes self-determination essentially as: 'the federation of the United States of Indonesia will control the entire territory of the federation, on the understanding that the people of any territory are free to determine their own political status - within the federation'. She calls this internal self-determination.

In the Transition Agreement of 2 November 1949 (also binding right/ius cogens), which has already been mentioned several times, the UNCI had advocated an additional form of this right to self-determination. Namely, that by means of plebiscites as a democratic process, states could decide for themselves whether they wanted to join the federation, or whether they wanted to enter into a special relationship with the federation or with the Netherlands in complete freedom. She calls this external self-determination. But - as explained in Chapter 5 - this right to external self-determination was granted by the UNCI to federal member states, not to peoples within federal member states.

Article 2 of the Transition Agreement has already been included in Chapter 5. But for the sake of thorough understanding, the same text follows again:

> "Article 2 of the Third Agreement (Transitional Measures) providing:
>
> Article 2.1:The division of the Republic of the United States of Indonesia into component states shall be established finally by the constituent Assembly in conformity with the Provisional Constitution of the United States of Indonesia with the understanding that a plebiscite will be held among the population of territories thereto indicated by the Government of the United States of Indonesia upon the recommendation of the United Nations Commission for Indonesia, or of an organ of the United Nations under supervision of the United Nations Commission for Indonesia or other United Nations referred to, on the question whether they shall form a separate component state."

Paragraph 2 of this article declares the rights of the federated member states that do not ratify the federal Constitution and thus wish to remain outside the federation: external self-determination.

> "Article 2.2: Each component state shall be given the opportunity to ratify the final constitution. In case a component state does not ratify that constitution, it will be allowed to negotiate about a

[39] For the record, in addition to many separate reports to the Security Council on November 8, 1949, the UNCI also sent a Special Report to the Security Council on the discussions at the Round Table Conference on November 2, 1949. Again, that report did not extensively discuss the quality of the Federal Constitution, which was attached as a separate, but not actually enclosed, annex to the 122-page documents of that RTC: S/1417. And thus, virtually untraceable.

special relationship towards the Republic of Indonesia and the Kingdom of the Netherlands."

In its third Interim Report the UNCI qualify this Article 2 as follows (p. 12):

> "This article allowed means for the exercise of the socalled 'external right of self-determination', namely the right of Indonesian territories to dissociate themselves from the Republic of the United States of Indonesia and to enter into special relationship with both Indonesia and the Netherlands."

The above-mentioned Article 2,2 of the UNCI states that the right to external self-determination belongs to a member state of the federation. However, if we then interpret the word 'territories' in the paragraph above as territories like that of the Moluccas, then it says here that the UNCI also grant that right to external self-determination to a people like that of the Moluccas.

Karen Parker[40], the author who pleaded on behalf of the Association of Humanitarian Lawyers at the United Nations in 1996 for recognition of the external right to self-determination of the Moluccan population, concludes as follows:

> "It is patently clear that the Round Table Conference Agreements gave the Molukan people the prerogative to refuse incorporation into the Republic of the United States of Indonesia either by exercise of a negative vote in a pre-incorporation plebiscite or by refusing to ratify the Provisional Constitution."

Again, with reference to the detailed considerations in Chapter 5 about whether a people within a state was entitled to external self-determination, Parker's view is not entirely correct. None of the rights established by the Round Table Conferences of November and December 1949 offered peoples the right to external self-determination clearly and without discussion, although a number of articles certainly aimed at doing so. Especially the above quote from the third UNCI Interim Report.

Because of the constitutional mess and the dismantling of the federal constitution from January 1950 onwards, the Moluccas fell into a constitutional vacuum and could do nothing but make use of rights that they still possessed: being a Daerah, added to the reservation on accession to the Negara Indonesia Timur. And, of course, by referring to the many times with which articles of the RTCs suggested that peoples within states also had the right to external self-determination.

And with the advent of the UN-International Covenant on Civil and Political Rights in 1966, which enshrines the right to self-determination of peoples in Article 1 (more on this later), there is no longer any need to discuss the right of the Moluccas to be confirmed in that right after 70 years.

### 6.3 The attitude of the UNCI and the protest of the Netherlands

It is only in this third Interim Report that the UNCI pay attention to the way in which Sukarno et al. disregarded the mandatory law

[40] Karen Parker, ibid. p. 10.

(ius cogens) of that Article 2 of the Transition Agreement in favour of the establishment of the centralized unitary state. Here are the relevant paragraphs from that third report (pp. 12-16, paragraphs 36-46). Within those paragraphs we have placed asterisks in sections of the text which need a side note in more detail below the paragraph in notes.

> "34. Even prior to the signing of the Provisional Constitution there were indications of a movement for the liquidation of the negaras in Java and Madura and for the inclusion of these territories in the Republic of Indonesia.***** Following the transfer of sovereignty, this movement was greatly accelerated and was also active in Sumatra, Borneo and other adjoining islands. On 15 February 1950, President Sukarno, addressing the first meeting of Parliament, referred to the position of member states in the Federation in the light of popular demand for the abolition of the Provisional Constitution ****** of the country. He stressed the temporary ******* nature of the structure of the Republic of the United States of Indonesia and the provisional character of the Constitution, and announced the Government's intention to introduce in Parliament a draft Bill to be based on article 44 of the Constitution 'to channel the claims and demands of the people along legal and peaceful ways.' This Bill was eventually promulgated by the President on 7 March 1950, as the Emergency Law ******** 'on the procedure of political reforms of the territory of the Republic of the United States of Indonesia.'*********

*The UNCI therefore knew that liquidation was already under way before the transfer of sovereignty on 27 December 1949 and was proceeding at an accelerated pace after that transfer. However, the Commission did not sound the alarm.

** The 'popular demand' in the sense of 'popular will' was not a 'popular will' but imposed top down by Sukarno and enforced by means of articles 139, 140, 184 and 185 of the constitution (emergency laws plus military intervention). The UNCI simply let this pass.

*** Sukarno explains the provisional and thus temporary character of the constitution as temporary in the sense of 'we are free to make something completely different'. The provisional Constitution, however, was imperative law in the sense of the assignment to make a definitive federal Constitution. No comment from the UNCI.

**** And with the first Emergency Law of 7 March 1950, for which he had no authority and for which there was not yet a House of Representatives to judge it, nor a judicial review because the Emergency Act was inviolable as a federal law, Sukarno began to take absolute, totalitarian power.

***** Pursuant to Article 140 of the constitution, the Emergency Law (Article 139) of 7 March 1950 had to be presented to the House of Representatives without delay. However, there was no House of Representatives on 7 March 1950. By virtue of Article 111 of the constitution, elections were to be held within one year of the constitution coming into force. However, they were not held until 1955. What does this mean? First, that Sukarno used a power he did not have: an Emergency Law could only deal with an exhaustive range of subjects that were laid down in the Appendix to the Constitution. And none of those subjects concerned federal structures and procedures. Secondly, on March 7, 1950, Sukarno enacted the Emergency Law while there was no House of Representatives to approve or reject it. The UNCI could and should have intervened in a timely manner in that illegal process

of dismantling the federation with articles that should never have been included in the Constitution.

> 35. The Emergency Law of 7 March 1950 provided that the initiative to realize 'political reforms' could be taken by each state, by the Government of the Republic of the United States of Indonesia, or by a territory without the status of a state; such initiative should be approved by the population of the territory concerned, directly, through a plebiscite, or by a majority vote of a council of representatives specially elected for that purpose. However, a number of exceptions to the above principle were provided for and actually no * plebiscites were held. A 'political reform' might be (a) the liquidation of a state through the transfer of all authority and power directly to the Government of the Republic of the United States of Indonesia; (b) the liquidation of a state by incorporation into another state; (c) the fusion of several states into one; or (d) the partition of a state and incorporation into several other states.

* Sukarno promised in the Emergency Law to hold public consultations in accordance with Article 2 of the Transitional Agreement of 2 November 1949, enforced by the UNCI, but did not carry out that promise. Later, the absence of a plebiscite that should have preceded the proclamation of independence from the Moluccas was invoked – by Indonesia - as a defect in the legality of that proclamation. Again, the UNCI failed to raise the alarm.

> 36. The 'political reforms' started immediately with the promulgation of the Emergency Law and, on March 9, by decree of the Federal Government the territories of East Java, Central Java, Madura, Padang and Sabang were incorporated into the Republic of Indonesia. This process continued during March and April and by the beginning of May 1950, all states and territories, with the exception of East Sumatra and East Indonesia, had joined the Republic of the United States of Indonesia (acting also on behalf of East Sumatra and East Indonesia) and the Republic of Indonesia, which followed these developments, led to an agreement on 19 May concerning the establishment of a unitary state.
>
> 37. While not questioning that these reforms in the first place pertained to the Government of the Republic of the United States of Indonesia, the Netherlands High Commissioner, in a letter addressed to the Commission on 25 May (appendix III), expressed his Government's concern over safeguarding the right of self-determination as laid down in article 2 of the Agreement on Transitional Measures. The Netherlands Government asked how the right of self-determination could be carried into effect in a unitary State. In the view of the Netherlands Government, article 2 of the Agreement of Transitional Measures imposed on the United Nations Commission for Indonesia 'a task of its own in that the recommendations of holding a plebiscite under its supervision among the population of areas which in its opinion are qualified therefore must emanate from it.' The Netherlands Government indicated that the result of a possible plebiscite was less important than the safeguarding of the principle itself. *

* The Netherlands tried to intervene by drawing the attention of the UNCI to its own Article 2 of the Transitional Agreement of November 2, 1949. An attempt to make it clear to the UNCI of its task, duty and responsibility to intervene in the process of liquidation of the federation.

> 38. The Commission forwarded the High Commissioner's letter to the Indonesian Government on 3 June and expressed

confidence * that plans for the creation of a unitary State for the whole of Indonesia would not interfere in any way with the right of self-determination of the people or with the obligations of the Government under the terms of the Round Table Conference agreements (appendix IV).

* Instead of calling the Government of Indonesia to order under (a) applicable law (the federal Constitution, the Transition Agreement) and (b) its mandate to supervise the process of self-determination after the transfer of sovereignty, the UNCI falls back on diplomatic language by using the words 'expressed confidence' that the right to self-determination will also be respected within the envisaged unitary state. The fact that the UNCI considers it perfectly normal that there are 'plans for the creation of a unitary state for the whole of Indonesia' does not only come as no surprise to the UNCI, but she does not even go into it. The UNCI was a co-signatory of the agreements of the Round Table Conference of December 1949 and as such knew the purpose of signing these agreements was the creation of a definitive federal state. If, after a few weeks, not only informally, but also formally, the opposite was set in motion, all the alarm bells should have been set off at the UNCI, followed by reporting to the Security Council and intervention by the latter to stop this mistaken process and put it back on the path of federalisation.

39. In a letter addressed to the Commission on 8 June (appendix V) the Indonesian Prime Minister expressed the view that the right of self-determination of the peoples in Indonesia was to be guaranteed by establishing autonomous provinces or communities; he further stated that preparations were being made to hold general elections to a constituent as stipulated in the Provisional Constitution; the constituent assembly *, together with the government, would enact the final constitution 'displaying the real democratic ** features of the unitary State'.

* For the record, the Constituent Assembly, which should lay the foundations for the final federal constitution did not begin its work until 1955. At that time, the unitary state had already been in force for five years.

** To this day, the Moluccas are waiting for 'democratic features'.

40. Referring to the Prime Minister's letter, the Netherlands High Commissioner again raised the question of the Commission's responsibilities under article 2 of self-determination (appendix VI). With reference to the first question, the Netherlands Government maintained its view that the Commission's task with regard to the right of self-determination was not conditional upon the initiative of one or other of the parties; it also maintained that the Commission should have raised objections to 'a development which threatens to affect the very basis of the right of self-determination.' With regard to the second question the Netherlands Government expressed the opinion that the dissolution of the federale system in favor of a unitary state before the final constitution was promulgated was inconsistent with the provisions of the Agreement on Transitional Measures and precluded the exercise of the right of self-determination in conformity with article 2 of this agreement. The Netherlands Government, therefore, requested * clarification on the following three points: (a) the extent and character of autonomy to be given to provinces in the unitary state; (b) the right of autonomous provinces to decide whether or not to ratify the final constitution and to realize the right of 'external self-determination' in the sense of the paragraph 2 of article 2 of the Agreement on Transitional Measures; (c) the willingness of the

Indonesian Government to request the Commission to recommend territories in which plebiscites should be held.

* The Netherlands insisted on intervention by the UNCI. But because the UNCI had already opted for a detached position, the Netherlands essentially started a rear-guard fight, with no prospect of a political external right of self-determination for the Moluccas.

41. The Commission considered it necessary to state its position. In letters addressed to the parties on 24 June (appendix VII), it stressed that the obligation to implement the Round Table Conference agreements, including the Agreement on Transitional Measures, rested with the Governments of the Kingdom of the Netherlands, and of the Republic of the United States of Indonesia. Although the Commission, as an organ of the United Nations, had participated in the Round Table Conference and signed its covering resolution, it could not be considered a party to the Agreement. The responsibility ***** of the Commission as an international organ entrusted with the task of observing the agreements was necessarily secondary to that of the parties. Consequently, the Commission had regarded it as inappropriate to take action on the basis of the provision of the Round Table Conference agreements without having first been approached by at least one of the parties. Although under article 2 of the Agreement on Transitional Measures the Commission undoubtedly had the right to intervene in internal political developments in Indonesia if, in its view, circumstances made it necessary, this provision could hardly be construed as imposing on the Commission the obligation to do so, especially in the case of absence of any initiative by either of the parties or by the population of any territory.

* The UNCI withdrew even further from the dispute by explicitly stating that it saw no own responsibility to intervene and that the two parties, the Netherlands and Indonesia, had to fight it out for themselves.

42. In his reply, dated 29 June (appendix VIII) the Indonesian Prime Minister recognized that, in a unitary State, the Commission would maintain its power, under paragraph 1 of article 2 of the Agreement on Transitional Measures, to recommend plebiscites 'on the question whether a territory should have autonomous powers'. However, the right of self-determination as foreseen by paragraph 2 of article 2 of the Agreement on Transitional Measures would not, in the view of the Indonesian Government, be exercised before the final constitution was enacted by the Constituent Assembly. The question of the extent to which the provisions of paragraph 2 might be implemented was to be dealt with 'in the light of the new order of things which would exist after the promulgation of the final constitution'. In a letter addressed to the Netherlands High Commissioner on 29 June, the Indonesian Prime Minister reiterated his previous statements concerning the autonomy to be granted to regional units in the unitary State; he pointed out that in the opinion of his Government the preference for a unitary state expressed by the great majority of the population constituted in itself a de facto exercise of the right of self-determination *****. With regard to the third point raised by the Netherlands Government (para. 40), he stressed that the term 'recommendation' implied a non-binding character and stated that the Indonesian Government would be unable 'to consider any recommendation (for holding plebiscites) the implementation of which would conduce to chaos and therefor to jeopardizing Indonesia's own vital interests'.

* We see here a remarkable example of crookedness on the part of the Prime Minister of Indonesia. He says that the question of the external right to self-determination under the second paragraph of the UNCI Transfer Agreement of 2 November 1949 must – according to Prime Minister Hatta - be seen in the light of the new order after the final Constitution, an order which, as we know, was enforced by force and oppression. According to Prime Minister Hatta, the right to internal and external self-determination guaranteed in Article 2 was intended for the order of a federal state, not for a new order in the form of a unitary state. The UNCI let this reversal of legal reality pass. The UNCI then uncritically adopt Hatta's sentence: "he [Hatta] pointed out that in the opinion of his Government the preference for a unitary state expressed by the great majority of the population constituted in itself a de facto exercise of the right of self-determination". Aristotle, the founder of formal logic, would turn in his grave if he had to listen to this kind of nonsensical reasoning. Furthermore, Hatta argues that there is a popularly supported preference. Another lie: the consent of the people was enforced by emergency laws and the deployment of the army. To conclude with Hatta's absurd statement that the guaranteed plebiscites will not take place because they would lead to chaos, damaging the interests of Indonesia. It is incomprehensible that the UNCI passed on this exceptional nonsense uncritically to the Dutch delegation instead of putting the Security Council in the highest state of alert. Anyway, let's settle in: "Even though political nonsense is fast, science eventually catches up."

> 43. In a letter dated 15 July (appendix IX), the Netherlands Government, while agreeing with the Commission's viewpoint that the implementation of the Round Table agreements primarily concerned the parties, maintained its opinion that the observance of the implementation of the agreements might be considered an independent task and that, in particular, the provisions of article 2 of the Agreement on Transitional Measures not only granted the Commission rights, but also imposed on it an obligation to act for the realization of the right of self-determination. At the same time, in a letter addressed to the Indonesian Prime Minister, the Netherlands High Commissioner took note of the Indonesian Government's declaration concerning the autonomy to be granted to the provinces in the unitary State; however, he reserved the right of his Government to return to this matter on the basis of article 2 of the Agreement on Transitional Measures**.***

* This is when the Netherlands threw in the towel by no longer opposing the establishment of the unitary state[41]. With the

[41] The Dutch attitude towards the Moluccan right to self-determination is described in literature -for instance - as follows: "Though self-determination is obviously not seen as merely a political maxim, the claim made during the Round Table Conference that self-determination was an inherent right of peoples is far out of line with the general Dutch attitude towards self-determination during this period and for a long time afterwards. This attitude can be characterized as follows. Self-determination is a legal principle which all nations should apply in their policies (colonial or otherwise), but there is no remedy in international law which can hear the complaints of those who are denied that right. At least, that was the ultimate consequence of the Dutch assertion that any discussion by a UN body of such questions as to who was to get self-determination, on what conditions, and under what circumstances, was excluded by the domestic jurisdiction clauses of the Charter (or at best could take place only by courtesy of the Dutch Government). For the Dutch representatives in the Security Council these questions were, strictly speaking, not questions of international law at all."

reservation made - with reference to the right to self-determination pursuant to Article 2 of the Transition Agreement, which has already been mentioned many times - to return to it when the Netherlands would settle, the curtain fell for the Moluccas. From that moment on, the Netherlands focused on safeguarding its own interests within the Dutch-Indonesian Union, a subject that we will not discuss further in this study. The Security Council, too, resigned itself to this anti-constitutional course of events. Following a request from the UNCI to see again whether a diplomatic solution could be found, a debate on this subject in the Security Council, which had been on the agenda for 30 October 1950, was suspended by manipulations on the part of Indonesia and never resumed after that.

> 44. Meanwhile, the discussions between the Government of the Republic of the United States of Indonesia and the Government of the Republic of Indonesia initiated by the agreement of 19 May continued in Djakarta. At a joint session of the cabinets of the Republic of the United States of Indonesia and the Republic of Indonesia, held on 20 July, full agreement was reached on the formation of the unitary State. With regards to the new administrative division, it was decided that the State should consist of ten provinces ***** constituted as follows:
> (a) Java and Madura to be divided into the provinces of West Java, Central Java and East Java;
> (b) Sumatra to be divided into the provinces of North Sumatra, Central Sumatra and South Sumatra;
> (c) Borneo to form one province;
> (d) East Indonesia to be divided into the Lesser Sunda Islands, the Celebes and the Moluccas.

* With the structure of provinces within a unitary state, the right to external self-determination was abolished.

> 45. Immediately following the agreement, the legislative bodies began discussion on the draft bill revising the Provisional Constitution of the Republic of the United States of Indonesia in order to adapt it to the unitary structure. The Bill was signed by the President on 15 August and became the Provisional Constitution of the State. With regard to the administration and the autonomy of the provinces, the revised Provisional Constitution provided that the division of the territory of Indonesia into large and small autonomous territories and the organization of their administration should be determined by the law, taking into consideration the wish of the population, and that the territories should be given large measures of autonomy. Article 131 of the revised Provisional Constitution is attached as appendix X.

> 46. At a ceremony held on 15 August 1950 in the Indonesian House of Representatives, in the presence***** of the members of the diplomatic corps accredited in Djakarta and the members of the Commission, President Sukarno proclaimed the establishment of the Republic of Indonesia as a unitary State."

* As the saying goes, 'We rest our case', at least as far as the culpable unprofessional behaviour of the UNCI is concerned.

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See: H.F. van Panhuys e.a., International Law in the Netherlands, Volume Three, p. 169-170, T.M.C. Asser Institute, Sijthoff & Noordhoff 1980, Oceana Publications Inc. Dobbs Ferry, N.Y.

## 6.4 Indonesia becoming member of the United Nations

Just over a month after the establishment of the unitary state, Indonesia was accepted as the sixtieth member of the United Nations. This was done in two steps: first a decision of the Security Council, followed by a decision of the General Assembly of the United Nations.

### *6.4.1 The Security Council's decision to admit Indonesia to the United Nations*

Now follows the text of the Security Council's decision, based on brief and unanimous interventions by its members, to admit Indonesia to the United Nations.

> "Report of the Security Council to the General Assembly
> Covering the period from 16 July 1950 tot 15 July 1951
> Six Session, Supplement No. 2 (A/1873)
> New York 1951
>
> Part II
> Other Matters Considered By The Security Council And Its Subsidiary Organs
>
> Chapter 7
> Admission of the Republic of Indonesia to membership in the United Nations
>
> 747. By a letter dated 25 September 1950 (S?1809), addressed to the Secretary-General, Mr. L.N. Palar, Permanent observer of the Republic of Indonesia to the United Nations, applied on behalf of his Government, for admission to membership in the United Nations. A declaration of acceptance of obligations contained in the Charter was submitted with this letter.
>
> 748. The Security Council considered the application at its 503rd meeting (26 September 1950).
>
> 749. When the agenda for the meeting was being considered, the representative of India drew the Council's attention to the application. He believed that it was not likely to be opposed by any member of the Council and that, therefore, it was not necessary to refer it to the Committee on the Admission of New Members. The Council itself could take a final decision on the application, as had been done in the case of Pakistan on a previous occasion. As regards the merits of the present case, Indonesia had the largest Moslem population in the world and, in a sense, the State could be described as the child of the United Nations. He therefore proposed that the application be placed on the agenda and disposed of first." *****

* The representative of India circumvented the only security test that the Security Council could have used to examine whether Indonesia could legitimately and justifiably be admitted as a member of the United Nations. With the cooperation of the President, he overruled the Committee on the Admission of New Members. Through this Committee, the Netherlands, and also the Moluccas, could have declared that the unitary state established by Indonesia was based on abuse of rights, bad faith[42], lies,

[42] Panhuys e.a., ibid. p. 173: "….. the liquidation of the federal structure of the RUSI [Republic of the United States of Indonesia] was at best not in good faith. The Dutch Government, however, was of the opinion that both it and the South Moluccas lacked an effective legal remedy. The argument that the sovereignty

deception, military violence, sanctioned by a dysfunctional UNCI. Conduct that was in no way consistent with the purpose of the United Nations. Let alone that Indonesia could be seen as a peace-loving state.

> 750. The representative of China stated that nothing would have pleased him more than to have been in a position to welcome the Republic of Indonesia to the ranks of the United Nations. The record of the Council showed that, from the very beginning of the Indonesian question, his delegation had displayed the utmost sympathy for the people of Indonesia and had done its utmost to promote the independence of the Republic of Indonesia. For all those reasons, the developments in Indonesia were most welcome to China. Unfortunately, the Government of the Republic of Indonesia, two months ago, had recognized the Peking régime. Such a recognition must be regarded as premature and as displaying a lack of faith in the principles of international law. To his regret, his delegation would therefore abstain from voting on the application.
>
> 751. The representative of Yugoslavia stated that Indonesia, a mere geographical term only a few years ago, had now become an independent nation. That fact was one of the most striking examples of the political maturity of the peoples of Asia. It was with deep satisfaction that the Yugoslaviav delegation unreserved supported the application of the Republic of Indonesia for admission to the United Nations.

752. The representative of France declared that the French delegation would gladly support the application of the Republic of Indonesia. Its membership in the Organization would represent the natural culmination of an evolution in which the United Nations had played a preponderant part and would also be in harmony with the development of relations between France and Indonesia.

753. The representative of the Union of Soviet Socialist Republics supported the proposal to admit the Republic of Indonesia to membership in the United Nations. He would vote in favour of adoption by the Security Council of a suitable recommendation, in accordance with Article 4 of the Charter.

754. The representative of the United States of America stated that the application of the Republic of Indonesia for admission to membership in the United Nations marked a major success for the Security Council and for the community of nations. The question of Indonesia had been before the Council since August 1947. There had been times when the complications of the case and the hostilities involved had made the solution of the problem most serious and difficult. However, over and above the many difficulties there had prevailed the will of the parties, with the help of the United Nations, to settle the issues before then peacefully. His Government, which had watched with interest and attempted to assist in a creative way in the establishment of a new and independent Indonesian nation, had welcomed the formation of the voluntary Netherlands-Indonesian Union. The records showed that the Republic of Indonesia was a peace-loving State, able and willing to carry out the obligations of the

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transferred to Indonesia was 'mortgaged' by the duty to install a federal system, was rejected."

United Nations Charter. His Government would therefore vote in support of the application.

756. The President, speaking as the representative of the United Kingdom, warmly supported the application of the Republic of Indonesia for membership in the United Nations. He considered that the Republic fully met the requirements laid down in Article 4 of the Charter.

757. Speaking as the President, he presented the following proposal:
"The Security Council finds that the Republic of Indonesia is a peace-loving * State which fulfils the conditions laid down in Article 4 of the Charter, and therefore recommends to the General Assembly that the Republic of Indonesia be admitted to membership of the United Nations."

Decision: At the 503rd meeting on 26 September 1950, the Security Council adopted the above proposal by 10 votes in favour, with one abstention (China).

* How is it possible that everyone accepted indiscriminately the characterization of a 'peace-loving state' claimed by Indonesia itself? Perhaps the answer consists of several parts:

(a) First, the creation of the state of Indonesia was seen as the culmination of a successful process of post-war decolonization of a state with many millions of Muslims. After all, it was partly to that end – promoting decolonization - that the UN was founded.
(b) That decolonization process was led and guided by the UN itself. That is why the representative of India called it a 'child' of the UN.
(c) The UN was only five years old and had an interest in raking in as many members as possible. Indonesia entered as member 60. Now there are 193.
(d) The role America had assigned itself was also significant. Partly to fulfil its promise to support processes of decolonization after the war, partly to think along with the construction of a federal state, partly to prevent communism from gaining a foothold in Indonesia.
(e) It also played a part in the fact that people were fed up with the actions of the Netherlands between 1945 and 1950. It had lost its credibility. In the light of the UN interest to score internationally with yet another new member, a country with the largest Muslim population in the world, the request of the Netherlands to take the UN Charter seriously and to condemn the abuse of rights by Indonesia was of less importance.

*6.4.2 The decision of the General Assembly to admit Indonesia*

Two days later followed the decision of the General Assembly to admit Indonesia.

Resolution A/RES/491 (V) 1950 General Assembly UN
"Admission of the Republic of Indonesia to membership in the United Nations
The General Assembly
Noting the recommendation of the Security Council of 26 September 1950 that the Republic of Indonesia should be admitted to membership in the United Nations.
Noting also the declaration made by the representation of the Republic of Indonesia to the effect that it will accept the obligations contained in the Charter of the United Nations.

Admits the Republic of Indonesia to membership in the United Nations.
289th plenary meeting, 28 September 1950"

With that, the plea was settled. The Netherlands acquiesced and even reported - through the Minister of Foreign Affairs, Minister Luns - in the Dutch House of Representatives on 11 December 1959[43] that it would be 'impossible and undesirable' to bring the South Moluccan issue back to an international level. As a result, the Moluccan issue remains unresolved to this day. Despite the innumerable requests, petitions and visits to UN- bodies to address and resolve this issue as a matter of principle of indisputable international law.

[43] Dutch Second Chamber, 1952-1953, 11 December 1952.

## PART II THE LEGITIMATE WISH OF THE SOUTH MILKS TO REOPEN THE MOLUCCAN ISSUE

Part II contains in one chapter a detailed analysis of the legitimate wish of the Moluccan people to reopen the file and to restart the decision-making process from the constitutional situation at the end of December 1949.

# 7. ABUSE OF JUSTICE AS A REASON FOR REOPENING THE MOLUCCAN QUEST FOR JUSTICE

This chapter deals with the question: how should the behaviour of the Republic of Indonesia - in addition to the question of morality - be legally qualified? Which legal conceptual framework applies here?

## 7.1 The conduct of the leadership of the Republic of Indonesia in legal terms

Decision-making by governments must comply with inalienable principles such as, the sovereignty of a people, the right to self-determination, correct laws and treaties. Plus, the enforcement of compliance with all that. Anyone who denies this implies that representatives of governments can decide for themselves that they are above the law. However, the rule of law says: 'King, Emperor, Admiral, the law applies to all'.

This is also the vision of former UN Secretary-General Kofi Annan[44]:

> "The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

Now that populist/nationalist driven autocratic governance is on the rise in more and more countries in the world, it is recommended that former President Bill Clinton's statement be read: "It's the economy, stupid", for: "It's the rule of law, stupid." All those who are very concerned about the increase of attacks on democracy by people who first master the procedures of democracy and then destroy them, we advise to read this article: 'Democracy's night shall pass'.[45] Then they know they are not alone.

If the analysis of the law in question - as we explained in Chapter 5 - has made one thing clear, it is that President Sukarno has used Articles 118 ('The President is inviolable') and 130 ('Federal laws are inviolable'), plus a number of other articles, to place himself above the law. We are now going to explain the legal consequences of this.

The most important legal concepts that are relevant in this context are called:

[44] See the 'Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies', 13 August 2004, S/2004/616, p. 4.

[45] Matteo Laruffa, 'Democracy's night shall pass', https://aspeniaonline.it/democracys-night-shall-pass/.

- The inviolability of the Head of State (immunity in the sense of operating above the rule of law).

- Using a power for a purpose other than that for which it was granted (détournement de pouvoir).

- Abuse of power in the sense of assuming a power that one does not have (abus de pouvoir).

- Abuse of justice/rights in the sense of taking decisions using the preceding terms (abus de droit).

*7.1.1 Inviolability of the Head of State added to inviolability of federal laws*

It is incomprehensible that the Americans involved in this process have accepted Articles 118 and 130. Had they previously studied the Papers 65 and 66 of the American Federalist Papers (1787-1788), it is highly probable that they would have stopped this erroneous Constitution. The fact that the Head of State may never be above the law was one of the main reasons in 1776 to secede from England and his inviolable King. The 'framers' - being the members of the Philadelphia Convention who designed the world's first federal constitution in 1787 - adopted an impeachment article (American federal constitution, article II, 4) after thorough consideration in case a future President was guilty of 'Treason, Bribery, or other high Crimes and Misdemeanors'.

The 'framers' did not specify what was to be understood by 'Crimes and Misdemeanors' in this context. Analyses of the deliberations in the Convention of 1787 indicate the use of a so-called 'hen-dia-dys': one-by-two. This is a linguistic construction which expresses 1 thing by means of 2 elements. In the Dutch language this occurs in an expression such as: 'The ship has perished with man and mice'. That means completely gone. In the realm of politics, we have 'Committees for Advice and Assistance'. There is no such thing as a committee for advice versus a committee for assistance. The words Advice and Assistance together express one aspect: offering spiritual support.

For example, the two elements 'Crimes and Misdemeanors' together mean the worst thing one can accuse a President of, namely abuse of office/abuse of power, including violation of his constitutional oath. And that was amply the case. Every autocrat in the world would be glad to sacrifice his right arm to be constitutionally inviolable and - with the construction that laws may not be tested against the constitution - to be able to keep his laws out of the reach of judicial review against the constitution.

Aside we like to point out the following. The Constitution with which the President of Indonesia established the centralized unitary state in 1950 has the same inviolability, extended with that of the Vice-President. Article 83 (1) reads: "The President and the Vice-President are inviolable". Article 103 of the 1950 Constitution contains another fundamental flaw: "Any intervention in judicial matters by other than judicial organs is prohibited, except when authorized by law." The text before the comma is correct constitutional law. The phrase behind the comma is not. Because the President and Vice-President are inviolable, they can intervene

in judicial matters by law. That is the means of power of a dictator, a constitutional 'mortal' sin.

*7.1.2 Use of a power for a purpose other than that for which it was granted*

The delegation of the Republic of Indonesia, together with the Federal Consultation Meeting, finalized on 29 October 1949 in Scheveningen the text of the federal Constitution that was accepted on 27 December 1949 as the basis for the transfer of sovereignty to Indonesia. In view of the way in which the powers from the federal Constitution were used to liquidate the federation in favour of the establishment of the unitary state, the question must be asked: were the erroneous articles of the Constitution discussed in Chapter 5 deliberately introduced as a means to pave the way for the establishment of the unitary state through the liquidation of the federation?

The literature studied does not answer this question. And those involved have since died. We are therefore unable to determine whether the articles used to dismantle the federation were deliberately and intentionally incorporated into the Constitution in advance. But once they were in it and obtained the force of law when sovereignty was transferred on 27 December 1949, they were then deliberately used to achieve a different purpose (i.e. the unitary state) than that for which the Constitution was designed (i.e. the definitive federal state). This is détournement de pouvoir.

*7.1.3 Abuse of power in the sense of assuming a power that one does not have*

The détournement de pouvoir carried out was supported by using the Emergency Act to dismantle already formed federal structures and procedures (see section 4.2). Its promulgation was based on a power that the President did not have. It was therefore an abuse of power. And it then gave room to the use of military force, the dismantling of the police organisation in the territories that were annexed, the deprivation of civil liberties and the renunciation of the constitutionally prescribed referendums.

*7.1.4 Abuse of justice/rights*

All this together was instrumental to the abuse of justice/rights committed. This could have happened due to the lack of articles in the federal Constitution that should have prevented this abuse. In short, there were no articles on checks and balances, the necessary constitutional defence mechanism to prevent one of the three powers of government (trias politica: legislative, executive and judiciary) from taking control of the other.

The federal Constitution of 27 December 1949 would not exist by today's standards of correct constitutional federal law.[46] Once again: it is so wrongly composed that a leader who wanted to

[46] Nevertheless, in 2019 there is a clear trend towards autocratic governance in an increasing number of countries. Democracies are under threat. There is an urgent need to build defence mechanisms into the constitutional and institutional components of democracies. See Matteo Laruffa, The institutional defences of democracy, in: "Democrazia e Diritto" 2/2018, FrancoAngeli Ed., pp. 29-47, DOI:10.3280/DED2018-002002.

establish autocracy could draw the absolute power to himself by the combination of:

(a) being inviolable himself, and being able to rule with inviolable federal laws;
(b) the unauthorized promulgation of an Emergency Law outside the control of the House of Representatives and out of the control of the Judiciary;
(c) applicable throughout the territory of the Federation and to all political subdivisions thereof;
(d) to enforce it through using the armed forces;
(e) with the elimination of the states' own army and police organisation;
(f) to suspend civil liberties;
(g) as a result of the absence of fundamental articles which could and should have prevented this;
(h) which was wrongly not noticed by the parties who should have raised the alarm, including the UNCI.

Therefore, the Provisional Federal Constitution was a product of failing constitutional law because it opened the door wide to serious abuse by a totalitarian regime. The system of checks and balances, with which the three powers of government are to be kept apart, was lacking in the federal Constitution. This absence of checks and balances allowed for a special form of violation of the rule of law, the principle that no one should be above the law. But the government - read: the President - was the law. He was the sovereign. He could claim powers with impunity that did not belong to him. He could use articles of the Constitution at will for any purpose other than that for which they were designed. And because he exercised that sovereignty in the period from 27 December 1949 to 28 September 1950 - the period when Indonesia was not yet a member of the United Nations and therefore not yet subject to the provisions of the UN Charter - he was legally invulnerable. Untouchable, in the sense of Hobbes' Leviathan. More about that in Chapter 8.

Because the erroneous nature of the Constitution had not been thoroughly studied when Indonesia joined the United Nations in September 1950 - barely a month after the unlawful establishment of the unitary state - it was not possible later to address the leader of Indonesia on the execution of the Moluccan resistance leader Dr. Chris Soumokil on 12 April 1966.

For the record, we add that many years after the transfer of sovereignty, a Committee of the Dutch House of Representatives has sent a letter to the Indonesian Vice Prime Minister dated 27 February 1978, the result of a detailed account of the discussions on the self-determination of the South Moluccas that had taken place in the context of the RTC in November 1949. The Constitution is mentioned, but also in 1978 the completely wrong quality of that Constitution is not discussed. A sign of a lack of knowledge in Dutch politics in the field of federal state organisation.

The Universal Declaration of Human Rights (1948) does not prohibit the death penalty, because some countries (that do recognise the Universal Declaration) do not accept any restrictions in that respect. Partly because of this, the Universal Declaration is not a binding right (ius cogens). As general moral standards, the Declaration only functions for those who recognize these

standards. That is why Indonesia - contrary to the fundamental prohibitions, commandments and principles of the entire treaty system of the United Nations - can continue with repression and exploitation on its territory - also outside the South Moluccas. Because the Moluccas are a people - and not 'de iure' a state - they cannot invoke Article 2(4) of the United Nations Charter, which prohibits threatening and attacking the territorial integrity and political independence of one state by another. Nor can they invoke Article 51 of the Charter, which gives a State under attack from another State the right to self-defence[47]. Another appeal that might be successful will follow.

### 7.2 What does the international legal order determine about abuse of justice/rights?

In the academic literature, the concepts 'détournement de pouvoir', 'abus de pouvoir' and 'abus de droit' are generally referred to together as one concept of 'abuse of justice/rights'. That is why in this report we now only talk about abuse of justice/rights. This is difficult to prove, by the way, because the person who is attacked on it has the law on his side and substantiates his own right with various interpretations of the law. The doctrine of 'abuse of justice/rights' implies that a right may not be exercised if it is actually abused. This is amply the case in the Moluccan case.

When we talk about the question of what the international legal order thinks of abuse of justice/rights, this does not mean that we can only fall back on principles developed in the course of the 20th century. Already in Roman times the principle 'Ex iniuria ius non oritur' applied. This means: 'From injustice comes no right'. So, a state that is guilty of unlawfulness conduct cannot claim that the legislation it makes afterwards is lawful. In addition, the Romans knew the pronunciation: 'Ex factis ius oritor'. That means: 'It is facts that create law'. Or: 'Law arises from facts'. In Chapter 15 where we formulate the Requisitory – being the foundation of our formal Complaint against Indonesia (Chapter 16) - these concepts come back again.

We first look at provisions of international law that prohibit abuse of justice/rights. With the preliminary remark that the Charter of the United Nations (1945) does not contain a provision on abuse of justice/rights. We do find these in other international documents.

The European Convention on Human Rights and Fundamental Freedoms (1950) states:

> "Article 17 - Prohibition of abuse of rights
> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms set forth herein or at their limitation to a greater extent than is provided for herein.

The Charter of Fundamental Rights of the European Union states:

[47] For the doctrine of 'Self-Defence' , see the Handbook of International Law, ibid., Chapter 12 by Willem van Genugten, Fred Grünfeld and Dick Leurdijk, p. 387-390.

"Article 54 - Prohibition of abuse of rights
Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for in this Charter'.

The Universal Declaration of Human Rights (1948) states:

"Article 30 - Prohibition of abuse of rights
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act at the destruction of any of the rights and freedoms set forth herein".

Quoting these examples of a ban on abuse of rights is only intended to indicate that it has a place as such in international law. It is unfortunate that the United Nations Charter does not have such a prohibition. It is also unfortunate that the Universal Declaration of Human Rights is not a binding treaty. It is a non-binding resolution of the UN General Assembly, and therefore only an agreement to which countries conform, as long as it does not hinder them.

### 7.3 What can the Moluccas do against abuse of rights?

The fact that abuse of justice/rights exists in the international legal order raises the question: how can a people put an end to such abuse? To answer this question, a different level of abstraction is required: it is a dispute. And in order to put an end to a dispute, international law has two different paths:

- A legal way. This is, of course a natural aspect of this case. To embark on the legal way, one must go to a judge.

- A political way. This is the case, for example, when it comes to a desired change in the constitutional status quo. This includes the fact that the Moluccas wish to occupy a different political position in the world. So that path, too, is obvious. Seeking a political solution is a form of peaceful change and falls under the category of 'non-judicial' disputes.[48]

In practice, these kinds of legal disputes usually turn out to have a political connotation. As a result, the resolution of the dispute is usually guided by political means. The emphasis here is on the peaceful settlement of a dispute. Either by coming to an agreement among themselves, or by requesting a binding decision from a third party. The relevant procedures are set out in Chapter VI of the Charter of the United Nations (Articles 33-38).

The major problem, however, is that an attempt to obtain justice based on a treaty litigation procedure is always under political pressure. In the words of Lea Ypi [49]: "Law (-) depends on politics."

[48] Arthur Eyffinger & Pieter Kooijmans, Handbook of International Law, T.M.C. Asser Institute, 2007, Part 11.

[49] Lea Ypi, 'Why the right's new strongmen are winning everywhere' in: The Guardian, 16 March 2020.

Politicians determine who has access to rights and under what conditions. In this case, it is not an independent judge, but politicians, or specially appointed experts, who make a judgment in which the accusing party does not know what political negotiations are taking place behind the scenes. And most of the time they cannot influence them either. To fight a political battle with legal means is an uphill fight.

In view of the fact that the Moluccan issue has been accompanied by violent action on the part of oppressive Indonesia from 1950 to the present day, it cannot be ruled out that this violence will continue if a peaceful settlement cannot be achieved by means of political bargaining in favour of Indonesia. Only if this violence by Indonesia is brought to the attention of the international community can the Security Council consider taking measures under Chapter VII of the UN Charter. For example, by using a UN peacekeeping force (United Nations Peacemaking Forces) to prevent or minimise the armed conflict between parties. Sections 7.4 and 7.5 elaborate on the possibilities and impossibilities under treaty law.

Reality dictates that it must be assumed that Indonesia will use new violence if the Moluccas accuse Indonesia of abuse of injustice/rights. With repetition of their mantras:
(a) that it is a peace-loving state;
(b) that the liquidation of the federation and the establishment of the unitary state has been done in accordance with the articles of the constitution;
(c) that it had the consent of the people;
(d) that it has economically developed the Moluccas;
(e) and that the Moluccas (as well as the Papuas) who wish to gain their sovereignty should be seen as extremist separatists; a claim which the General Assembly of the UN still accepts.

it is obvious that Indonesia, in the possession of absolute power, will once again deploy the army to suppress resistance on the territory of the Moluccas.

For this reason, the Moluccas will benefit little from reference to the so-called 'Manila Declaration on Peaceful Settlement of International Disputes' accepted by the United Nations on 15 November 1982. This Declaration requires the peaceful settlement[50] of a dispute through negotiations conducted in good faith. And that will not be the case. From the outset, the Moluccan issue has been based on bad faith on the part of Indonesia. In international law, it is therefore assumed that in the event of a dispute involving a significant imbalance of power on the part of one of the two parties, a legal solution is preferable to a political solution.

[50] For the doctrine of peaceful dispute resolution, see the Handbook of International Law, ibid., Chapter 11, Peaceful Dispute Resolution by Arthur Eyffinger and Pieter Kooijmans, p. 347.

The question now is: how can the Moluccas acquire a legal solution that is 'just and therefore in that sense equitable' for both parties? We now outline some legal routes.

## 7.4 Courts that are not possible

*7.4.1 An appeal to the International Criminal Court in The Hague cannot be made*
The International Criminal Court was established by the Treaty of Rome in 1998. Of the 193 Member States of the UN, 124 have ratified it. China and India are opposed in principle. America, Russia and Israel belong to a group of countries that have signed but not ratified it. Russia withdrew its signature in November 2006. It is an indication of the relative weakness of the Criminal Court.

Indonesia is not a member of that treaty. It therefore does not offer the South Moluccas justice. Not only because Indonesia has not recognised the Criminal Court, but also because this Court is intended to try individuals suspected of human rights violations. Moreover, it is stipulated that the jurisdiction of the Criminal Court applies to crimes committed after the treaty went into on 1 July 2002 and - if a State has acceded after that date - from that date. The South Moluccas could only apply this judicial process if Indonesia recognises this Court, and then only for individual human rights violations committed after the date of accession to the treaty which is the basis of the International Criminal Court.

*7.4.2 An appeal to the International Court of Justice in The Hague cannot be made*
The International Court of Justice of fifteen members is the principal legal organ of the United Nations and, under Article 93, an integral part of the UN Charter. Parties which at the time of settlement of the dispute do not have a judge of their own in the Court may designate an ad hoc judge. This judge does not represent the interests of that designating party and, in addition to the permanent fifteen judges, he is independent like the other fifteen. If the South Moluccas were allowed to bring a case against Indonesia before the International Court of Justice, the two warring parties would undoubtedly each appoint an ad hoc judge.

But there is an insurmountable problem. The International Court of Justice deals with State-to-State disputes. The South Moluccas are not a state. At least not under international law. They are a people who would like to establish their own state. Even though the South Moluccas proclaimed their own independence on 25 August 1950 (exactly as Indonesia did in 1945), created a parliament on the basis of their own constitution and a government in exile in the Netherlands, it is not an independent state that can institute proceedings against another state within the procedural law of the International Court of Justice.

Note: It is possible that this raises the question of why the International Court of Justice in The Hague declared the Rohingyas admissible in January 2020. After all, the Rohingyas are also a people, not a state. The explanation is as follows. On behalf of the Organization of Islamic States, a group of fifty-seven countries, the African state of Gambia has brought the case

before the International Court of Justice. An indictment for genocide. In this way it became a state-versus state procedure and thus admissible before the Court.

Article 93(2) of the UN Charter does not help here either. It does, however, provide that a State that is not a Member State of the Charter may, under circumstances, be admitted to litigation before the International Court of Justice. However, as long as the South Moluccas are not a state, this cannot be invoked.

An additional problem is the fact that the International Court of Justice cannot just put a dispute on the agenda. It is an imperative condition that in any case submitted to the Court, the parties first, i.e. as States, accept the jurisdiction of the Court for that particular dispute. For example, by concluding an agreement together and then forwarding it to the Court. In essence, this means that there is no mandatory jurisdiction in the context of the International Court of Justice. In other words, the Court of Justice is not obliged to take action as soon as a dispute is submitted for trial. That Indonesia will not accept the jurisdiction of the Court in this specific case is obvious, apart from the fact that the Moluccas are not a state.

A further problem is the possibility that - if it were to come to a case before the Court at all - a third country might be able to intervene as an interested party in that dispute if that country considers that its interests would be adversely affected by that dispute. If the Netherlands suspects that its political-economic interests with Indonesia could be harmed by the reopening of this dispute, it may therefore join as a third party in order to safeguard its own interests as best as possible (Article 62 ICJ Statute).

## 7.5 A course of justice that is possible

*7.5.1 The International Covenant on Civil and Political Rights (ICCPR)*

The International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966 provides justice for peoples who do not have the status of State. But there are some problems with it.

To put it very briefly: strictly speaking, this treaty does not actually offer access to a complaint about the violation of the civil and political rights of the Moluccan people, which has been going on for seventy years. But materially this is the treaty where the people must obtain their rights. And that can be done by taking a detour.

Before we discuss this in more detail in paragraph 7.5.3, we will first quote the literal text of its Preamble, of Article 1 and section 1 of Article 2. The full text of this treaty can be found in the Appendices, which can be consulted online. Two preliminary remarks.

<u>The importance of Preambles</u>

Usually little attention is paid to Preambles of laws or treaties. That is a mistake. Preambles formulate the values to be protected by standards. Values are goals. Standards (= articles) are the means by which legislators aim to achieve these goals. If a party feels damaged by the lack of norms, or by norms that are insufficiently

clear, then such a party can always appeal to the value-driven Preambles and invite the legislator concerned to express the following normative system of articles in the form of other and better articles in the spirit of the Preambles.

Prohibition of abuse of rights also in the ICCPR
In paragraph 7.2 we quoted articles from some treaties prohibiting abuse of rights. The International Covenant on Civil and Political Rights also has such a provision;

> Article 5
> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
> (-).

We will come back to this in section 7.5.5.

*7.5.2 The Preamble and Articles 1 and 2 of the ICCPR* [51]
Now follow the Preamble, Article 1 and paragraph 1 of Article 2 of the ICCPR. We have deliberately chosen not to refer to appendices for this type of text because their essential meaning would probably not be studied with enough attention.

Take a close look at Article 1(1). It is strengthening Article 73b of the UN Charter that gives 'Non-Self-Governing Territories' the right to self-determination.

> Preamble
>
> The States Parties to the present Covenant,
>
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person,
>
> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,
>
> Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

[51] International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49.

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I
Article 1

1. All 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.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II
Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. (-).

*7.5.3 The Convention's half-jurisdictional procedure for nations that do not have the status of States*

Contrary to the case of proceedings through the International Court of Justice, which explicitly concerns disputes between States, the State-versus-State condition is not included in the ICCPR Convention. In the official ICCPR website the following is stated, see our [LK&PH] underlining:

> Who can complain?
> Anyone can lodge a complaint with a Committee against a State:
> - That is party to the treaty in question (through ratification or accession) providing for the rights which have allegedly been violated;
> - That accepted the Committee's competence to examine individual complaints, either through ratification or accession to an Optional Protocol (in the case of ICCPR, CEDAW, CRPD, ICESCR and CRC) or by making a declaration to that effect under a specific article of the Convention (in the case of CERD, CAT, CED and CMW).
>
> Complaints may also be brought by third parties on behalf of individuals, provided they have given their written consent (without requirement as to its specific form). In certain cases, a third party may bring a case without such consent, for example, where a person is in prison without access to the outside world or is a victim of an enforced disappearance. In such cases, the author of the complaint should state clearly why such consent cannot be provided.

For the status of the Moluccan people this means:

(a) Anyone can lodge a complaint with the Human Rights Committee responsible for the application of the ICCPR Convention.
(b) But that complaint is only admissible if the state against which the complaint is made has ratified that convention. Well, that is the case. Indonesia ratified the 1966 treaty in 2006. So that would legitimize filing a complaint with the Human Rights Committee.
(c) However, Indonesia has not ratified the 'Optional Protocol'. And in doing so, it is blocking legal proceedings to that Committee.

A state that ratifies the 'Optional Protocol' [52] gives the Human Rights Committee the right "to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant". Indonesia doesn't allow that. As a result, no one can lay claim in a formal sense to the application of the law that, in a material sense, belongs to the Moluccan people.

One can understand that complicated political relations since the establishment of the United Nations in 1945 have led to peculiar legal constructions in the various UN treaties. But the combination of principles of legal discipline with those of systems theory leads to the conclusion that we have here a systemic error. With its membership of both the Charter of the United Nations and the Covenant (ICCPR Treaty) under discussion here, Indonesia has received powers - for example the right to vote in the General Assembly - without being held accountable for the use of those powers. Indonesia states that it respects this treaty but does not have to account (through non-ratification of the Protocol) for the fact that it continuously violates this treaty.

An analogy that is known from the struggle for freedom of the thirteen American colonies around 1776 arises here. The increasing tax burden from England - imposed by the King and his Parliament in which the colonies were not represented - led them to the statement: 'No taxation without representation'. In the Moluccan case - and for every nation that fights for its sovereign freedom - the ruling applies: 'No powers without accountability'.

Even if one can understand that the United Nations tries to do as much justice as possible, one should not accept systemic mistakes. Giving powers to governments who are not accountable for their decisions and actions is a typical systemic error of treaty-based institutions. Like the United Nations with the Charter and the European Union with the Lisbon Treaty. This is the basis of what is called the 'democratic deficit' of the UN and the EU.

[52] This Optional Protocol can be studied online in the Appendices. See the document Human Rights Bodies - Complaints Procedures page 29.

*7.5.4 The full course of justice through the Special Procedure of the Human Rights Council*

Of course, the regulators within the United Nations have also understood that an oppressed and exploited people are lawless if the state to which it opposes ratifies the Convention but not the Protocol at the same time. That is why a detour has been created, which does provide formal access to deposit a complaint in the right place. This is the 'Special Procedure of the Human Rights Council' [53], mentioned in the document Human Rights Bodies-Complaints Procedures as follows:

> "There are also procedures for complaints which fall outside of the treaty body system - through the Special Procedures of the Human Rights Council and the Human Rights Council Complaint Procedure."

And that is the detour for the Moluccan people to be formally declared admissible by the Human Rights Council.

Note: the Covenant (ICCPR) is monitored by the Human Rights Committee of eighteen persons. The Special Procedure is in the hands of the Human Rights Council of forty-seven members. Members of the Council are required to serve a three-year term, renewable once. In the period 2006-2019 Indonesia was not a member of this Human Rights Council. A complaint to this Council is handled by rapporteurs or experts with a very broad mandate.

Some important aspects of this special procedure should be mentioned here.

1. In addition to violations of human rights in other areas, the 'Special Procedure' includes violations of civil and political rights. This will legitimise the rapporteur/expert/working group of five persons who are to investigate the Moluccan complaint in order to take the 'Covenant on Civil and Political Rights' (ICCPR) as the material basis for that investigation. In short, a two-track approach: an investigation into the violation of human rights (civil) and into the abuse of the law with the political aim of liquidating the federation (political).

2. The state against which the complaint is made is obliged to cooperate, under strict supervision that that state does not retaliate against those who have made the complaint. Let us hope that the value of this treaty provision does not have to be tested. Just to be on the safe side, we informed the Dutch Police and Intelligence Service that we, as Federalism for Peace Foundation, presented this report to the Human Rights Council on 12 April 2020.

3. The investigators are independent experts, not Council staff, and work under the supervision of the High Commissioner for Human Rights.

[53] These 'Special Procedures of the Human Rights Council' can be examined together with the associated complaints procedure - the Human Rights Council Complaint Procedure - in the Appendices that can be viewed online. In both documents we [LK&PH] have printed important words in bold.

4. There are 44 thematic and 12 country mandates. As Indonesia commits a wide range of violations, several of these 44 thematic mandates apply. Their task is “seeking information about legal, policy or structural developments, submitting observations, or following-up on recommendations”. Well, this report gives them abundant information on these three topics.

5. The investigators will visit the accused country and report to the Human Rights Council.

More specifically, the following aspects are important in the Human Rights Council Complaint Procedure:

6. The complaint procedure concerns “violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances”. Well, the investigators find in the Moluccan issue all kinds of violations that this sentence refers to.

A Complaint can be made "by individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations”. The latter aspect is what our Federalism for Peace Foundation provides, as an instrument to strengthen peacemaking, peacekeeping and peacebuilding:

7. The right, as an NGO, to submit the Complaint (see Chapter 15 and 16) to the Human Rights Council in accordance with the official Complaint Procedure.

8. The Complaint should not be “manifestly politically motivated”, although it is not clear on the basis of which criteria one would decide to reject a complaint against human rights violations on the grounds that they are “manifestly politically motivated”. By their very nature, such complaints always contain negative connotations of the political authority of the state that commits or permits the violations.

9. The complaint must contain a “factual description of the alleged violations, including the rights which are alleged to be violated”. It won't be difficult in single cases. In our case it concerns seventy years of violations, some of which have been summarised in lists, some of which have not. The Appendices that can be studied online contain two such lists by D. Sahalessy. We also show reports from Amnesty International and Human Rights Watch. As well as an extensive list of violations, included in the book ‘The South Moluccan Republic. Sketch for a description of the latest history of the South Moluccan people’ by Bung Penonton.

10. A particular aspect that could have been a major obstacle to being declared admissible by the Human Rights Council is the requirement in United Nations treaty law that a complainant must first have exhausted all national remedies before being granted access to the Human Rights Council. However, a hardship clause has also been devised for this obstacle. The text reads as follows: “A complainant is only 'admissible if domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged”. This so-called 'hardship clause' opens the way to

the Human Rights Council, because it is obvious that someone who wants to sue Indonesia via Indonesia's national legal remedies will immediately disappear into prison. Or even worse, is murdered.

11. At the end of this special procedure, we pay attention to the Human Rights Complaint Procedure Form. This form is also included in the online Appendix Special Procedures of the Human Rights Council. The following aspects deserve attention here:

12. The Complaint must not exceed eight pages. However, we have a report of more than 200 pages. How do we solve this? Well, as follows:
    (a) At the end of our report, Chapter 15 contains a detailed Requisitory. It covers more than eight pages. Therefore, in order to obtain formal access to the Human Rights Council, we draft a Complaint of less than eight pages, with reference to the more extensive and specified facts in Chapter 15, and with reference to the overall report which contains the facts, arguments and analyses in support of the Requisitory.
    (b) Section III of the form requires "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances". Reference is made to the report as an annex to the complaint.

*7.5.5 Indonesia previously reviewed by the Committee on Human Rights* [54]

The Human Rights Committee, in charge of the application of the 'International Covenant on Civil and Political Rights' (ICCPR), has reviewed Indonesia's conduct once. We outline this because it offers interesting information for a rapporteur/expert/working group – investigating the complaint of this report on the Moluccan case - under the Human Rights Council.

As already mentioned, with the establishment of the centralized unitary state in August 1950, a new Constitution of the Republic of Indonesia immediately came into force. It makes no reference to the self-determination of peoples within the territory of the Republic. That Constitution was subsequently amended several times, but the 2002 version currently in force does not provide for the right to self-determination either. We will now discuss this in more detail. Both constitutions are included in the Appendices, which can be studied online.

Pursuant to Article 28 of the ICCPR the Human Rights Committee, charged with supervising and implementing the ICCPR Covenant, operates on the basis of Article 40 of the Covenant. That Article provides that a State becoming party to the ICCPR Covenant

[54] The United Nations Human Rights Committee consists of 18 people, not to be confused with the United Nations Human Rights Council of 47 people we dealt with in paragraph 7.5.4.

must, within one year of the entry into force of the Covenant for that State, submit to the Committee a report on the measures taken by that State in the preceding year to improve the rights recognised in the Covenant.[55] This report shall be submitted to the Committee whenever the Committee so requests. In fact, the reports are first sent to the UN Secretary-General, who then forwards them to the Committee. The Committee then examines such a report and responds to it with concrete recommendations for taking additional measures to improve the rights of the people in question.

Although Indonesia is a member of this 'International Covenant on Civil and Political Rights' as early as 23 May 2006, it only submitted its first report under Article 40 of the Covenant to the Committee on 19 January 2012. So not after one year in 2007, but only after six years in 2012. This is indicative of the relative weakness [56] of this part of the United Nations system as well: the Human Rights Committee has no power to force a member state to comply fully with the provisions of the Covenant. The report of Indonesia of 19 January 2012 (under the code CCPR/C/IDN/1) is included in full in the Appendices to this study, which can be studied online.

Immediately at the beginning of that report Indonesia puts an end to the idea of self-determination. Because of the Moluccan importance, we again quote the literal text so that the reader can estimate the quality of Indonesia's line of reasoning. After an Introduction to a paragraph Indonesia writes (look especially at paragraph 3):

> "I Introduction
> 1. (-)
>
> II. Implementation of Specific Provisions of the Covenant
>
> Article 1
>
> Self-determination
>
> 2. The Preamble of 1945 Indonesian Constitution affirms '... that independence is the inalienable right of all nations' and '… that the people of Indonesia hereby declare their independence ...'. This implies that Indonesian independence is a political manifestation of the right to self-determination.
> 3. Furthermore, with reference to the declaration in Article 1 of the International Covenant on Civil and Political Rights (ICCPR), Indonesia considers that the term, "right to self-determination" appearing in this article does not apply to a section of people of a sovereign independent state and cannot be construed as authorizing or encouraging any action which would

[55] The reporting procedure is included as an Appendix that can be studied online.

[56] The weakness of this treaty can also be deduced from the reserved attitude of the United States towards this International Covenant on Civil and Political Rights. See Willem van Genugten: 'The United States' Reservations to the ICCPR; International Law versus God's Own Constitution', in: The Role of the Nation-State in the 21st Century. Human Rights, International Organizations and Foreign Policy. Essays in Honour of Peter Baehr, (ed.) Monique Castermans-Holleman, Fried van Hoof & Jacqueline Smith, Kluwer Law International.

dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and independent state.
4. (-).”

Although Indonesia has been a member of this ICCPR-treaty since 2006, it states without any shame (see the Preamble and Articles 1 and 2 of that Constitution in section 7.5.2) that Article 1, paragraph 3 of the treaty on the right of self-determination of peoples in Indonesia does not apply. On its own authority, it does not recognize this first article of the treaty and thus continues the line it has taken since 1945. Not only in the Indonesian Constitution of 1945, but also in that of 1950 when the unitary state was established, and in the later version of 2002, the right of self-determination for peoples is not included.

The Committee on Human Rights responds to Indonesia's first report with several concrete recommendations, but does not say a word about:

(a) the fact that Indonesia, as a Member State, does not recognise Article 1 of the Convention, and
(b) that it is also committing an abuse of rights as a result of violation of Article 5, paragraph 1 of the Covenant, the article which we already quoted in paragraph 7.5.1 and which does not allow the use of provisions of the Covenant (i.e. by not recognising a provision in this respect) to destroy rights and freedoms granted by the Covenant. The Committee's concrete recommendations (CCPR/C/IDN/CO/1) are included in the Appendices to our report, which can be studied online.

**In short: an UN-member state ratifies an UN-covenant that enshrines the right to self-determination in Article 1, makes it clear that it does not recognise Article 1 and is not held accountable by the Committee, or by another UN-body. Anyone who understands or condones this may contact us for a lesson in basic constitutional law.**
**The centuries-old principle 'pacta servanda sunt' (treaties must be observed) also applies to Indonesia and also to the United Nations, which is responsible for monitoring compliance with its own treaties. And when a treaty is not complied with by a member state, sanctions should be imposed. For example, application of Article 5 of the Charter: suspension; or Article 6: expulsion.**

Incidentally, the fact that the Committee on Human Rights ignores Indonesia’s violation of the Covenant (not recognising Article 1) does not mean that it suffices with insignificant recommendations. It looks closely at a large number of concrete violations of human rights in Indonesia and recommends that Indonesia take action in this respect. With the request to prove in a subsequent report before 12 July 2017 that it has implemented the recommendations into measures to improve human rights in Indonesia. As far as is known, Indonesia has so far failed to comply with this request to report again before July 2017.

To remind the Committee on Human Rights of its task and mandate, the following section shows how Indonesia is violating the human rights enshrined in its own constitution of 2002.

**7.6 The violation of constitutionally guaranteed human rights**
See the table below. The left-hand column contains the articles on human rights of the Indonesian Constitution of 2002. The right column contains some concise quotes from two Amnesty International annual reports on human rights violations by Indonesia against peoples on its territory. The quoted Annual Reports of Amnesty International can be consulted on the Internet. The Constitution 2002 is included in full in the Appendices, which can be consulted online.

We limit ourselves in the right column to a few quotes from the AI-Annual Reports 2000 and 2017/2018. They are exemplary of Indonesia's incessant violation of human rights, and thus contrary to the essence of the treaties under the aegis of the United Nations, more specifically the violation of its International Covenant on Civil and Political Rights (ICCPR). None of Amnesty International's annual reports lacks a comprehensive account of the way in which Indonesia violates human rights. Literature, unlike that of Amnesty International, on the continuation of violations is too extensive to mention here.

| Articles human rights in Constitution Indonesia 2002 | Quotations from Amnesty International's annual reports 2000 and 2017/2018 |
|---|---|
| **Chapter X A Human Rights**<br><br>**Article 28**<br>The freedom to associate and to assemble, to express written and oral opinions, etc., is regulated by law.<br><br>**Article 28A**<br>Every person has the right to live and to defend his/her life and existence.<br><br>**Article 28B**<br>(1) Every person has the right to establish a family and to procreate based upon lawful marriage.<br>(2) Every child has the right to live, to grow and to develop, and has the right to protection from violence and discrimination.<br><br>**Article 28C**<br>(1) Every person has the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture, for the purpose of improving the quality of his/her life and for the welfare of the human race.<br>(2) Every person has the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state. | **Annual report 2000**<br><br>**Killings and violence by the security forces**<br>Hundreds of people were killed in the context of counter-insurgency operations, communal violence and political protest. Counter-insurgency operations in Aceh against the armed opposition group the Free Aceh Movement intensified as demands for independence in the area increased and resulted in scores of extrajudicial executions. The Free Aceh Movement was also responsible for human rights abuses including arbitrary killings.<br><br>On 3 February at least seven people were shot dead when members of the TNI opened fire on a procession in Idi Cut, East Aceh.<br><br>On 3 May, at least 38 people, including at least six children, were shot dead by the TNI in Dewantara Sub district, North Aceh District, as they took part in a demonstration against military Violence in a neighbouring village.<br><br>On 23 July, at least 45 people were extrajudicially executed at a religious school In Beutong Sub-district, West Aceh. |

**Article 28D**
(1) Every person has the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.
(2) Every person has the right to work and to receive fair and proper remuneration and treatment in employment.
(3) Every citizen has the right to obtain equal opportunities in government.
(4) Every person has the right to citizenship status.

**Article 28E**
(1) Every person is free to choose and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently return to it.
(2) Every person has the right to the freedom to believe his/her faith (kepercayaan), and to express his/her views and thoughts, in accordance with his/her conscience.
(3) Every person has the right to the freedom to associate, to assemble and to express opinions.

**Article 28F**
Every person has the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and has the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.

**Article 28G**
(1) Every person has the right to protection of his/herself, family, honour, dignity, and property, and has the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.
(2) Every person has the right to be free from torture or inhumane and degrading treatment, and has the right to obtain political asylum from another country.

Extrajudicial executions also took place in Irian Jaya in the context of mounting pressure for independence from the local population.

Three people participating in pro-independence ceremonies in Sorong in July and September were reportedly killed by the security forces.

Excessive and lethal force characterized the authorities' response to many disturbances and demonstrations, including armed and peaceful opposition movements and civil unrest.

In Jakarta, at least six people were shot dead during demonstrations in September against the proposed new security law.

In Maluku killings by the military and police occurred as they tried to restore order in the context of communal violence between Muslims and Christians. The security forces were also accused of bias and there were reports of their supporting one side or the other during the violence which resulted in hundreds of deaths during the year.

Robby Young was shot dead by a member of the military during a disturbance at Jayapura port, Irian Jaya, in July.

**Torture and ill-treatment**
There were continuing reports of torture and ill treatment of both criminal and political suspects.

In Sorong, Irian Jaya, two men who were among a group of 22 people arrested in connection with a flag raising ceremony sustained broken legs as a result of torture.

**'Disappearances'**
Dozens of people "disappeared" In Aceh after being taken into custody by members of the military or the

PPRM, a riot police unit. Some people who "disappeared" were subsequently found dead and were believed to have been killed by the security forces. Others remained unaccounted for.

**Article 28H**
(1) Every person has the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and has the right to obtain medical care.
(2) Every person has the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness.
(3) Every person has the right to social security in order to develop oneself fully as a dignified human being.
(4) Every person has the right to own personal property, and such property may not be unjustly held possession of by any party.

**Article 28I**
(1) The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

**Death penalty**
At least 27 people remained under sentence of death. In September an official at the Directorate General of Correctional Institutions was reported to have said that 16 prisoners could be executed imminently. However, no executions took place during 1999. Draft legislation to establish a human rights court provided for a maximum punishment of death for those convicted of serious human rights violations. The court had not been established by the end of the year.

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Indonesia failed to address past human rights violations. The rights to freedom of expression, of peaceful assembly and of association continued to be arbitrarily restricted. Blasphemy provisions were used to imprison those who peacefully exercised their rights to freedom of religion and belief. At least 30 prisoners of conscience remained in detention for peacefully exercising their

(2) Every person has the right to be free from discriminative treatment based upon any grounds whatsoever and has the right to protection from such discriminative treatment.
(3) The cultural identities and rights of traditional communities must be respected in accordance with the development of times and civilisations.
(4) The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government.
(5) For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights must be guaranteed, regulated and set forth in laws and regulations.

**Article 28J**
(1) Every person has the duty to respect the human rights of others in the orderly life of the community, nation and state.
(2) In exercising his/her rights and freedoms, every person has

rights to freedom of expression or of religion and belief. The security forces carried out unlawful killings and used excessive force during protests and security operations. Two men were caned in public in Aceh after being convicted by a local Shari'a court of same-sex consensual sexual relations.

**Police and security forces**
Human rights groups reported unlawful killings and other serious human rights violations by security forces, primarily in the context of excessive use of force during mass protests or during security operations. No perpetrators were known to have been held to account, particularly for numerous incidents in Papua.

**Excessive use of force**
Between September 2016 and January 2017, joint police and military forces carried out security operations in Dogiyai, Papua province, during the run-up to the 2017 local elections. On 10 January police officers arbitrarily arrested Otis Pekei when he refused to hand over a knife at a

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| the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society. | police checkpoint, and detained him at the Moanemani sub-district police station. Later that day, police delivered Otis Pekei's body to the home of his family; the family accused the police of torturing him during detention. No investigation was known to have been conducted.<br><br>On 1 August in Deiyai, Papua province, police officers arbitrarily opened fire into a crowd of protesters without warning, wounding at least 10 people, including children. Nine police officers were subjected to disciplinary action; no criminal proceedings were known to have been opened.<br><br>**Unlawful killings**<br>The number of killings by police of suspected drug dealers increased sharply, from 18 in 2016 to at least 98 in 2017. Some of the officers involved in the incidents were seconded to the National Narcotics Agency. Police claimed that all the killings were in self-defence or because suspects tried to flee the scene. No independent |

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|---|---|
| | investigations were known to have been conducted into these killings. The number of deaths escalated after several high-ranking Indonesian officials, including the President, advocated during the year for tougher measures to address drug-related crime, including calling for the application of unrestrained lethal force against suspected traffickers.<br><br>**Deaths in custody**<br>Deaths in custody and torture by police personnel were reported by human rights organizations. On 27 August Rifzal Riandi Siregar was arrested in Batang Toru precinct in North Sumatra province after he was involved in a fight with a police officer. When his relatives visited him at the Batang Toru police station, he told them that he had been badly beaten at the station by four police officers, including the one with whom he had had the altercation. On 3 September, Rifzal Riandi Siregar was found dead in the police station. At the request of his family, the police |

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| | transferred his body to a police hospital in Medan, where an autopsy was conducted. The police promised to give the autopsy report to the family within a week. They had not received it by the end of the year.<br><br>**Cruel, inhuman or degrading punishment**<br>At least 317 people were caned in Aceh during the year for offences such as adultery, gambling and drinking alcohol, as well as same-sex consensual sexual relations.<br><br>In May, two men were each caned 83 times in public after being convicted by the Banda Aceh Shari'a Court of consensual same-sex sexual relations (liwath) under the Aceh Islamic Criminal Code. Although Shari'a by- laws have been in force in Aceh since the enactment of the province's Special Autonomy Law in 2001, and are enforced by Islamic courts, this was the first time that gay men had been caned under Shari'a law in the province. |

The Appendices that can be consulted online contain two impressive contributions by D.O. Sahalessy. A Memorandum of 11 June 2003 entitled: 'Indonesia: the most prominent abuser of laws and truth', with a comprehensive description of Indonesia's human rights violations against the people of the South Moluccas. And 'Turning Back to the Natural and Spiritual laws' (undated). Together, both documents offer a gruesome picture of the injustice that Indonesia has done and continues to do to the Moluccan people.

The Appendixes also contain a list of 91 Moluccan political prisoners (drawn up in October 2010), divided over a number of political prisons, with an indication of the number of years of imprisonment. In addition, the Human Rights Watch website provides detailed information on Indonesia's ongoing human rights violations throughout the country.  From the many pieces of evidence that the violation of human rights continues to this day, we show one example. The five persons behind bars are the people the arrow points at in the list of arrested persons (see next pages).

16 december 2019

"IN DE STRIJD OM MENSENRECHTEN WEGEN DADEN ZWAARDER DAN WOORDEN"

**December 2019 (Ambon)**
**Lijst Molukse Politieke Gevangenen**
**Daftar Tahanan Politik Maluku**
**List of Moluccan Political Prisoners**

## LP NANIA (AMBON)

| Naam / nama / name | Status : Veroordeeld / Dihukum / Sentenced | |
|---|---|---|
| 1. Jhon Markus | 17 jaar/tahun/year | |
| 2. Romanus Batseran | 17 jaar/tahun/year | |
| 3. Jordan Saya | 17 jaar/tahun/year | |
| 4. Yohanis Saya | 17 jaar/tahun/year | |
| Piter Yohanis | 15 jaar/tahun/year – jul 2019 | Vrij/Bebas/Free |
| Ruben Saya | 20 jaar/tahun/year – feb 2019 | Vrij/Bebas/Free |
| JOHAN TETERISSA | 04-12-2019 Overleden/Meningal/Deceased | |
| Jeki Riri | 15 jaar/tahun/year – dec 2018 | Vrij/Bebas/Free |
| FRANS SINMIASA | 25-04-2014 - 21-10-2017 Overleden/Meningal/Deceased | |
| Daniel Malawau | 15 jaar/tahun/year – dec 2017 | Vrij/Bebas/Free |
| William Lawalata | 25-04-2014 | Vrij/Bebas/Free |

## RUTAN WAIHERU (AMBON)

| Naam / nama / name | Status : Veroordeeld / Dihukum / Sentenced | |
|---|---|---|
| 5. Ishak Josias Siahaya | Gearresteerd/Ditangkap/arrested | 29 juni 2019 |
| 6. Pelpina Werinussa | Gearresteerd/Ditangkap/arrested | 29 juni 2019 |
| 7. Markus Noya | Gearresteerd/Ditangkap/arrested | 29 juni 2019 |
| 8. Johan Noya | Gearresteerd/Ditangkap/arrested | 29 juni 2019 |
| 9. Basten Noya | Gearresteerd/Ditangkap/arrested | 29 juni 2019 |

5/11

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They were arrested on 29 June 2019 for hanging an RMS flag in the house of one of them, Izak Siahaya. During a hearing on 28 November 2019, it was not clear who had hung that flag there: the people arrested or the police themselves? So-called witnesses against the five withdrew their testimony.

The prosecutor demanded 10 years in prison. The judge has handed down a conviction of 5 years.

By the way, it's irrelevant who hung that flag in that house. The arrest on the grounds of displaying the RMS flag violates the fundamental right to freedom of expression. But that fundamental right does not exist in Indonesia. The Article 28 in Chapter X of the Indonesian Constitution, dealing with Human Rights (mentioned in the table above) reads: "The freedom to associate and to assemble, to express written and oral opinions, etc., is regulated by law". That law prohibits expressions that point to the desire for a Moluccan state of one's own, depicted by showing the Moluccan flag. Similarly, freedom of religion is 'fake law'. Article 28E of the above table of Human Rights from the constitution of Indonesia begins with the words "(1) Every person is free to choose and to practice the religion of his/her choice, (-)". In reality: only six religions are permitted by law. All others - including several hundred indigenous religions - are forbidden. Their practice is prosecuted.

Finally, a remarkable passage from the legislation of the United States of America. In the summary[57] of the H.R.2601 - Foreign

[57] Summary: H.R.2601 — 109th Congress (2005-2006), 28 July 2005.

Relations Authorization Act, Fiscal Years 2006 and 2007 we read the following text in Section 1115. See the italicised section:

> "(Sec. 1115) Recognizes the progress in democratization and decentralization in Indonesia. Reaffirms condolences to the people of Indonesia for the profound losses inflicted by the December 2004 earthquake and tsunami. *Expresses concern about continuing human rights violations by Indonesian security forces, and notes that implementation of special autonomy holds the best chance of promoting peace and stability in the conflict-torn provinces of Aceh and Papua. Directs the Secretary to report to the appropriate congressional committees respecting: (1) implementation of special autonomy for Aceh and Papua; and (2) the 1969 Act of Free Choice."*

After fifty-five years of silence - for political and economic[58] reasons - about the violation of human rights and the liquidation of the right to self-determination by Indonesia, the US House of Representatives finally reopened the discussion on this subject. Although the text emphasized human rights, another motive for the U.S. to deal with Indonesia played in the background: in the Moluccas Al-Quaeda had set up a camp to train terrorists.

### 7.7 Penalties for Member States which fail to fulfil their obligations

UNCI's mandate did not include the right to impose sanctions for the abuse of rights by Indonesia. It could only advise, mediate and bring pressure to bear with the threat that it was acting on behalf of the Security Council, which did have the power to bring Indonesia to order by means of sanctions. The fact that the UNCI in its three Interim Reports

(a) did not explicitly report to the Security Council that the federation was being wound up with abuse of rights, and
(b) did not advise the Security Council to impose sanctions,

indicates that the UNCI failed to act for reasons likely to be related to political and economic interests. The same may apply to the actions of the UN Committee on Human Rights. Although the UNCI, too, has no sanctions of its own to force Indonesia to comply with the treaty, it has failed over the years to expressly denounce Indonesia's violation of the ICCPR treaty and to advise the Security Council to impose sanctions.

Before discussing the authority of the Security Council and the UN General Assembly to impose sanctions, we first outline - necessary to underline the seriousness of the matter - the failure of both the UNCI and the Committee on Human Rights to support the peace and security goals of the UN.

*7.7.1 Shortcomings in the functioning of the UNCI*

In Chapter 6 we extensively discussed the third (last) Interim Report of the United Nations Commission for Indonesia (UNCI) of April 1951. Addressed by the Netherlands on the fact that Indonesia had eliminated the external right of self-determination

[58] The Bechtel Corporation, among others, operated on the territory of Indonesia, also in the areas annexed by Indonesia. It is the largest engineering and infrastructure company in the US.

of the peoples of Indonesia by establishing the centralized unitary state and the associated constitution 1950, the UNCI replied that this was not its business and that the two parties Indonesia and the Netherlands had to resolve their problem themselves. The Netherlands made it clear that the external right of self-determination had been enforced by the UNCI itself and laid down as a binding right in Article 2 of the Transitional Agreement of 2 November 1949. And that, according to the insights of the Netherlands, the UNCI therefore bore responsibility in the sense of a duty to uphold Indonesia's observance of that right. But in response to this position of the Netherlands, the UNCI persisted in its opinion that its responsibility did not extend to a duty in this respect and requested the Netherlands to settle this dispute in consultation with Indonesia. Because it was already clear at that time that Indonesia was going to register as a member of the United Nations and it was also clear that the Security Council had no intention of blocking this, the Netherlands gave in and concentrated on the benefit of maintaining interests with Indonesia through the Indonesian-Dutch Union.

The UNCI could have intervened. Its mandate was broad. Just as it had formulated Article 2 of the Transitional Agreement on its own authority, it could have enforced it by threatening to activate the Security Council to impose sanctions. Just as it had a mandate to report to the Security Council during the period of 27 December 1949 (the transfer of sovereignty) and the establishment of the unitary state on 17 August 1950 that Indonesia was abusing the provisional federal Constitution in order to regulate exactly the opposite, namely the unitary state.

The UNCI may have had various motives for ignoring the duty to enforce what had been established by law. But it had been appointed by the Security Council to oversee a legally valid course of the decolonisation process. She failed to do so. She deliberately allowed the Dutch colonization of the South Moluccas to be taken over by Indonesia.

*7.7.2 Shortcomings in the functioning of the Human Rights Committee*

In its response to the report Indonesia submitted in 2012 on its measures to promote human rights, the Committee on Human Rights did not say a word about the fact that

(a) this report comes six years too late;
(b) Indonesia violates Article 1 (the right of self-determination for all peoples) of the ICCPR;
(c) and therefore, also violates Article 5, paragraph 1 (prohibition of abuse of rights).

We do not know whether the Committee on Human Rights may have put pressure on Indonesia behind the scenes. But in the Committee's official response to Indonesia's position, ignoring these violations of the ICCPR Covenant cannot be trivialized with good intentions behind the scenes. Like the UNCI, it has failed to call Indonesia to order at crucial moments. Even if it is merely making recommendations to point a member state in the right direction, there are sufficient possibilities within the UN treaty system to put effective pressure on a member state that does not comply with its treaty obligations.

*7.7.3 The immunity of the UN as a blockade against complaints of dysfunction of UN-bodies*

The problem, however, is that neither the UNCI, which has long since ceased to exist, nor the Committee on Human Rights can be sued for dereliction of duty or any other form of improper operation. As in the European Union, UNCI officials enjoy immunity (Article 105 of the UN Charter). Thus, they cannot be charged against the UN for failure of UN bodies. Even though the UNCI has not raised any obstacles against Indonesia's efforts to take over the colonization of the South Moluccas from the Netherlands. And even though the Committee on Human Rights has allowed this colonization to continue to this day, in constant violation of the human rights and freedoms for which the ICCPR Treaty was established.[59]

This does not alter the fact that there is still such a thing as 'noblesse oblige': legal immunity requires an increased sense of moral responsibility. We will see whether - after this report has been presented to the UN - the competent bodies will comply with this moral awareness, by still doing justice to the Moluccas with the well-established system of sanctions at the disposal of the UN.

*7.7.4 The power of the General Assembly to impose sanctions on Member States*

There's some light on the horizon for the UN-sanctioning powers. The main responsibility of the Security Council is to maintain international peace and security. In order to guarantee this, the Security Council has the power (Article 34 Charter) to investigate (impending) disputes and to take measures, including making a proposal/recommendation to the General Assembly of the United Nations to expel the member in question and to guarantee security in the area concerned with a UN peacekeeping force. The General Assembly may take such a decision with two thirds of the members present (Article 18 UN Charter). In view of the importance for the South Moluccas to take account of the legal aspects of this matter, we quote the relevant powers under the Charter again literally. Check the italicized words [LK&PH]:

> "Article 5
> A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council *may be suspended* from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.
>
> Article 6
> A Member of the United Nations which has persistently violated the Principles contained in the present Charter *may be expelled*

[59] See for more information about the immunity of international organs: Eric de Brabandere, 'Measures of constraint and the Immunity of International Organizations.' In: Ruys T., Angelet N., Ferro L., (red.) The Cambridge Handbook of Immunities and International Law, Cambridge: Cambridge University Press 2019, p. 327-349. See also the Handbook International Law (red.) Nathalie Horbach, René Lefeber, Olivier Ribbelink, ibid., p. 251.

> from the Organization by the General Assembly upon the recommendation of the Security Council."

For the record: the ICCPR Covenant is an integral part of the treaty system of the UN Charter. This means that the Committee on Human Rights, charged with the supervision of the ICCPR treaty, has the power to inform the Security Council about Indonesia's systematic violation of its treaty obligations. Including the power to advise on the application of Articles 5 (suspension) and 6 (expulsion) from the Charter-organization.

In short, if the Security Council and the General Assembly so wish, Indonesia can be suspended and/or expelled from the United Nations. We ignore now speculations about the way in which the Security Council will handle its decision-making (based on unanimity and therefore with the right of veto). We also ignore the undoubtedly numerous speculations on how Indonesia will react to a procedure to be brought before the Human Rights Council on behalf of the South Moluccas. This procedure will be dealt with in the paragraph 7.8.

*7.7.5 The ghetto of powerless people*

Many people know the abbreviation UN. Few people know the UNPO: the 'Unrepresented Nations and Peoples Organization'. This is an international organization that accommodates thirty-eight indigenous peoples, minorities, unrecognized states and occupied territories. These are groups of people who have committed themselves to defend their political, social and cultural rights. They know that the UN 'Covenant on Civil and Political Rights' (ICCPR) is also intended for them, but their powerlessness prevents them from asserting their right to self-determination 'de iure'. The South Moluccas are members of the UNPO.

The existence of this organization marks the failure of the international political and legal community. Despite all the Preambles, Articles and Procedures of the various UN treaties, and despite all national and international courts, the 193 member states of the UN condemn these thirty-eight groups of people to choose shelter within the UNPO: ghettoization, driven by powerlessness.

Isn't this absurd? Peoples for whom the United Nations was founded must seek shelter in an 'Unrepresented Nations and Peoples Organization' that is just as powerless as those peoples themselves, while among the 193 member states of the UN are countries (such as Indonesia) that can ignore the age-old adage 'pacta servanda sunt' with impunity if it suits them better.

There are increasing doubts about the functioning of the UN. The end of its life cycle seems imminent. A fundamental form of resourcing and restructuring is needed in order to survive. This resourcing should begin with the radical clearing of this ghetto under the name UNPO, created by the UN's failure to provide these peoples with a secure sovereign status. In what way? By unconditional commitment to federalism for peace as an extra instrument in the UN's toolbox of peacemaking, peacekeeping and peacebuilding. The reasons for the UN's existence. Solving these conflicts, starting with those of the Moluccan people.

## 7.8 The right to reopen the Moluccan issue

The South Moluccas have enough grounds to indict Indonesia, through the already discussed 'Special Procedure of the Human Rights Council', due to continuing violation of the ICCPR Treaty. Against this background, we discuss the question on what grounds the South Moluccas can approach the Human Rights Committee in order to reopen the Moluccan issue. And the question of who should send that message to the Committee.

*7.8.1 On what basis can the South Moluccas ask the UN to reopen the Moluccan issue?*

Let's get – once more – some key facts straight:

1. On 27 December 1949, a provisional Constitution for the Federation of the United States of Indonesia came into force with the mandate to establish a definitive federal Constitution by means of a Constituent Assembly. The government led by President Sukarno and Prime Minister Hatta ignored this constitutional mandate. The Constituent was only put to work in 1955.

2. The Provisional Federal Constitution contained provisions on the right of self-determination of peoples within Indonesia. This constitutionally guaranteed right to self-determination was supported and supplemented by a Transitional Agreement concluded by the parties on 2 November 1949, in which, under the authority of the United Nations Commission for Indonesia (UNCI), the right to external self-determination for states was explicitly laid down.

3. External self-determination for states was supported by various articles that also granted the right of external self-determination to peoples within states. Discussion of this became irrelevant when, after two months, the Federation was dismantled, and all the rights of peoples were destroyed in any case. The Moluccas then ended up in a constitutional vacuum. Furthermore, the discussion about whether a people has the right to external self-determination is no longer relevant now that the International Covenant on Civil and Political Rights (ICCPR, 1966) has enshrined this in so many words in Article 1.

4. In order to emerge from this constitutional vacuum, the Moluccas proclaimed their own independent state on 25 April 1950, based on their previously acquired autonomous sovereign status. The subsequent violent occupation of Moluccan territory by the Republic of Indonesia does not imply that the Moluccas have thereby transferred their sovereign status.[60]

[60] The occupation of a country does not involve the transfer of sovereignty to the occupier. See Articles 42-56 of The Hague Regulations 1907, and Articles 27-34 and 47-78 of the Fourth Geneva Convention 1949.

5. Instead of the mandatory definitive federal Constitution, Indonesia established a unitary state eight months after the transfer of sovereignty on 27 December 1949. Coupled with a Constitution for the unitary state in which the right to self-determination no longer existed.

6. In the period from 27 December 1949 (the transfer of sovereignty to the Federal State) to 17 August 1950 (the liquidation of the Federal State in favour of the establishment of the Unitary State), Indonesia dismantled all the federal structures and procedures already created. To that end, the President used his own inviolability and the inviolability of federal laws (his laws) by abusing a number of articles of the federal Constitution. Including granting himself the power to start dismantling federal structures and procedures by means of an Emergency Law, a power that did not accrue to him constitutionally.

7. In that period, Indonesia ignored its constitutional obligation to give peoples the opportunity to express their views on their desired political position by means of plebiscites: to remain within the federation or, externally, to enter into an independent political relationship with Indonesia and/or the Netherlands.

8. Points 5, 6 and 7 were implemented on the basis of an Emergency Law against which peoples could not oppose themselves with legal instruments. Issuing this emergency law was illegal because the President did not possess the power on that subject and because there was no House of Representatives to which he should have submitted it for review. Because of the inviolability of this illegal Emergency Act, the road to judicial review of the Constitution was also cut off. Actual resistance was suppressed by military force. This military violence continues to this day. Even political violence: in meetings of organs of the United Nations, representatives of Indonesia always characterize acts of resistance against this violence as extremist separatism.[61]

9. It is certain that on 27 December 1949 Indonesia signed the transfer of sovereignty from the Netherlands to the federation of the United States of Indonesia, with the motive to thus acquire 'de iure' (legally) the status of a sovereign state recognised under international law, and then - using a few articles of that federal constitution that should never have been included - immediately liquidate the federation in order to establish the unitary state.

10. This behaviour of Indonesia can be regarded as deceptive action and bad faith. In more specific legal terms, it falls under the combination of détournement de pouvoir, abus de droit and abuse of office, concepts that are summarized in contemporary international law as abuse of justice/rights. Various treaties prohibit this abuse.

[61] Karen Parker: "Because the Malukan people have the right to self-determination, the armed conflict that occurs periodically between Molukan forces and those of Indonesian should be considered a war of national liberation in exercise of the right to self-determination", p. 14.

11. In its reports to the Security Council, the United Nations Commission for Indonesia - entrusted with a broad mandate to oversee and direct the process of establishing the final federation of the United States of Indonesia, and fully aware of the fact that Indonesia abused the Provisional Federal Constitution in order to liquidate the federation in favour of the establishment of a unitary state - never mentioned that it actively condemned this state of affairs, nor did it submit opinions to the Security Council calling Indonesia to the order of constitutional law in force.

12. Pointed out by the Netherlands the failure of the UNCI to intervene adequately - partly based on the intrinsic responsibility of the UNCI for the right to (external) self-determination of peoples in Indonesia by virtue of Article 2 of the Transitional Agreement of November 2, 1949 - the UNCI, as mentioned earlier, chose the position of Pontius Pilate and thus delivered the people of the South Moluccas to a new colonizer, who, sixteen years later, on April 12, 1966, crucified and executed the leader of the Moluccan resistance, Dr. Chris Soumokil.

13. While the liquidation of federal structures and procedures was in progress, and the UNCI did not call the Government of Indonesia to order or advise the Security Council to take action with the broad mandate it had been given, rulers in the Moluccas filled the constitutional vacuum created by Indonesia by activating their legal reservation to join the federation. They judged that Indonesia's behaviour would lead to the destruction of the right to self-determination, resulting in the annexation of the South Moluccas, and therefore proclaimed their own sovereign state of the South Moluccas, the Republic of Maluku Selatan (RMS), on 25 April 1950. With its own constitution, parliament and government.

14. The subsequent struggle for freedom, which was fought by military force, lasted until the execution of Dr Chris Soumokil in 1966 and still exists today in the form of the South Moluccas' passive resistance to Indonesia's oppression. Meanwhile, the government of the RMS should have opted for exile in the Netherlands. An exile that continues to this day.

15. Numerous petitions and similar initiatives from the Moluccas, addressed to organs of the United Nations, have never had any effect.

16. The Committee on Human Rights has once, under the 'International Covenant on Civil and Political Rights', made strong recommendations to Indonesia to take measures to improve human rights. However, it has so far not condemned the fact that Indonesia, as a member state of the ICCPR, violates Article 1 of the ICCPR by not recognising the right of self-determination of peoples in Indonesia. Nor on the fact that Indonesia, following the advice to take measures against the notorious violation of human rights, did not report on the measures taken within a year - nor later.

17. This violation by Indonesia of the ICCPR is even more unlawful because it is also a violation of Article 5 of the ICCPR which prohibits abuse of rights.

18. In administrative law, when a court establishes an abuse of rights, it stipulates that the contested government decision is null and void. However, we are not dealing here with administrative law, but with international law, in which bodies that supervise the observance of treaty law may advise to adjust decisions that are deemed incorrect, but have no enforceable power to annul decisions of states that violate treaty obligations by means of abuse of law.

19. The Committee on Human Rights therefore does not have the power to annul ex post Indonesia's decision-making to establish the unitary state. It does, however, have the power to draw the attention of the Security Council to the fact:
    - that the abuse of rights by the Indonesian authorities in 1950 led to a unitary state without the right to self-determination instead of the prescribed and constitutionally guaranteed federal state with the right to self-determination;

    - that Indonesia is in violation of the ICCPR by not recognizing self-determination under Article 1 of that treaty; and is in violation of Article 5 of the ICCPR for abuse of rights;

    - that Indonesia, from 1950 to the present day, has responded to any opposition - including peaceful opposition - to repression and exploitation by means and measures prohibited under the ICCPR Treaty;

    - that the Security Council has the authority to intervene autonomously in urgent situations to ensure peace and security;

    - that the Security Council has the authority to state that the right to self-determination for peoples in Indonesia continues to apply, since self-determination is inalienable under Article 1 of the ICCPR;

    - that thus the South Moluccas are entitled to take the constitutional status of the moment of the transfer of sovereignty to the Federation of the United States of Indonesia on 27 December 1949[62] as the date on which the South Moluccas may still bring their legally valid right to choose between internal or external self-determination into proceedings in accordance with the provisions of the federal constitution then in force, and in accordance with Article 1 of the ICCPR Treaty in force;

[62] It is worth noting that the Moluccas on 17 August 1945 - the day on which Sukarno proclaimed independence from the Republic of Indonesia - were not part of that Republic, but of the Netherlands. The territory of the Republic was limited to part of the Jakarta district. We consider reopening the Moluccan issue to its status at that time useless, because it was only on 27 December 1949 that a constitutional situation was created with clear rights for the people of the South Moluccas. Namely the right to choose between internal and external self-determination.

- that by means of a plebiscite - derived from the provisional federal constitution - the people of the South Moluccas may be asked whether they still wish to be an independent state;

- that, in the event of a confirmation of that people's desire to become an independent state, the South Moluccas can determine, on the basis of the provisional federal Constitution, whether that independent state of the South Moluccas will have the political position of a South Moluccan unitary state, or that of a federal state of which the South Moluccas are a member state with other states, for example those of Papua and Western Papua, Acheh, some islands within Oceania and - possibly also - the Republic of Indonesia;

- that the Security Council cannot ignore this issue because otherwise the abuse of the right to repression will be honored and because such a renewed failure of the Security Council is a poor response to autocratic governance that is developing in many parts of the world and thus activating increasing forms of popular resistance.

In PART III of this report we elaborate on this idea of a federal state with the South Moluccas as a state.

*7.8.2 Who can ask the United Nations to reopen the Moluccan issue?*

In accordance with the 'Human Rights Council Complaint Procedure' mentioned in section 7.5.4, our Federalism for Peace Foundation is entitled to submit the formal Complaint, elaborated in Chapter 16, to the Human Rights Council. As already mentioned in the Summary Considerations, this report has been compiled without substantive consultation with representatives of the Moluccan community because we wanted to analyse and assess the Moluccan issue as objectively as possible.

On the basis of our valid title we are - by the 'Special Procedure of the Human Rights Council' which has already been dealt with - an NGO which may apply to the United Nations for the reopening of the Moluccan question based on the legal analysis of this report. In anticipation of what we will write about this in the Requisitory of Chapter 15, we request:

(a) To scrutinize this report of the Federalism for Peace Foundation for its potential to be a peacemaking instrument in addition to peacekeeping and peacebuilding.
(b) To advise the Secretary-General to request the General Assembly to decide that the reopening of the Moluccan issue is legally legitimized for meeting the UN's goals of maintaining peace and security.

(c) To further advise the Secretary-General to request the General Assembly to suspend Indonesia as a member of the UN (Article 5 Charter) and/or expel as a member of the UN (Article 6 Charter) and to intervene with a UN peacekeeping force if

> Indonesia does not comply with the measures imposed on Indonesia by the Security Council to allow the South Moluccas to decide freely on their inalienable right to self-determination on the basis of the constitutional situation of 27 December 1949.

If the Human Rights Council, the Secretary-General and the General Assembly of the United Nations ignore these justified wishes of the South Moluccas, history will mark this as a serious loss of credibility for the UN. Especially at a time when resisting against autocratic governance with absolute power is the order of the day throughout the world. If this report does not make the UN decide to take its responsibility towards the Moluccan people, then it condemns itself to a place on the fringes of geopolitics.

For the record, we close this chapter with an article from the Dutch *Nieuwe Leidsche Courant* of 30 March 1950, i.e. three months after the transfer of sovereignty on 27 December 1949. Soekarno had already begun to dismantle federal structures and procedures with the deployment of an Emergency Law. The newspaper article below illustrates the great lie in the opening words of the Constitution of 15-17 August 1950, cited earlier in section 5.3, by which the unitary state was established. The great lie was the claim - written as the first sentence of Consideration in the Preamble - that the entire people of Indonesia wished for that unitary state: "That the people of the component States throughout Indonesia desire the formation of a Unitary Republic;"

The newspaper article makes it clear that this was by no means the case. Moreover, the article shows that it was already clear at the time that the UNCI had failed. Accurate reading – unfortunately only in Dutch - gives a good impression of the usurpation of absolute power under the auspices of a UNCI that looked the other way.

# Oost-Indonesië voelt niets voor het juk van Djokja

## De procedure is ontleend aan Oost-Europa

Binnen de R.I.S. heeft reeds een reeks volkeren het hoofd moeten buigen voor de machtsbegeerte van Djokja, hun gebied is gevoegd bij dat/van de republiek Indonesia (niet te verwarren met de republiek Indonesia Serikat). Zij zijn als het ware door Djokja opgegeten.

Oost-Java, Madoera, Pasoendan, Zuid-Sumatra hadden de illusie, dat zij in R.I.S.-verband vrijheid en zelfstandigheid zouden verwerven, maar het R.I.S.-verband bleek een acide-bad te zijn waarin de negara's gemakkelijk tot een oplossing werden gebracht. Het werd een schitterend middel om Djokja's streven naar macht te verwezenlijken.

Djokja's procedure is eenvoudig. Het onketent een unitaristische „volksbeweging", bekend uit Oost-Europese landen, b.v. Tsjechoslowakije. Dat een dergelijke „volksbeweging" geen aanwijzing behoeft te zijn omtrent de wensen der meerderheid van de bevolking, weten wij maar al te goed.

In aansluiting op deze actie oefent men druk uit op de R.I.S. Anak Agoeng werd gedwongen, zijn wetsontwerp, waarbij aan de negara's de mogelijkheid geopend werd, hun eigen status te bepalen, terug te nemen. Inplaats daarvan is de door Soekarno ondertekende noodwet gekomen, welker regeling hierop neerkomt, dat de negara, waarin een „volksbeweging" het gezag heeft aangetast, door het R.I.S.-parlement, waar de aanhangers der republiek in de meerderheid zijn, zonder vorm van proces bij de republiek kan worden gevoegd. Op deze wijze is een einde gemaakt aan Pasoendan, Madoera, enz. Het begrip noodwet betekent, wet in strijd met de voorlopige constitutie, waarbij „nood" de wederrechtelijkheid moet goedmaken.

Hoe kan de Unci deze procedure verwerken. De ontbinding der negara's is in strijd met de accoorden der Ronde Tafel-conferentie. De R.I.S. heeft n.l. de souvereiniteit aanvaard op voet van de bepalingen dier voorlopige constitutie. De R.I.S. heeft dus met de noodwet een elementaire voorwaarde geschonden.

Krachtens haar handtekening onder de mantelresolutie heeft de Unci zich verplicht, toe te zien op de nakoming dier overeenkomsten. De Unci zal het acidebad moeten omkiepen, zij zal moeten zorgen, dat de noodwet ingetrokken wordt en een einde moeten maken aan de „volksbewegingen." Zij zal ook moeten zorgen, dat de vernietigde negara's de zelfstandigheid terugkrijgen.

Hoever zal Djokja nog kunnen gaan, als de Unci haar verplichtingen niet nakomt? Wij houden er rekening mede, dat West-Boreno nog onder het juk van Djokja zal moeten doorgaan en dat misschien ook Oost-Sumatra zich niet zal kunnen staande staande houden, maar de stormloop van Djokja heeft het element van verrassing verloren. Met name de volkeren van Oost-Indonesië zijn tot bezinning gekomen en hebben een kabinet geformeerd, dat afwijzend staat tegenover Djocja's streven. **de L.**

### HOE DE SCHEPEN

**AAGTEKERK** 29 v Marseille n Barcelona. Aalsdijk 29 v N York n Boston. Aalsum 29 te Masawa. Albireo 21 te R'dam verw. Alchiba p 29 Finisterre. Alcinous 28 van Belawan n R'dam. Alcor p 29 Fern. Noronha. Aldebaran 29 te Narvik. Alderamin 29 te Marseille. Algenib 29 dwars Porto Praya. Almdijk 29 te Antwerpen. Alpherat 28 te Houston. Alwaki 29 v Montevideo n N York. Amstelkerk 29 v Havre n A'dam. Andijk 29 v R'dam n Bremen. Arendsdijk 29 te N York. Ariadne 28 van Lissabon n Havre. Arnedijk 28 te Galveston.

**BAARN** 27 te Callao. Bacchus 27 te N Orleans. Berlage 27 v Hongkong n Yokosuka. Beverwijk p 30 Gibraltar. Blitar 29 v Banlikpapan n Donggala. Boissevain 29 te Kobe. Boskoop 29 ter hoogte Lissabon.

**CERONIA** 29 dwars Oporto. Cistula 30 te Abadan. Clavella 29 te Hobert. Congostroom 29 te Accra. Constant 29 v Konen-



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# PART III THE ROUTE TO RESTORATION OF THE SOVEREIGN FREEDOM OF THE SOUTH MOLUCCAS

The previous chapters made clear what went wrong and who was responsible for it. The following chapters make clear how it should be done.

## 8. SOVEREIGNTY OF THE PEOPLE AND THE RIGHT TO SELF-DETERMINATION

This Chapter 8 approaches the Moluccan question from a political-philosophical point of view. It is a further substantiation of the right of the South Moluccas to ask the United Nations to reopen this file. And in this way to enable the people to decide their own political future.

### 8.1 A political-philosophical perspective

Until now, we have mainly looked at the question of the freedom of the Moluccan people from historical, political and legal angles. It is not unimportant to also look at it through political-philosophical glasses.

In this context, it is important to consider the concept of 'popular sovereignty', because that is essentially what it is all about. And derived from this, we will discuss the consequences for the right to self-determination.

### 8.2 Popular sovereignty as a guiding principle

People's sovereignty literally means that the highest authority rests with the people. This sentence raises two questions:

- What do we understand by 'the highest authority'?
- When can we speak of 'the people'?

In the course of history, political philosophers have thought differently about what 'sovereignty' - the highest authority - means in the relationship between citizens and the power of the government.

For the French political philosopher Jean Bodin (1530-1596), sovereignty meant that it was in the hands of an absolute ruler. This ruler imposed laws on his subjects and, regardless of their content, he did not have to answer to anyone. He himself was not bound by any law. Thus, he was above the law. The laws had to comply with the divine laws but, because the sovereign was modelled in the image of God, as a matter of course.

Thomas Hobbes (1588-1679) thought in the same line as Bodin. In order to prevent a war of all against all, society could not do without a totalitarian ruler. This prince - whom he called Leviathan - had to protect the rights of citizens. With this monarch the society entered into a contract, whereby all rights and freedoms of the citizens were transferred in exchange for protection and preservation of life, peace, prosperity and property. Obedience to the sovereign applied in all circumstances.

With John Locke (1632-1704) the people were given a more meaningful status. The monarch is expected to reflect the will of the people based on a contract. In this context, citizens entrust the Prince with several powers: the right to make laws, to implement and enforce laws, and to judge. If the government does not properly carry out its task, it may be deprived of its power. The latter was therefore unthinkable in Hobbes' views.

Jean Jacques Rousseau (1712-1778) takes the next decisive step in this line of thought. In his eyes, the sovereign is not a sovereign,

not a human being, but a thought, an abstract concept.[63] This concept concerns the unified community of all members belonging to this community, which expresses the general will.

According to Rousseau, 'freedom, equality and happiness' are lost in modern societies compared to primitive societies. With the help of a social contract, the state is formed to guarantee 'freedom, equality and happiness'. A contract means give and take. Getting guarantees means giving up liberties. In other words, you give up personal freedoms in order to regain guarantees that protect your freedoms. The social contract that you enter together is based on the general will. This general will equals sovereignty.

History shows a development in which sovereignty shifts from (a divinely held) sovereign to the people.

The situation of Indonesia around the fifties could best be compared with the views of Hobbes. After all, there is a situation of war with the former settler the Netherlands, which also has repercussions on relations within Indonesia, in which a civil war is not inconceivable. Then people need a strong man (sovereign Leviathan) who puts things in order and doesn't shy away from using every means at his disposal. Most of the people of Indonesia saw Sukarno as this sovereign.

The provisional Constitution of the Republic of Indonesia of 1950 was proclaimed with, among other things, the following considerations:

> "That the people of the component States throughout Indonesia desire the formation of a Unitary Republic.
> That sovereignty is in the hands of the people;"

The consideration that the entire people want the unified state - with the knowledge that the South Moluccas have proclaimed themselves sovereign people - is untrue. This immediately violates the second consideration - that sovereignty rests with the people.

This is a situation which, in Rousseau's eyes, cannot exist. He holds the view that sovereignty is inalienable. He says the following:

> "I therefore state that sovereignty, being merely the exercise of general will, can never be alienated, and that the sovereign, who is nothing more than a collective being, can only be represented by herself. Power can be transferred, but not will."[64]

When the Constitution stipulates that sovereignty lies with the people, it cannot be that there is a ruler who ignores it. Rousseau goes on to say:

> "For will is general or it is not; it belongs to the people as a whole or to only a part. In the first case, this declaration of will is an act

[63] Carel E. Smith, 'Soevereiniteit: solipsisme of institutie?', In: Molier G., Slootweg T.J.M. (red.) 'Soevereiniteit en Recht. Rechtsfilosofische beschouwingen'. Den Haag: Boom Juridische uitgevers, 2009, pp. 33-53.

[64] Jean-Jacques Rousseau, 'The Social Contract, or Principles of State Organisation', Amsterdam/Meppel, 1995, p. 62.

> of sovereignty with the force of law. In the second case it is merely a separate will, or an act of government; at most it is an order." [65]

When the people formulate their general will, it has the force of law, in particular the Constitution. A good example of this is the American Constitution. Its preamble reads as follows:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America".

It is the people ('We the People') of the United States who (as sovereign) give themselves the Constitution. This means that ratification of this law expresses the general will. That is sovereignty in optima forma.

Incidentally, a Constitution is not necessarily necessary to establish sovereignty. Peoples who do not have a state of their own cannot establish a Constitution at all, simply because of the absence of a state. Yet a nation can be sovereign without having a Constitution. But then that people will have to establish its sovereignty in some other way. Well, that is what the South Moluccan people did by means of the proclamation of independence on 25 April 1950. This was the expression of their general will and thus their sovereignty (see paragraph 4.3). But as long as that sovereignty is not legally -'de iure' - recognized by the international political community, by forcing Indonesia to transfer sovereignty over the Moluccas (which it owns by illegally acquired right) to the Moluccas, the proclamation of its own Moluccan sovereignty has no legal value.

### 8.3 What is a people?

This brings us to the previously formulated question: 'What is a people?

According to the Dutch encyclopedia, the definition of 'people' is: 'a historically grown community of hereditarily related people with more or less equal language and customs'. The decisive element is ethnicity. So, this definition does not contain any geographical boundary [66]. According to Amnesty International, a people is a group of people with a shared language, culture and history. Peoples are formally the basis of international law.[67]

The South Moluccans have their own culture, history and regional languages. We can undoubtedly label them as a people. Certainly, if we also use the five elements of a people, as defined by Miller:

> "These five elements together - a community 1) constituted by shared belief and mutual commitment, 2) extended in history, 3)

[65] Ibid, p. 63.

[66] This is an important argument in favour of creating a federal state for - among others - the Kurds who are spread over no less than four countries.

[67] https://www.amnesty.nl/encyclopedie/zelfbeschikking-en-mensenrechten.

active in character, 4) connected to a particular territory, and 5) marked off from other communities by a distinct public culture,- serve to distinguish nationality." [68]

In addition to having their own shared commitment, a shared history, national holidays and specific cultural experiences, these five elements are the most important elements for a people to fight for their right to self-determination. A right that has two components: partly as a basis for the will to secede unilaterally from a state, partly as a basis for a morally justifiable demand for secession. Where it is important to strike the right balance between creating chaos in the geopolitical arena when peoples are haphazardly separating themselves from the state in which they do not feel happy, and on the other hand being obliged to live within a total lack of space to be able to separate themselves. Catalonia and Scotland seem to be caught between these two extremes. In both cases, the conditions for leaving with dignity and distinction - without violence or instability - do not yet seem to be sufficiently fulfilled to take the step towards external self-determination. For the South Moluccas they do. After 70 years of colonialism by Indonesia, the legal conditions for unilateral resignation - as well as the moral basis for this - have in any case been met.

**8.4 Justice is an important foundation of peoples**

John Rawls is best known for his theory of justice from 1971.[69] This theory concerned the situation in limited liberal societies. Afterwards Rawls further developed his ideas in 'The Laws of People' on justice between peoples.[70]

The interests of liberal peoples are specified by their reasonable conception of political justice: they wish to protect their territory, preserve their independence, ensure the well-being and security of their citizens, and maintain their political institutions that guarantee freedoms, as well as the free culture of their civil society. In addition, according to Rawls, there is an important element mentioned by Rousseau as 'amour-propre' but applied to peoples. By this is meant the appropriate self-respect, the pride that a people have and that is based on the shared awareness of a common history and culture.[71]

Rawls lists several principles that generate international consensus (basic charter), which are prerequisites for an international society of 'well-ordered liberal peoples':

- Nations are free and independent, and this freedom and independence must be respected by other nations.
- Peoples must comply with treaties.

[68] David Miller, 'On Nationality'. Oxford: Clarendon Press, 1995, p. 27, quoted by Cis de Hoop, 'For every nation its own country, On the right to secession', Final essay Bachelor of Philosophy, Utrecht University, February 13, 2016, p. 2.
[69] See for a Dutch translation of this masterpiece: Rawls, John, 'A Theory of Justice', translated by Frank Bestebreurtje and introduced by Percy B. Lehning, Lemniscaat, Rotterdam, 2006.
[70] Rawls, John, 'The Laws of People, with The Idea of Public Reason Revisited', Cambridge (MA): Harvard University Press, 1999.
[71] Lehning, Percy B., 'Kopstukken filosofie, Rawls', Lemniscaat, Rotterdam, 2006, p.120.

- Peoples are equal and are participants in the agreements that bind them.
- Peoples respect the duty of non-intervention.
- Peoples have the right to self-defense, but no right to wage war on other grounds than self-defense.
- Peoples must respect human rights.
- Peoples should respect the right to war.
- Peoples have a duty of assistance to other nations, when they live under unfavorable conditions that make it impossible for them to develop into a just or decent political and social regime.

In addition, Rawls believes that this list could be supplemented with a few specific principles, such as the formation and regulation of federations of peoples.[72]

If we observe the Constitution of the Republic of Indonesia and at the same time take its membership of the United Nations seriously, the conclusion can only be that the Republic considers itself to be a liberal nation and subscribes to the aforementioned principles. This entails the obligation to treat other peoples, such as the South Moluccas, as such. That duty is systematically ignored.

**8.5 Transmigration policy**

After the formation of the unitary state in 1950, Indonesia has transmigrated tens of thousands of Javanese, Maduresians and Buginese to the Moluccas. They were given economically more advantageous positions than the original population.

By migrating people with different cultural and religious backgrounds on a large scale, the composition of the population changed. In the long run, it can be disputed that there is such a thing as the South Moluccan population. If one continues along this line one could even question the sovereignty of this population. In that case, this form of ethnic pollution[73] also constitutes bad faith in this respect.

**8.6 Self-determination, colonialism and autocracy**

The fact that we can consider the South Moluccans as a people puts them in a position to claim the right to self-determination. There are two forms of self-determination. Internal self-determination is the ability of a people to develop and move forward entirely within the territory of a leading state. External self-determination is about the right to establish one's own state.[74]

The pursuit of external self-determination is more far-reaching, because establishing one's own state automatically means that another state loses territory. An existing state is therefore wise to guarantee the right to internal self-determination of a people within its territory. If this does not happen, then a claim of the right to self-determination - in that case external - by the people concerned is legitimate.

[72] Ibid. p. 124.

[73] This is the opposite of ethnic cleansing, but with a similar purpose.

[74] Cis de Hoop, ibid., p. 17.

Within the federal United States of Indonesia at the end of December 1949, the South Moluccas retained their sovereignty. This meant that they could invoke internal self-determination within the larger whole. As well as external self-determination outside the whole.

This was completely different with the unitary state of Indonesia that was proclaimed eight months later in August 1950. As a province, the South Moluccas were subject to the centralized authority of the Republic of Indonesia. As a result, they lost their sovereignty, but not their right to self-determination. They can only regain that sovereignty if it is transferred by law by Indonesia. Just as the Netherlands transferred sovereignty over the territory of Indonesia to the Federal Republic of the United States of Indonesia in December 1949. With their inalienable right to self-determination, the Moluccas can demand that this transfer should still take place.

That right to self-determination of the South Moluccas was reaffirmed and reconfirmed by Dutch judges and the Association of International Law (see Chapter 5). There can be no doubt about this in all reasonableness.

In that light, the following sentence of the Preamble to the current Constitution of Indonesia is hypocritical:

> "With independence being the right of every nation, colonialism must be eliminated from the face of the earth as it is contrary to the dictates of human nature and justice."

After all, now that the right of self-determination of the South Moluccas is not recognized[75] by the Republic of Indonesia, the compulsion to consider and treat the South Moluccas as a province of the Republic of Indonesia is a form of colonialism. Colonialism is defined as follows:

> "Colonialism is the attempt by one country to establish settlements and to impose its political, economic and cultural principles in another territory".[76]

The imposition of Indonesia's political, economic and cultural principles on the South Moluccas is undeniable. In doing so, Indonesia is acting contrary to their own (in the past so despised)

[75] This 'non-recognition' fits in with a repetition of the earlier quoted statement by Prof. Dr. Gesina van der Molen, former resistance fighter in World War II: "Numerous previously dependent areas have claimed and received independence on the basis of the right to self-determination. However, this right to self-determination is applied unilaterally when entire groups of states and population groups are denied this right. This applies not only to the countries of Eastern Europe, in particular Hungary, but also to certain regions of Asia, such as Kashmir, the South Moluccas, and so on. In short, the right to self-determination, which one either demands for oneself or strongly advocates for political motives for colonial areas, is ignored with regard to other countries and peoples. 'Self-determination for me, but not for you', is often the openly acknowledged guideline.' In: Enkele opmerkingen over het zelfbeschikkingrecht der volken, ARS 1962, p. 73.

[76] Webster's Encyclopedic Unabridged Dictionary of the English Language, 1989, p. 291.

experiences. And that brings colonialism under the heading of autocracy. In the words of Bonger[77]:

> "Autocracy is the form of government of a collectivity that is controlled by a power that stands above its members. The elements of this description are therefore that the members themselves have no direct or indirect control over the collectivity but are governed from above. Autocracy, and this is the main point distinguishing it from democracy, has the interests of its carrier(s) in mind - its subjects are in favour of serving those interests".

**8.7 External self-determination as a primary or remedial right**

In international self-determination law there is a distinction between the 'Primary Right Theory' and the 'Remedial Right Only Theory'.[78] The first theory is based on the view that it is sufficient for a people to satisfy the aforementioned five elements listed by Miller in order to call a people a people with right and reason. Within those five elements, it is essential whether the collective identity of a people that wants to secede does not sufficiently correspond to the identity of the majority of the total people in the state in question. In that case, use of the primary right of secession is evident.

The 'Remedial Right Only Theory' states that a people only has a remedial right to self-determination, in the sense of a moral justification resulting from the injustice done to such a people. For example, in the field of violation of human rights. In that theory, therefore, a condition must be met - in this case annexation, oppression, exploitation and other violation of human rights - before a people can claim that right to self-determination.

Well, both theories apply to the South Moluccas.

**8.8 The United Nations Charter**

It is desirable to consider how the United Nations interprets the concepts of 'popular sovereignty' and 'self-determination' and how we should assess this in the context of the issue of the Moluccas. The preamble to the United Nations Charter opens with the following phrase:

> "We, the peoples of the United Nations..."

This is very similar to the American Constitution. That's probably no coincidence. The United Nations is thus unmistakably saying that 'popular sovereignty' is the foundation for their actions.

The UN does not limit the concept of 'peoples' to those nations that are part of their organization. The preamble speaks of 'the promotion of the economic and social progress of all peoples'. The Charter also says something about the concept of 'self-determination'. The second objective of the UN is as follows:

[77] For the description of the term 'autocracy' we deliberately take this quote from a book that was also published in 1934 in Batavia, i.e. under colonialist Dutch rule: Prof. Mr. W.A. Bonger, Problems of Democracy, P. Noordhoff, Groningen/Batavia, 1934, p. 18.

[78] Cis de Hoop, ibid., passim.

> "To develop friendly relations between nations based on respect for the principle of equal rights and self-determination for peoples, and to take other appropriate measures to strengthen peace throughout the world;"

We may conclude that the UN endorses both the sovereignty of the people and their right to self-determination. The question is whether the UN also respects this in its actions. Therefore, we need looking at Indonesia's accession to the United Nations.

### 8.9 Accession of Indonesia to the United Nations

The Republic of Indonesia was admitted to the United Nations by the Security Council on 26 September 1950. The question is whether the South Moluccas could invoke the provisions of the UN Charter. After all, from the moment the Republic of Indonesia was established on 17 August 1950, the South Moluccas had lost their constitutional sovereign status.

As noted above, the provisions of the Charter extend beyond the territory of the Member States. This would mean that the South Moluccas did have the opportunity to lodge resistance with the UN.

Indonesia was admitted to the United Nations as the sixtieth member because, among other things, the Security Council and the General Assembly blindly accepted Indonesia's own claim that it was a 'peace-loving state'. It had escaped the attention of the decision-making bodies that the Republic of Indonesia - by depriving the people of the South Moluccas of their sovereignty - had acted in violation of Article 4, paragraph 1 of the Charter:

> "Membership of the United Nations shall be open to all other peace-loving States which accept the obligations contained in this Charter and which, in the opinion of the Organization, are able and willing to fulfil those obligations".

What obligations are we talking about? Article 56 of the Charter states that all Members undertake to act jointly and separately in cooperation with the Organization for the purposes set forth in Article 55. Article 55 states the following:

> "With a view to creating an atmosphere of stability and well-being necessary for the maintenance of peaceful and friendly relations between nations, based on respect for the principle of equal rights and self-determination for peoples, the United Nations shall promote (...)."

In doing so, the UN underscores the right of self-determination of peoples and thus also of the South Moluccas. Against this background, the observation of the Security Council and the General Assembly that the Republic of Indonesia is a 'peace-loving state' is questionable. Which judge would accept a proven killer's claim to be a loving man?

### 8.10 Are we going to a pandemic of autocracy?

In addition to a structural threat to our survival from unavoidable global warming, and cyclical threats such as pandemic virus outbreaks, increasing autocracy is taking on the character of mutually contagious state terror. We have drawn attention to this threat in several places in this report. Now we quote some of Lea Ypi's observations on this subject. It may be taken as a message to

the United Nations to prove that it is time to clean up the house of the United Nations (by recognising the fundamental principles of this Chapter 8) before it becomes an 'Augeas Stable' that - through the negligence of the United Nations - paves the way for a strong man to bring the UN to its final resting place. Weimar is only hundred years ago. Ypi [79]:

> "In the ongoing crisis of liberal democracy, only the new right seems to understand the relation between law and politics, often interpreting it in sinister ways. The right, ever more coherent in its ideology and disciplined in its organisation, is increasingly willing to challenge the guardians of the law through a relentless assault on the institutions on which the law relies to be enforced: the courts, the civil service, the press, multilateral institutions.
> (-)
> All around the world, from Poland and Hungary to the US, from Brazil to India, the right's assault on the rule of law, the related undermining of civil servants, judges and civil society activists, its censoring of the press, are all part of a campaign to exert the executive over all other branches of the state. Its ultimate aim is to turn the law into an instrument of rightwing politics, to disempower those who would still see it as a vehicle of social emancipation.
> (-)

The right's offensive on the rule of law is not surprising. Attacking the constitution, mocking abstract human rights, discrediting universal citizenship as little more than a dangerous illusion, are familiar tropes of traditional conservative thinking: from Edmund Burke's critique of the French revolution, to Joseph De Maistre's hostility to constitutionalism, to Carl Schmitt's celebration of the power of the executive to suspend legal norms. The conservative answer to the contradictions of modern societies has always been to invoke a mythical past of cultural homogeneity, and unflinching respect for the authority of tradition.
(-)
The right has managed to both reappropriate its tradition and renew itself by displacing its own crumbling centre. Reluctant to do the same, the left is losing. It is losing because it has divorced politics from law. Righteous outrage is no substitute for political action. If people think all politicians are corrupt, they are not going to miss them on the Today programme. If laws are widely seen as a tool in the hands of self-serving elites, nobody is going to feel sorry when judges are called traitors, or sympathise with bullied civil servants. The assault on legality will continue to have legitimacy.
(-)

[79] Lea Ypi, 'Why the right's new strongmen are winning everywhere' in: The Guardian, 16 March 2020.

To win, we must not passively defend the rule of law, but actively change how we do politics. The challenge lies in connecting the law – an abstract, seemingly eternal body of rules – to the realm of politics, to show which rules are worth changing and which are worth fighting for."

### 8.11 Summarising

- We have shown that the South Moluccas can be considered 'a people'.
- The UN grants nations sovereignty and the right to self-determination.
- This right to self-determination has been explicitly established several times by various judges.
- The South Moluccas were a sovereign entity with the right to self-determination within the United States of Indonesia.
- The establishment of the centralized unitary Republic of Indonesia and the dissolution of the federation led to the destruction of the sovereignty of the South Moluccas.
- But the right to self-determination is an inalienable right. It cannot be destroyed.
- The destruction, by Indonesia, of Moluccan sovereignty and the denial of the right to self-determination is in flagrant violation of the United Nations Charter.
- It is also contrary to Indonesia's own Constitution (popular sovereignty) and goes against their explicitly formulated aversion to colonialism and autocracy.
- It is also contrary to the principles of equitable international cooperation.
- Finally, the Moluccan right to secede from Indonesia is justified under the insights of international law, particularly within both the 'Primary Right Theory' to secession and the 'Remedial Right Only Theory'.

# 9. FEDERALISM AS INSTRUMENT FOR RESOLUTION OF CONFLICTS WITHIN AND BETWEEN PEOPLES AND STATES

The purpose of this Chapter 9 is to clarify basic aspects of the federal organisation of the State.[80] As Federalism for Peace Foundation we are in direct contact with the Federal Alliance of European Federalists (FAEF), the European federation of federalist movements. Both organisations work closely together to promote federalism as an instrument for conflict resolution and peacemaking. A federal Europe is the ultimate goal of that cooperation.

## 9.1 Three characteristics make federal state formation unique for peaceful conflict resolution

*9.1.1 The first federal constitution emerged from the need to resolve conflicts*

Few people know that one of the main reasons for designing the world's first federal constitution - that of America in 1787 - came from conflicts between the thirteen former colonies of England. They had declared independence in 1776 and established a confederate state of thirteen independent states. Subsequently, they had all started their own governing system. Because they did not know how to do this, and because the nature of a confederate system meant that the Confederation[81] had no binding potential, things went wrong and they began to quarrel with each other. Between 1776 and 1787 the thirteen separate states formed three groups, a Northern, a Southern and a Central group, willing to attack each other.

James Madison, one of the three authors of the famous Federalist Papers - the unofficial Memorandum of Explanation of the Federal Constitution of 1787 - was given the green light by George Washington to get a group of people together to try to resolve the conflicting nature of the thirteen states by amending the confederate treaty. That became the famous Philadelphia Convention: fifty-five representatives of twelve of the thirteen states decided within a fortnight that the poor confederate treaty would become even worse if they tried to fulfill their legal mission to improve it.[82] They stepped out of the box, threw the treaty in the trash, devised the building blocks of a federal Constitution, worked it out for a few months and, after six months, finished composing the world's first federal Constitution. Contrary to their legal mission, they submitted it to the people of the thirteen states for ratification. By mid 1789, all thirteen states had ratified it, thus

[80] We must necessarily limit ourselves. For a comprehensive insight into the essence of federalism we refer to the book 'Sovereignty, Security and Solidarity', Leo Klinkers, Lothian Foundation Press, 2019.

[81] A Confederation is an unbinding loose collection of states, based on a treaty instead of a constitution. It is like a dovecote: as easy as you fly in it, as easy as you fly out if you don't like it.

[82] For a detailed explanation of the structural errors of the American confederal treaty (1776-1789) see Papers 15 through 22 of the Federalist Papers of James Madison, Alexander Hamilton and John Jay.

creating the federation of the United States of America. A process of growth from thirteen to fifty states in a federal context. It is still the very best federal constitution from the point of view of the interests of the people. The fact that it is currently quite messy is due to an outdated electoral system (district system) that no longer has sufficient defensive mechanisms to prevent the wrong people from taking top positions. Chapter 10 explains why this American constitution is still the best.

It is beyond the scope of this report to indicate for all federal states why peaceful conflict resolution determined the choice of a federal state form. We only refer to the most recently created federation, that of Belgium. By means of six far-reaching state reforms, Belgium has transformed the unitary state into a federal state of three parts since 1960. Two major parts: Flanders (Dutch-speaking) and Wallonia (French-speaking). In addition, a small German-speaking part. For more than a century and a half, Flemish people lived in a system of economic oppression by Wallonia. This was the cause of ongoing conflicts. By giving each of them a sovereign system with a federation, they can now live together peacefully.

*9.1.2 In a federation, member states remain in charge of their own affairs*

Soon several characteristics of federalism as an instrument for peaceful conflict resolution will be discussed, but one of them we will discuss now.

It is the property that, in a federal state context, the states are and remain sovereign: boss at home. Contrary to what is claimed, federated states do not transfer sovereignty to a federation in the sense of losing their own sovereignty. They establish a federation, or join an existing federation, because they have interests and concerns that they cannot (any longer) look after on their own. For example, protection against a foreign power that can declare war on them. In order to receive this protection, they entrust the use of powers from their own inalienable sovereignty to a federal body. They retain their own political and administrative constellation: their own parliament, government, judiciary, tax system and policy areas, which they consider to be better managed by themselves.[83] They also retain a country with a monarchy, if it becomes a federation or joins a federation. In a federation, a federal body cannot affect a state's own domain, because the powers of the federated states and the federal body are strictly separated constitutionally. Provided that the federal Constitution is well put together.[84] And that was certainly not the case with the federal Constitution for the United States of Indonesia in December 1949.

[83] Member states work together but can also compete with each other. In America, for example, the state of Texas tries to attract people and companies from California with lower tax rates than those in California.

[84] For this reason, the federal organisation of the State coincides with the concept of 'subsidiarity'. The principle of subsidiarity enshrined in the Treaty of Lisbon - the legal basis of the European Union - means that you have to leave it to countries that participate in that treaty to do what they do best themselves. The fact that this is always violated by the European Council of 27 heads of government is another matter. We cannot elaborate on that here, except to state that the Lisbon Treaty is a legal monster.

On the contrary. The federal body could easily dissolve the powers of the states by abolishing the member states.

With a metaphor we clarify the status of member states versus the status of a federal body.

Take an apartment building. Each owner of an apartment is the owner of his own house. In their own domain they are sovereign. If an apartment owner wants to eat vegetarian food three times a week, no higher authority can force him to eat meat. If he wants to get up every morning at six o'clock and take a cold shower, no problem. If he wants to sit on plastic camping furniture instead of design benches, he can go ahead.

But in an apartment building there are interests that an individual apartment owner can't take care of on his own. For example, taking care of the maintenance of the roof, the lifts, the heating and air conditioning system, keeping the stairs and portals clean. That is why apartment owners form an association of owners (Condominium), choose a board from among their number and entrust it with the care of these limitative interests. When buying an apartment, a new owner receives rules from the notary that regulate the rights and obligations of owners versus the board. A Condominium has the legal identity of an association and the organisational identity of a federation, based on regulations that have the status of a Constitution. The Board of Directors finances the care for these common interests with the monthly financial contributions of the apartment owners.

In addition to the topics we will discuss later, the following two aspects belong to the essence of a federal organisation:

- The board (= federal body) does not have the authority to take decisions on subjects other than those that are exclusively entrusted to the care of the board; for example, it cannot decree that everyone must leave the premises at seven o'clock in the morning and may only do their shopping in a supermarket designated by the board. These are subjects that are certainly not on the exhaustive list of interests to be taken care of and the Board therefore has no powers in this respect.

- If the Board (= federal body) makes a decision on the basis of a subject on the exhaustive list of interests to be looked after, the Board does so on its own authority. If, for example, the air conditioning system has to be replaced, the board can decide independently that on a certain day the electricity will be interrupted for a number of hours.

These two aspects make it clear that, in a federal organisation, the term 'federation' coincides with the term 'subsidiarity'. This implies, for the composition of a federal Constitution, that no article on subsidiarity is included in such a Constitution, because that would be a pleonasm.

*9.1.3 A federal state form prevents so-called 'nation-state anarchy'*
At the Peace of Westphalia in 1648 a number of long and devastating wars in Europe ended. Until then, citizens were subjects of a King, or an Earl, or a city, or even of the Pope of

Rome. The Peace of Westphalia marked a turning point: it was the birth of the so-called sovereign nation-states. From now on, they spoke of states with fixed borders. The citizens were inhabitants of the state. The sovereignty of states meant, among other things, that they were not allowed to be attacked by another state. But history shows that this completely failed. Nation states went to war after all. The most violent examples are Napoleon's campaigns to conquer other countries, some Franco-German wars and the First and Second World Wars. With the arrival of the United Nations in 1945 - inspired by the Atlantic Pact of Roosevelt and Churchill in 1941- war violence gave way to regional conflicts, without it being said that this would be less bad than outright wars between states.

The fact that nation-states always tend towards conflicts, which subsequently degenerate into wars, is called 'nation-state anarchy'. The term 'anarchy' should be understood well. It is a Greek word. The part 'an' means 'not' and 'archein' means 'rule' or 'govern'. Freely translated, 'nation-state anarchy' means the absence of a form of government between states, through which states are tempted to realise their national and/or nationalistic interests by waging war.

And that, in turn, means the eternal need for a form of government between sovereign states in order to prevent conflicts and thus the risk of war.

The European Union is a nation-state construction[85] that resembles the confederate treaty that was the cause of the slow disintegration (due to conflicts) of the just founded thirteen states in America between 1776 and 1787. The basis of the EU - the Lisbon Treaty as the worst legal document ever written in the history of Europe - is incapable of preventing, let alone resolving, conflicts between member states on the one hand and conflicts between a group of member states and the Union on the other hand. We will only mention conflicts concerning the position of the Euro, the financial and economic system, immigration, global warming, the application of the Schengen Agreement and, more recently, the 'anarchy' with which the Member States of the European Union, each acting individually and without any sense of commonality, took measures against the pandemic corona crisis.[86]

In practice, we see dividing lines similar to the relations between the thirteen nation-states in America between 1776 and 1787: clashes between a group of northern, a group of southern and a group of central states. In the EU, northwestern states are both in conflict with southern states over the Euro but - in the context of financing the Eurozone - also in conflict with the central authority of the EU. Furthermore, four states on the eastern side of the EU do not wish to comply with agreements on the reception of immigrants. EU countries are each explaining the Paris Climate Change Agreement in their own way. Countries are adapting the

[85] In his article 'Brexit's trauma and Europe trapped between opposing conservatisms', Mauro Casarotto (Federal Alliance of European Federalists, FAEF), explains how the European Union is caught between the conservatism of the 'Sovereignists' - the supporters of nation-state thinking - and the conservatism of the so-called 'Europeists' - the supporters of a Europe based on a treaty that eliminates as much as possible the differences between individual states. In: Europe-Today Magazine, December 24, 2019.

[86] See Zie Michele Ballerin, 'If the European Union was a federation …',.

application of Schengen to their national interests. The United Kingdom has now opted for Brexit. In short, all the ingredients for intensifying conflict and disruption, the genetic trait of nation-state anarchy. In America, the solution was found in the construction of a federal system. In Europe we are waiting for this for more than two centuries. For a description of the usefulness and necessity of the establishment of the federal United States of Europe, we refer briefly to the book 'Sovereignty, Security and Solidarity'.

The German philosopher Johannes Althusius[87] designed the building blocks of a federal state system in 1602. It was America's merit to concretely apply these philosophical thoughts in the world's first federal constitution and thus a system that was:

(a) allows nation states to remain sovereign;
(b) allow interests and concerns that they cannot look after themselves to be taken care of by a federal body bound by an exhaustive list of powers;
(c) which allows a form of transnational governance to nip conflicts in the bud and the available energy and potential need not be sacrificed to waging wars but to connectedness, security and prosperity.

*9.1.4 Private federations*

As already mentioned, 40% of the world's population currently lives in 27 federal states. The first was the United States of America in 1787-1789. It then served as a model for the creation of the other 26 federal states. The largest is that of India with a population of around one billion, 29 states, over 400 regional languages and 22 official languages guaranteed by the federal constitution. In Europe, Germany, Austria and Belgium are federal states and, as a federation, members of the intergovernmental European Union. In addition, Europe has federal Switzerland with 4 different peoples and 4 different official languages guaranteed by the constitution.

The fact that 40% of the world's population lives in federations refers to the public order. In the field of private law this is considerably higher. We highlight one because it is known all over the world: the federal organisation of football. All football clubs - amateurs and professionals - are bosses in their own domain. They have their own name, their own pitch, their own board, their own members' council, their own shirt, their own club song, their own canteen, their own parties, and so on. But they also have interests that they cannot take care of on their own. For example, drawing up a competition schedule for a whole year, the training of referees, the organisation of championships, and so on. That's why all clubs are members of a national association. In the Netherlands, this is the Royal Dutch Football Association. In England The Football Association. In Italy, the Federazione Italiana Giuoco Calcio. In Germany the Deutscher Fussball-Bund. In Spain the Real Federacion Española de Fútbol. In Europe, fifty-five such national federations make up the federal UEFA. And together with five continental federations it forms FIFA: the Fédération Internationale de Football Association. FIFA in turn is part of the

[87] For publications in the field of the method of Althusius see the publications in the Literature list of Thomas Hueglin.

Federal International Olympic Committee (IOC) of which all sports federations from all over the world are members. A gigantic federal system within which:
(a) each layer is sovereign;
(b) allowing billions of people to play sports;
(c) and billions of other people can watch it.

What does this mean? The foundation of a federal organisation consists of sovereign groups which, from bottom to top, have organised their degree of organisation in such a way that they entrust to a body that binds them powers from their own sovereign domain for the care of interests that they are unable to care for themselves. This makes federal organisation the most powerful form of organisation. Nobody can order Real Madrid to merge with FC Barcelona. But FC Barcelona and Real Madrid cannot organise the European Championships or the World Cup themselves. UEFA and FIFA respectively do.

The core of a federal system concerns the questions:
(a) what interests do you entrust to a federal body to look after?
(b) how do you organise the constitution in such a way that the separation between the powers of the federal states and those of the federal body is - and remains – watertight?
(c) so that the federal body cannot develop into an autocratic administration.

The fact that both parts of the federation - the federal states and the federal body - are made up of people who will always want to maximize their complex of powers is a fact of life. Tension is always there. So is corruption. FIFA's recent past has amply demonstrated this.

But one should not make the mistake of assuming that a federal organisation as such is susceptible to corruption. It is not the federal system, but the people who, rightly or wrongly, acquire a place in that structure, who determine whether a federal organisation operates honestly or unfairly, in good faith or in bad faith. The first and most important defence mechanism to prevent leaders within a federation from acting in bad faith is determined by the quality of the Constitution. We reiterate that the federal Constitution of December 27, 1949 was a legal mess and could therefore easily be abused by Sukarno to achieve exactly the opposite of what the Constitution had prescribed.

## 9.2 Standards of federalism

*9.2.1 The formation of a state*
The way in which a state is organized largely determines whether the people within that state feel happy. With a well-built state structure, it is no different than with a well-constructed chair or a well-prepared meal. On a wrongly constructed chair you get pain in your back and from a bad meal you have to vomit. It's all about craftsmanship, based on standards.

If we assume that a democratically designed state is the least bad form of state (Churchill's words), there are constitutional and institutional differences. The Netherlands is a constitutional monarchy in the form of a decentralized unitary state. France is a

republic in the form of a centralized unitary state. Germany is a republic in the form of a federation.

We are now only talking about the establishment of a federal state and base what follows on the ideas of political philosophers from Aristotle (three hundred years before Christ), combined with examples from federal practice.

*9.2.2 The sovereignty of the people as a philosophical starting point*

A federation is based on a philosophical and a practical starting point. The philosophical starting point is based on popular sovereignty. That is to say, all sovereignty rests with the people. This sentence dominated the Declaration of Independence of 1776 and the first federal constitution in America in 1787. In other words: this was the first time in the history of the world that a number of politico-philosophical considerations were enshrined in concrete binding law (constitutional) and an organisational form attached to it (institutional).

Those who do not accept that sovereignty rests with the people, accept that all power lies in the hands of an autocrat. And then the people are always the victims.

*9.2.3 Representation of the people as a practical starting point*

But the people can't meet in the square every day to make all the decisions. So, it has to be represented. That implies elections with the guarantee that they are free, can take place in seclusion and guarantee that minorities are also represented. The latter - minority representation - means that elections based on a district system with the adage 'the winner takes all' must be avoided in any case. See the misery with the two-party system in America and the United Kingdom. It is not for nothing that this system is referred to in the science of public administration as the 'spoil system'.

*9.2.4 The federal state works from bottom to top*

The sovereignty of the people is enshrined in layers, from the bottom up. The first and lowest layer is the family. They can make autonomous decisions. However, the family has interests and/or concerns that it cannot take care of itself. She therefore asks a higher layer - for example a neighborhood organ - to share some of the family's powers in the sovereignty of the family in order to look after those interests/concerns. In this way, a federal state is built from bottom to top. From layer to layer.

A simple example: suppose that on the occasion of the football World Cup - with the participation of the Dutch national team - the inhabitants of an entire street want to colour the street with orange flags and banners (a typical aspect of Dutch culture), but not one family in the street can provide orange in the entire street, then together they can create an occasional organ that, with a donation from all the families in that street, creates a beautiful orange scene.

That's federal organizing. But the federal body that provides orange throughout the street does not have the authority to decide that only hamburgers may be served at the joint barbecue after the Dutch final victory (if any), unless the residents of that

street have entrusted the use of that power to that federal body. The powers of a federal body are always limitative and precisely defined. The fact that, in practice, people will always try to seek out and even exceed its limits is not a characteristic of the structure of a federation but of the quality of the people who seek ever more power within any organization, also in a federation.

This is a characteristic of political functioning and not of federal organisation. As long as political parties do not succeed in building defensive mechanisms within their selection of candidates for political office against unsuitable candidates, the risk remains that the wrong people will seize power. It is not the federal structure, but the quality of the electoral system, combined with the quality of the selection for the election of political candidates, that can destroy the (federal) state.

*9.2.5 The main values of a federal state: freedom and happiness*
The most important value that the federal state must guarantee is to support the people to pursue their own happiness in freedom. No more and no less. What this essentially means is stated in the Preamble of the Constitution. It describes the values that must be preserved and guarded. Then the articles of the Constitution determine how this will be preserved and guarded. The next chapter contains a concrete federal Constitution with such a Preamble.

These concepts of 'freedom' and 'happiness' played a central role in the Declaration of Independence of 1776 and the first federal Constitution eleven years later in 1787. The concept of freedom then became the basis of those rules in the Constitution that were to be called 'checks and balances'. As mentioned earlier, in 1215, the English had denounced King John Lackland in the Magna Carta, in 1581 the Netherlands had said goodbye to the Spanish ruler with the Placard of Abandonment, and in 1776 the thirteen colonies in America said that they no longer wished to obey the English King. But to say that you want to be free is one, to make sure that this is legally valid, that is two. And they did so with that federal Constitution.

They knew from philosophers such as Aristotle and Rousseau what popular sovereignty meant, they knew from Althusius what the building blocks of federal thinking were, they knew from Montesquieu what the trias politica meant and for the first time in the history of mankind they devised a political form in which those various pieces of the political-philosophical puzzle were put together.

*9.2.6 The trias politica and the checks and balances*
The 'trias politica' are just two words. The underlying meaning is: "Thou shalt keep the three powers of the state - the legislative, the executive and the judiciary - apart in order to prevent the one from dominating the other and from creating autarchy". However, they also knew that it would be inevitable that those three powers would have to trespass on someone else's territory from time to time. So, the assignment was: build in so-called 'countervailing powers'. If one of the powers had to operate on the terrain of another, that other power would have to have the power to push that one back into its cage.

The members of the Philadelphia Convention designed a brilliant system of checks and balances within a brilliant Constitution. The most important aspect of this was: making as few articles as possible. Only the general interest of the thirteen would be regulated jointly. So, they made a Constitution of only seven articles:

(a) the countervailing powers of the thirteen states against the federal body;
(b) the countervailing powers between the three powers within each state (note that in a federation the member states remain independent and each have their own legislative, executive and judicial powers);
(c) and the countervailing powers between the three powers at federal level.

By comparison, this ingenious system of checks and balances was completely absent from the federal Constitution for the Federation of the United States of Indonesia of December 1949, which allowed the executive to subordinate the legislative and judicial powers to itself and gave the then ruling powers in Indonesia free rein to use the federal Constitution to establish a unitary state.

The structure of a well-constructed federal state is transparent. Whether it responds to the value that the state should support the people to pursue their happiness in freedom, does not depend on that structure but - again - on the quality level of the people in that structure.

*9.2.7 Accountability as the core of a democratic constitutional state*

Being accountable as an administrator to a parliament is at the heart of a democratic constitutional state. Another word for constitutional state is the 'rule of law'. We reiterate what this means: 'King, Emperor, Admiral, the law applies to all'. Nobody is above the law. If there's one principle to keep an eye on, it's this. It is one and indivisible with federalism. And thus, the opposite of the intergovernmentalist administrating system of the European Union and of the United Nations.

In an intergovernmentalist system, administrators - based on a Treaty instead of a Constitution - make binding decisions to the citizens, without having to answer to a transnational parliament freely elected by the people in one encompassing constituency. This is fundamentally wrong. One should not create a decision-making system in which state powers are granted to persons who do not have to answer to a fully-fledged parliament for their binding decisions. Even worse: not only do they not have to answer politically to a parliament, but they are also inviolable in a legal sense because of their immunity. An appeal to increased morality and conscience of an intergovernmental system - as compensation for the absence of a duty of accountability and the shield of immunity for wrong decisions - fails because one can only appeal to individuals on morality and conscience. Groups of people such as organizations are amorphous. As such, they possess no morality or conscience. And as an organization, they are not accountable for those values. In fact, in order to make sure that they do not have to answer to a fully-fledged and transnational parliament, they have arranged for them to enjoy immunity.

Jean-Jacques Rousseau already made it clear that within a democracy there will always be a tendency to turn it into an 'elective aristocracy', which then always tends towards an oligarchy. In this way, the most important functions and powers will be distributed among themselves in a small circle. In intergovernmental systems of governance such as that of the European Union and the United Nations, this is playing a role in optima forma.

Any intergovernmental system will eventually crack and squeak, conflicts will arise because top-down government is exercised without accountability, member states do not abide by treaty agreements, decisions are not taken from a view of the general interest of the joint member states but on the basis of an exchange of national(istic) interests of nation states. And then it's waiting for the system to collapse.

However happy we should be with the arrival of the United Nations in 1945, it does not relieve us of the obligation to establish that the treaty basis of the UN is at the end of its political life cycle. Officials within the UN make decisions about life and death. They must be held accountable for that. And only a Constitution, not a Treaty, can serve that purpose. After seventy-five years, the United Nations is faced with a decision that the former thirteen colonies in America took after only eleven years: they threw the confederate treaty that functioned as a divide into the wastebasket and created a federal state. Starting with thirteen, they grew to fifty independent sovereign states. The rest is history.

But what did the United Nations learn from that? Nothing. The not-for-profit independent think tank Center for United Nations Constitutional Research (CUNCR) is engaged in research and recommendations to improve the United Nations, the Charter, and the structure of the UN. Purpose: to constitutionalize the United Nations treaty through adjustments and repairs of the treaty: 'the making of a constitutional treaty'.

Its failure is predictable. For two reasons:

- A Constitution is a Constitution and a Treaty is a Treaty. A 'constitutional treaty' is nonsense. An oxymoron. It is the same nonsense that is regularly heard within the European Union when, for the umpteenth time, the dysfunction of the Lisbon Treaty should be solved by turning it into a constitutional treaty. This kind of thinking stems from a lack of knowledge of basic constitutional law.

- A faulty system can function for a few years, but in time it will generate problems. If one tries to solve those problems by adapting the system, one creates more problems. And in the series 2-4-8-16, and so on. To think that it will succeed is due to a lack of knowledge of elementary systems theory.

On 9 January 2020, the current Secretary-General of the UN, António Guterres, addressed the Security Council. He spoke about equal rights of all peoples, respect for self-determination, peaceful conflict resolution and the controlled use of power to ensure such principles. Principles that form the basis of international relations. With the warning:

> "But when these principles have been flouted, put aside or applied selectively, the result has been catastrophic: conflict, chaos, death, disillusionment and mistrust. Our shared challenge is to do far better in upholding the Charter's values and fulfilling its promises to succeeding generations."

Moluccans who read this - 'conflict, chaos, death, disillusionment and mistrust' - have only one answer to this:

> "Dear Secretary General, you are talking about us. Can we now assume that you are going to do much more to fulfill the values of the Charter, or were you talking to each other just to have a little courage, while you are about to retire and we have been waiting for 70 years for United Nations' intervention to free us from our lives in 'conflict, chaos, death, disillusionment and mistrust'?"

The Secretary-General's answer to that virtual Moluccan question can only be:

> "We are going to follow the example of the American colonies in 1787, we are going to throw the Charter in the wastebasket and finally make a federal Constitution as the only correct constitutional foundation under the United Nations. Whoever participates is welcome. Those who don't want to participate go on fighting, killing, looting, oppressing and exploiting. And if they're tired of that, they can join the back of the queue."

As a reminder to the Secretary General, some information about what was achieved in America in the period 1787-1789 follows.

*9.2.8 The Convention of Philadelphia*

In 1787, the fifty-five members of the Philadelphia Convention quickly realized this. The thirteen states/former colonies were on the verge of fighting each other. What did they do then? Contrary to the task of repairing the system errors in the Treaty, they threw the Treaty away and in two weeks they devised the basis for what was described above. They took another few months to work it out and presented it as a draft federal Constitution to the people of the thirteen states. If the people of nine states would agree, the federation would enter into force legally. And that took place in 1789.

*9.2.9 Federalism is a specific form of state formation*

In federalist circles there is a tendency to speak out on policy issues. However, there is no federal agricultural policy, no federal migration policy, no federal education policy and so on. One does not have to be a federalist to have a certain view on a certain social subject. In other words, federalism is not about specific policies but only about the way in which cooperation between independent entities is legally and organizationally regulated. If it is about a combination of states, it is about the organisation of the state. When it comes to private cooperation, such as, for example, the relationship between individual soccer clubs, their national federal federation, their European UEFA federation and their FIFA as a world federation, we talk about a private federation.

Creating a federal organisation requires craftsmanship: applying fundamental knowledge in the form of standard operational procedures. There is only one concept of 'federation', based on

standards. If those standards are 100% adhered to, it is a strong federation. If the standards are not 100% adhered to, then we are dealing with a weak federation. The further you deviate from the standards, the greater the risk that the federation collapses. This has happened a few times in Africa, Asia and Europe. A sad thing. In the words of Jennifer Smith[88]:

> "The tragedy of failed federations is the tragedy of the failure of peaceful, democratic coexistence."

For the record, the most important standards follow once again:

- The people of a collection of independent states/regions decide to form a federation. They do so because there are now interests and concerns that individual states/regions can no longer look after themselves.

- The people of the member states ratify a federal Constitution - of, for and by the people - that lays down the limitative powers of the federal body and the articles that guarantee the checks and balances for the preservation of the trias politica.

- The member states themselves remain sovereign, independent with their own cultural identity, i.e. with their own parliament, government, judiciary, own monarchy if present, own tax system, own policies.

- They let a federal body share this sovereignty by means of vertical separation of powers. That is to say: the federal body may, with the powers of the member states, take care of restrictive matters of which the member states say:

  > "Please, will you take care of that for us, because we can no longer take care of that ourselves".

- Both the Member States and the federal body have a parliament. The executive power of the federal body is accountable to it.

- The members of the federal parliament - unlike what is the case in America, for example - are elected transnationally on the basis of proportional representation. In which the territory of all member states together form a single constituency. Election on the basis of a district system as in the United States and in the United Kingdom is out of the question.

- What the policy of that federal state will be depends on the members of that parliament. One can speak of 'the policy of a federation', but not of 'federalist policy'.

Within the use of standards there is room to vary. Two examples. In one federation one can decide that foreign affairs as a whole should be at federal level. In other federations, for example in Belgium, although foreign affairs are considered to be in the common interest of the federation, Flanders and Wallonia may pursue their own foreign policy on subjects that do not fall under federal authority. Another example concerns the tax system. Normally, a fiscal union is built within a federation. As, for

[88] Jennifer Smith, 'Federalism', UBC Press 2004, p. 12.

example, in America. The member states levy tax for the federal body. The federal body pays money to the member states for investments or calamities. In practice, one year a member state may collect more federal tax than it recovers benefits and the next year the opposite may happen. Member states keep their own tax systems and may compete with them.

### 9.3 Should the Moluccas chose a federal form of state or a unitary state?

This report offers the facts and arguments with which the people of the South Moluccas may ask the United Nations to reopen the Moluccan question to the constitutional situation of 27 December 1949.

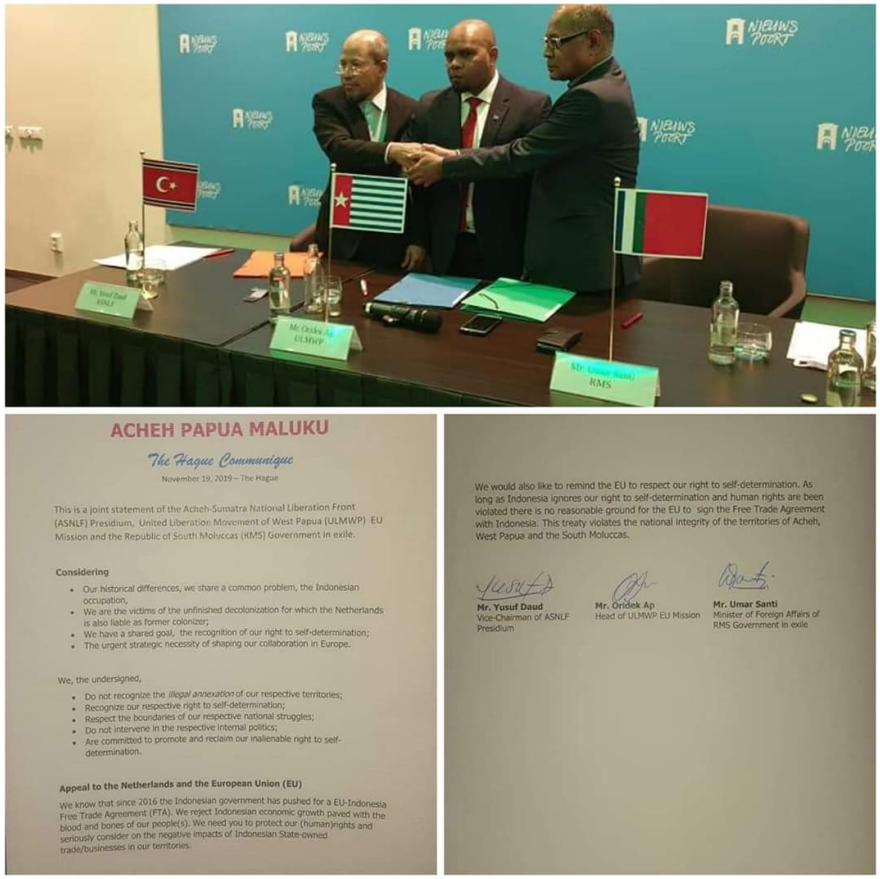
The argumentation that follows is thus derived from the status the Moluccas were given at the time when the provisional federal Constitution came into force. That status was that they were free to opt for internal self-determination within the federation or for external self-determination outside the federation, whether or not in a special relationship with Indonesia or the Netherlands. It appeared already after a few days that the choice for internal self-determination within the federation had disappeared, because Soekarno made it clear that the federation would be liquidated in favour of the establishment of a unitary state. Thus, Moluccan leaders decided, after noticing that the leaders of the state to which they belonged failed to listen to the warning of the increasing oppression by Sukarno, and at the insistence of thousands of Moluccans, to declare their own independence. They exercised their right to external self-determination under Article 43 of the Constitution and Article 2 of the Transition Agreement, a right which had been explicitly formulated and enforced by the UNCI and declared for approval by the contracting parties.

If we consider this legal reality of December 27, 1949 as a reality in 2020 and the South Moluccas can still make their choice - internal or external self-determination - then the choice will most likely fall on external self-determination. Next, the question arises: do they want a unitary state of the South Moluccas or a federal state with other peoples annexed by Indonesia and even possibly with (a slimmed-down) Indonesia? We consider the choice for a unitary state/nation state to be wrong. As the world becomes more aware that nation-states will always tend towards conflicting nation-state anarchy and that intergovernmental forms of government such as the EU only have a limited political life span and will sooner or later collapse, the choice for a unitary state, whether or not treaty related to other states, is strongly discouraged. This is an outdated form of state formation. The tendency is precisely to have more federal states because their member states remain sovereign, wars are prevented, regional conflicts are made manageable and the available energy can be spent on solidarity, security and prosperity. Moreover, we estimate that in several policy areas the South Moluccas are too small to go their own way and that transnational responsibilities would be better allocated at a higher level - i.e. together with other states.

We therefore strongly support a choice for a federal state structure in which the South Moluccas are their own sovereign

state alongside a few others. The question then is: which others? Well, because Papua and Acheh, like the South Moluccas, are annexed and to this day demand sovereign independence, these two peoples - transformed as states - could be other states. It is a matter of diplomacy and negotiation whether Indonesia, then reduced in scale, will also join as a state. Although it is conceivable that other parts of Indonesia - Bali, for example - would also choose to join such a federal state. Also states/peoples outside Indonesia such as Vanuatu. In Chapter 10 we place this issue in a geopolitical context.

The picture below shows that the connection between the peoples of the South Moluccas, Acheh and Papua is alive. Their joint appeal in the press center of the Dutch parliament on 19 November 2020 to the Netherlands and the European Union not to conclude a free trade agreement with Indonesia as long as the annexation and the violations of human rights continue says enough.




(a) knowing and applying the standards of this Chapter 9 and not lapsing into nationalistic tampering;
(b) translate the federal constitution of Chapter 11 into their own Moluccan identity, but without exceeding the number of ten articles;
(c) and in accordance with Chapter 11, submit the draft federal constitution for ratification by their peoples, since all sovereignty rests with the people.



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## 10. FEDERALIZATION MOLUCCAS IN GEOPOLITICAL PERSPECTIVE

### 10.1 Choose a federal state

In short, the arguments for opting for federal state formation. The people of the South Moluccas have legal legitimacy to ask the United Nations to use the treaty system to restore the constitutional situation of 27 December 1949. That situation was:

- A federal state.
- During a transitional period to complete the final federation, peoples could opt for self-determination within the federation or for self-determination outside the federation.
- Being an inalienable right that was nullified by abuse of rights and violence.

If the South Moluccas are still given the opportunity to speak out, they will opt for external self-determination. So, separation from Indonesia. The question that then arises is: do they opt for a South Moluccan unitary state or for a federal state with other partners?

This report leaves no room for misunderstanding that a choice for federalization is obvious. Choosing for a nation state is a step backwards in history. Nation-state thinking is so closely linked to nation-state anarchy[89] that new conflicts, leading to wars, are on the horizon. Where the loser is known in advance. That is the last thing the South Moluccas need. Peace, security and prosperity - driven by Moluccans themselves - that is the point on the horizon where people want to arrive.

### 10.2 In a geopolitical perspective

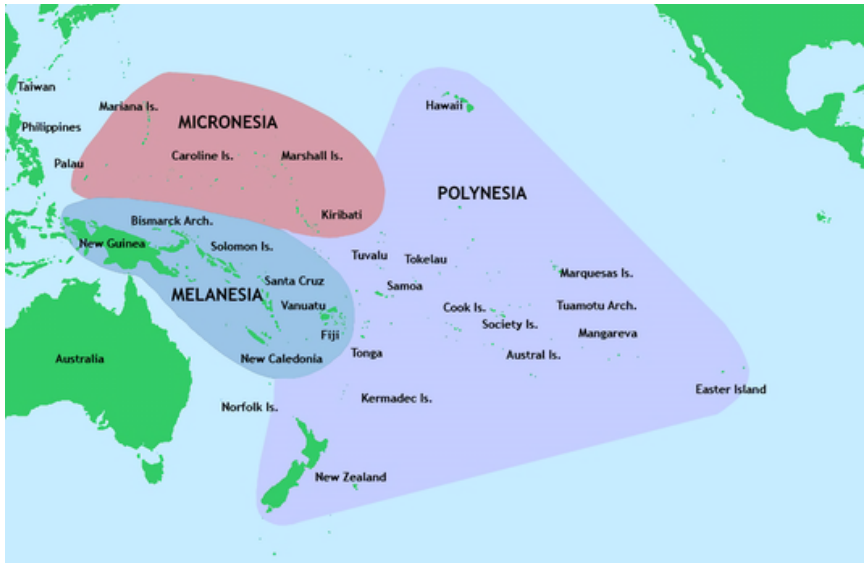
As previously reported, 40% of the world's population already lives in 27 federal states. From a geopolitical point of view, there will be a need to expand the number of federations. Individual nation states are less and less able to properly and skillfully represent all the interests that the globalizing world surrounds them.

Intergovernmental alliances, based on a treaty, will not succeed either. This type of governance has a limited political life cycle. In the absence of democratic accountability, governance becomes more important than representation, operates increasingly top-down, drifts away from the people and ultimately disintegrates the intergovernmental system. Only federal state structures are

[89] The corona crisis in the first months of 2020 again showed painfully traditional wrong political reactions: as soon as governments see a transnational danger or interest, they opt for the reflex of 'own country first'. Without any awareness of the fact that the word 'pan' in 'pandemic' means 'whole'. A problem that affects the 'whole' must be tackled by the 'whole', in this case a federal state, and not nation-state driven searches for solutions. Incidentally, an approach based on 'the whole' can lead to different approaches within member states. See Mauro Casarotto, 'Covid 19, EU crisis and insanity of national governments', in Europe Today Magazine, 24 March 2020 (https://www.europe-today.eu/2020/03/24/covid19-eu-crisis-and-insanity-of-national-governments/?fbclid=IwAR1nclYLMsijv-TfhJG2AkR8iK3dKZD6X6kkZj8--2Oq4398GlinFhH2xuY).

sustainable, provided they are properly constructed according to the standards described above.

In the expectation that the South Moluccas will anchor their freedom politically by means of federal state structure, the question arises: what should this federation be called? After all, in a federal state context, the South Moluccas form a state, alongside other states. The most obvious state next to that of the South Moluccas is a state formed by what is now West Papua and Papua. Whether or not merged with the neighboring independent state of Papua New Guinea. But seen from a geopolitical perspective it would be wise not to think inductively, but deductive. Look at this map of three island groups in Oceania.




We know that ethnologists do not agree on the question of the exact boundaries of ethnicities under the denominators of the Melanesian, Micronesian and Polynesian archipelagos. Migratory movements have mixed up over the centuries. On this map, the Moluccas lie just outside Melanesia, but the common opinion is that they are a Melanesian-Austronesian people.

We expect the 21st century to be characterized by an accelerated process of federal state organization. Reasons:

- Nation states make too many conflicts that end in regional wars.
- In the globalizing world, they are less and less able to take full care of themselves.
- The intergovernmental UN's treaty instruments cannot prevent or resolve these conflicts and wars; in addition to these instruments, it will have to accommodate federal state institutions.

The federalization of several islands of Oceania - together a continent - is the challenge facing the United Nations. Three federal states of Melanesia, Micronesia and Polynesia can grow step by step into the federation of the United States of Oceania in a well-thought plan. The South Moluccas will be the first to start building the Republic of the United States of Melanesia.

More than ever, the island groups of Oceania have a reason to unite as a region with the status of a continent in a federal state. The undeniable rise in sea level will cause many islands to disappear, unless that care is entrusted to a federal body. The individual islands themselves cannot take care of this. Not every island can be saved now that scientific calculations[90] show that a rise of no less than four meters is imminent. But with a federal state institution it is possible to prevent the downfall of other islands. It does not all have to be realised by 2020. But with a sensible approach, it can be completed before the middle of this century.

[90] See the publication in Europe-Today Magazine by Leo Klinkers and Emile Glans van Essen: https://www.europe-today.eu/2019/10/09/give-room-to-the-oceans-then-the-rising-sea-level-can-be-lowered/

# 11. A PROPER FEDERAL CONSTITUTION

Before elaborating in detail on the usefulness and necessity of seeking a solution to the Moluccan question first and foremost through federalization, we quote Article 50 of the International Covenant on Civil and Political Rights (ICCPR):

> "Article 50
> The provisions of this Covenant shall extend to all parts of federal states, without limitation or exception."

So that Covenant also covers federal states.

## 11.1 Main features of a correct federal constitution

*11.1.1 The origin of the federal constitution presented in this chapter*

This Chapter 11 contains a federal Constitution of ten articles. It is preceded by a Preamble describing the constitution's complex of values. The ten articles contain the norms by which these values are protected. This is how a Constitution is structured: values protected by norms.

The text was designed by Leo Klinkers and Herbert Tombeur in the period August 2102 and May 2013 within the framework of their European Federalist Papers[91]. They wrote these Papers after the American Federalist Papers of James Madison, Alexander Hamilton and John Jay (1787-1788) with which they explained to the peoples of the thirteen small states what the founding fathers of the first federal Constitution in the world - the Philadelphia Convention - meant by that Constitution.

The following Constitution is - as best practice - derived from the American Constitution and intended for the constitutional basis of a federal Europe under the name of the United States of Europe. Although the American Constitution served as a model, Klinkers and Tombeur have improved, strengthened and modernized it in terms of European constitutional and political relations. As such it is suitable for any combination of states that wish to form a federation together. The South Moluccas are free, in cooperation with other peoples, to adapt this model to the own identity of the peoples who want to join the federation. The Federalism for Peace Foundation can be of assistance in this respect.

There are, however, a few remarks to be made here:

- The text should be submitted as a draft Constitution to a Citizens' Convention with the task of improving these articles. The Convention should then submit the draft to the people for ratification: All sovereignty rests with the people. It is of, by and for the people. For the procedure to be followed, see Chapter 12.

- With an ban on extending the ten articles. If this is not done, there's no stopping amateurs and bunglers weakening this

[91] The List of literature consulted (paragraph 18.2) contains a link to these European Federalist Papers.

carefully designed example of generally binding federal constitutional regulation with specific interests of federated states. The next section discusses this in more detail.

*11.1.2 Why should the Constitution contain only ten articles?*
Legislative doctrine provides the do's and don'ts of correct legislation. In this context, only one is important: design only general binding rules and do not render them ineffective by formulating exceptions to those general binding rules.

If norm X of a Constitution is to be binding on people on Ambon, then it must also be binding on people in West Papua if West Papua is a member state of the federation. If the people of West Papua say: "We are different from those on Ambon, so we ask for an exception to that generally binding norm X", then the people of Acheh say: "We are even more different than those on Ambon and in West Papua, so we claim another exception to that norm X". If one allows one exception to general binding rules, they multiply like rabbits. An irrepressible growth of exceptions to generally binding regulations - usually the product of populist/nationalist political folklore - destroys the Constitution. A correct federal Constitution only regulates general binding rules and no exceptions to them.

That is how wrong the Lisbon Treaty - the legal basis of the European Union - is. Not only do some of its general binding rules conflict with each other, but they are also unworkable because each EU member state has negotiated several exceptions to these general binding rules. This is one of the reasons why the treaty is unable to guarantee unity, solidarity, security and prosperity. Member states jump in all directions as soon as they have to fulfil an obligation that they do not like, even if they have previously committed themselves to do so. The treaty-based UN-system has got the same system errors. We must fear that it is - eventually - bound to collapse as regional conflicts increase on the one hand and autocratic governments refer to negotiated exceptions to avoid UN-interventions on the other hand.

It is evident that states, and citizens of states, have a great diversity of wishes, thoughts and ideas about the way in which they want to cherish and protect their own identity. Because they are numerous and diverse, it goes without saying that there is little that connects them in a general sense. So that forces to make few generally binding rules. For this important aspect of legislative doctrine, a good expression has been coined in social practice: 'The more rules, the more fools'.

Make only generally binding rules for those subjects that are recognised and endorsed by the member states as being in the common public interest. Precisely for this reason, federal state organization - if created by professionals and ratified by the people - is the strongest form of organization when several states want or have to live and work together. The fixed separation between the sovereign powers of the federated states and those of a federal body ensures that the vast majority of what unites people in their identity can be arranged in their own homes. So, within their own state. The federal body only regulates what the states say: "We have a few concerns and interests that we can't regulate ourselves, would you as a federal body do that, please?"

And that then leads to a small limitative set of general binding rules. In this context: only ten articles.

More is neither necessary nor desirable. The ten articles of a correct federal Constitution may not contain any rule relating to a specific member state interest. A federal Constitution of 197 articles such as that of the United States of Indonesia is not only unnecessary but also part of the causes of its failure. Why representatives of America, the Netherlands and the UNCI did not see this coming and could have intervened in time to make a correct federal Constitution is a mystery. Unless we have to assume that they did not have the necessary knowledge and/or preferred to look after other interests. However, that can only serve as an explanation, not an excuse.

*11.1.3 What should those 10 articles contain?*

The ten articles of a correct federal Constitution must be limited to the distribution of responsibilities and powers. At the heart of this is:

(a) the allocation of clear powers to clearly distinguishable state bodies;
(b) the separation of the powers of federal states and the federal body;
(c) the separation of legislative, executive and judicial powers at state and federal level (trias politica);
(d) a system of checks and balances to effectively separate these three powers as soon as one of them tries to control the other;
(e) an unconditional commitment to the rule of law: no one is above the law.

**11.2 The Preamble of the federal Constitution**

In previous chapters we have drawn attention to Preambles that preceded the articles of some treaties. As important as Preambles are, so bad are they read. Articles (= norms) of Constitutions have no meaning if they are not understood as defensive mechanisms against violation of the values in the Preambles. So, the power of the value complex of a Preamble is the Alpha of the power of a Constitution where the articles stand for the Omega. In Moluccan terminology: the Preamble is 'Mena', the articles are 'Muria'.

The Preamble that Klinkers and Tombeur designed in their federal Constitution (in the European Federalist Papers, 2012-2013) for the United States of Europe is not good enough. That is why Klinkers recently designed a new one. It follows with the remark: it can always be better and stronger. People who want to connect with the Moluccas in a federation can propose to improve and complete the text of the Preamble. There is no restriction on this, as is the case with the ten articles which may not be extended, in order to prevent specific interests of states such as a virus from dismantling the Constitution. Klinkers has also extended Article 5 of the federal Constitution, which will follow in paragraph 11.3, by a few paragraphs.

The following Preamble is provided with an Explanatory Memorandum. This is part and parcel of legislation. Earlier it was already indicated that the federal Constitution of the United States of Indonesia did not have an Explanatory Memorandum. This was partly a reason for the fact that this Constitution could be abused to achieve an entirely different purpose than that for which it was designed: abuse of rights. For the Explanatory Memorandum to

the articles of the Constitution in section 11.3, we refer to Papers 20 to 25 of the European Federalist Papers.

Note: this Preamble was written for a federal Europe. We have not deleted anything in it and leave it up to the people of the South Moluccas to replace European-oriented text parts themselves with texts that fit the South Moluccan situation. With or without the support of the Federalism for Peace Foundation.

*11.2.1 The Preamble*

We, the citizens of the states [here a list of participating states],

I. Whereas
(a) that the federation of the United States of Europe hereby established by us has the task and duty to support us as citizens in our search for happiness in freedom;
(b) that it should support our quest for happiness should base
- on working restlessly to preserve the diversity of all life forms on Earth,
- on unconditional respect for the diversity of sciences, cultures, ethnicities and beliefs of the citizens within the federation,
- and on human compassion for citizens from outside the federation who want to find their happiness within the United States of Europe;
- that in carrying it out, it should bear witness to wisdom, knowledge, humanity, justice, and integrity, in the full awareness that it derives its powers from the people, that all men on earth are equal, and that no one is above the law.

II. Considering further:
(a) that this federal Constitution is based on the wealth of thoughts, considerations and desires of European philosophers - and of European political leaders after World War II - to unite Europe in a federal state form;
(b) that the federal system is based on a vertical separation of powers between the member states and the federal body through which the member states and the federal body share sovereignty;
(c) that the horizontal separation of the legislative, executive and judicial powers (trias politica) both at the level of the federal body and at that of the member states is guaranteed by a solit system of checks and balances.

III. Whereas, finally, without prejudice to our right to adjust the political composition of the federal body in elections, we have the inalienable right to depose the federation's authorities if, in our view, they violate the provisions of points I and II,

Adopt the following articles for the Constitution of the United States of Europe,
Article 1 ….
Article 2 ….
Et cetera

*11.2.2 The Explanatory Memorandum of the Preamble*
We reiterate that this is an example for Europe and that the people of the South Moluccas can exchange words typical of Europe for text appropriate for a federation of the Moluccas and other states.

The preamble 'We, the citizens of the states ...' shows that this Constitution is ratified by the citizens themselves. It is thus of, by and for the citizens of the United States of Europe, in accordance with the adage 'All sovereignty rests with the people'.

The United States of Europe' consists of the citizens, the member states and the federal body.

It is a Constitution, not a Treaty. When countries or regions want to live together in peace and have to cooperate through historically determined borders, but nevertheless want to retain their autonomy and sovereignty, a federation is the only form of state that can guarantee this. This is not possible with a treaty. A treaty is an instrument for administrators to cooperate in policy areas without regular democratic accountability for the decisions they make.

The fact that this Constitution is first ratified by the citizens and only then by the parliaments of the member states indicates that - in accordance with the elementary aspects of federalism formulated by Johannes Althusius around 1600 - it is established from the bottom up and not imposed from above.

This federal Constitution guarantees the common interest of the citizens of the United States of Europe (so later from the South Moluccas) and leaves it to the citizens of the member states, and to the member states themselves, to serve their own interests.

That is why this federal Constitution consists of a limited number of rules of a general binding nature. There are no exceptions - driven by national interests - to these generally binding rules.

Explanation of Consideration Ia

The self-evident 'pursuit of happiness' of the citizens and the mission and task of governments to support the citizens is a cornerstone of the Declaration of Independence (1776) and of the subsequent American Constitution (1787-1789), the first federal Constitution in the world. This served as a model for the federations that were subsequently established and which currently house 40% of the world's population. The 'pursuit of happiness' is therefore also a cornerstone of the federal Constitution of the United States of Europe. The pursuit of happiness includes values such as peace, security and prosperity.

Explanation of Consideration Ib

In the first place, this consideration gives the federation the task of working restlessly to preserve the diversity of all life forms on Earth. Unsuccessful preservation of the diversity of all forms of life threatens human life on Earth. This task requires maximum cooperation, expertise and reliability within the federation's authorities.

Secondly, the federation has maximum respect for diversity in social life. Wherever it disappears, monocracies are created, condemning parts of society to inbreeding. Diversity of sciences, cultures, ethnicities and religions creates new sciences, cultures, ethnicities and religions. This Constitution therefore rejects any

agitation aimed at protecting the so-called 'own people first' and will use all legal means to combat such agitation.

Thirdly, as a consequence of the above, this Preamble explicitly indicates that there is no room for a slogan like 'Europe first'. The Federation of the United States of Europe shares its place on Earth with all other peoples and does not lock itself up behind the walls of a 'fortress Europe'. Closing the external borders for the purpose of protectionism of one's own people is not listed in the list of crimes against humanity, but nevertheless has a serious penalty: the eventual disappearance of what one wishes to preserve. In other words: open external borders, not closed borders.

That creates obligations:

- To design and implement plans such as the Marshall Plan (1948-1952) to support poor countries in their economic development in order to eliminate the need to flee to Europe.
- With immediate effect, to provide a humane existence for the approximately sixty million war refugees.
- To strengthen the demographic and geopolitical position of Europe by offering immigrants a secure existence within the federation with wisdom, knowledge, humanity, justice and integrity.
- Considering the implementation of this as one of the common interests of the federation.

This Constitution is therefore a task and an opportunity for fundamental political renewal now that post-war democracies have come to the end of a seventy-five- year life cycle and have led to the exclusion of citizens in favour of treaty-based governance which, by its very nature, has become increasingly oligarchic and protectionist.

Explanation of Consideration Ic

The foreseeable end of the political life cycle of post-war democracies, as just mentioned, places those countries that seek to protect democracy on a 'tour de force', comparable to the revolution of the Enlightenment. Democracy and the representation of the people must be reinvented on the basis of the principle of 'All sovereignty rests with the people'.

The Treaty of Lisbon should give way to a Constitution that takes representation of the citizens as its starting point. This implies, among other things, the abolition of the European Council of Heads of Government and State, the creation of a European Parliament based on proportional representation within one constituency - the territory of the federation - and a government led by a president elected by the citizens. Thus, equipped with a democratic mandate.

That can only succeed with wisdom, knowledge, humanity, justice and integrity. With only two certainties: if it succeeds, it is a crucial revolution for the preservation of Europe. If it fails, by the end of this century, after the last tribal war in Europe initiated by nation-state anarchy, someone will turn off the light.

Democracies cannot prevent elections from leading to groups within democratic institutions that wish to use their power against democracy. This Constitution enables the institutions of democracy as much as possible to deal with abuses of democratic procedures by building in defence mechanisms. The task is therefore a fundamental reorientation of the concept of democracy in 21st century Europe. With a task for political parties to consider their own responsibility to devise instruments to defend democracy against parties that abuse (or would like to abuse) the procedures of democracy in order to destroy that democracy. Probably more than any other organisation within a democratic system, political parties will have to reflect on wisdom, knowledge, humanity, justice and integrity in order to ensure the viability of a federally united Europe.

Explanation of Consideration IIa

The 'building blocks' of federalism as a state institution originate from the so-called Political Method of Johannes Althusius (1603). The 'cement' to inextricably connect these 'building blocks' was supplied in the writings of European political philosophers such as Aristotle, Montesquieu, Rousseau and Locke with their views on popular sovereignty and the doctrine of the trias politica. The American federal Constitution is based on these writings, while Europe condemned itself to waging wars for centuries.

Not only philosophers provided the 'cement' for the building blocks of federalism. Also, political and social leaders - in the Interbellum period, for example the British Philip Kerr, better known as Lord Lothian - and after the Second World War the Italian Altiero Spinelli who, with his Ventotene Manifesto (1942), laid the foundation for the post-war pursuit of federalism. Between 1945 and 1950 this aspiration was led by a large number of conferences and plans led by statesmen, scientists, cultural figures and civil movements. But in 1950 it radically ceased with the 'Schuman Declaration'. Although the Declaration fully demanded the creation of a federal Europe, it placed its elaboration in the hands of government leaders. In this way - unintentionally, but through guilty ignorance of how to make a federation - the treaty-based intergovernmentalism that is taking the European Union to the end of its current political life cycle was created.

Explanation of Consideration IIb

The thirteen former American colonies in late 18th century solved the dilemma of 'never again a ruler versus the need to represent the people'. They applied the system of shared sovereignty devised by Althusius by inventing the vertical separation of powers between sovereign states and a federal body. Without sacrificing the integral member state sovereignty, they asked a federal body to take care - with the powers of the member states - of a limitative number of common interests.

Contrary to the assertion that, in a federation, member states transfer all or part of their sovereignty in the sense of 'giving away and thus losing', this is not the case. Parents who bring their child to a teacher do not lose anything of their parenthood but entrust the teacher the parent's authority to teach the child knowledge that the parents themselves cannot realise. Not only does it remain their child, but after a school day it comes home with extras: new knowledge that the parents themselves could not

have given to the child. That is why another popular view is incorrect. Namely the opinion that a federation is a superstate that destroys the sovereignty of the member states.

The vertical separation of powers, leading to shared sovereignty between the federal body (operating for the whole) and the member states, also solves another problem. Namely the principle of subsidiarity. This principle in the Lisbon Treaty states: 'The authorities of the European Union should leave to the Member States what the Member States can do better themselves'. Because Article 352 of the Treaty allows the European Council to take any decision that, in the Council's view, serves the Union's objectives, the Council can ignore the principle of subsidiarity. In a federal state form, this legal pitfall is absent. In a federation the subsidiarity principle coincides with the vertical separation of powers and therefore does not need to be mentioned as such in the articles of the Constitution.

A final aspect of this Consideration IIb implies that - because of the restrictive set of powers of the federal body - all other powers remain with the citizens and the member states. This implies, inter alia, that the member states retain their own Constitution, parliament, government and judiciary, including their own areas of policy, in so far as these are not defined by the vertical separation of powers in the exhaustive list of interests that the federal body is required to represent on behalf of the member states. Any monarchies will also be maintained.

Explanation on Consideration IIc

The horizontal separation of the three powers - the legislative, the executive and the judiciary - is not a specific feature of just a federal state form but serves as an adage for any state that wants to prevent domination by one power. Within a federation, however, there are two peculiarities.

Firstly, from the first federal state - that of the United States of America - the trias politica must be established both at the level of the federal body and at the level of the individual member states. Secondly, in addition to the invention of the vertical separation of powers mentioned above, the federal Constitution of the United States of America has introduced a second innovation: the checks and balances. Saying that a self-respecting state must consider the trias politica high is merely expressing a value. But values can only be guarded and preserved by means of norms. That is why the American Constitution - and also this European Constitution - contains articles that prevent the inevitable action of the three powers in the field of another power from slipping into the supremacy of one power over the other. To that end, there are the checks and balances. They are the indispensable countervailing powers to curb the ever-present 'desire' for the three powers to expand their complex of powers at the expense of the powers of the others.

Explanation of Consideration III

Citizens derive from the English Magna Carta of 1215, the Dutch Placard of Abandonment of 1581, the American Declaration of Independence of 1776 and the French Revolution of 1789 the inalienable right to depose governments from the federal body if they violate the provisions under I and/or II.

In accordance with the adage 'All sovereignty rests with the people', the citizens of the United States of Europe are the federation's alpha and omega. Alpha in the sense of: they ratify the federal Constitution and thus establish a system of representation of the people, of executive governance based on political decision-making by the representative body and jurisdiction to settle disputes. Omega in the sense of the inalienable right to dismiss those who unexpectedly abuse the federal system, for example by (attempts to) establish autocracy of a leader who wants to operate above the rule of law.

### 11.3 The ten articles of the Federal Constitution

Once again, it is the draft of a federal constitution for Europe. The South Moluccas can exchange all European references for texts linked to their own identity.

*Article I – The Federation and the Bill of Rights*

1. The European Federation is formed by the Citizens and the States, participating in the Federation.
2. The powers not delegated to the European Federation by the Constitution, nor prohibited to the States by this Constitution, are reserved to the Citizens or to the respective States.
3. The European Federation endorses the rights, freedoms and principles as written in the Charter of the Fundamental Rights of the European Union, excluding the principle of subsidiarity, as mentioned in the Preamble of this Charter. The European Federation accedes to the European Convention on Human Rights and Fundamental Freedoms.

*Article II – Organization of the Legislative Branch*

*Section 1- Setting up the European Congress*

1. The Legislative Branch of the European Federation lies with the European Congress. It consists of two Houses: the House of the Citizens and the House of the States, also known as the Senate.
2. The European Congress and its two separate Houses reside in Brussels.

*Section 2 – The House of the Citizens*

1. The House of the Citizens is composed of the representatives of the Citizens of the European Federation. Each member of the House has one vote. The members of this House are elected for a term of six years by the Citizens of the Federation who are qualified to vote, united in one constituency. The election of the members of the House of the Citizens always takes place in the month of May, and for the first time in the year 20XX. They enter office at the latest on June 1st of the election year. The members resign on the third day of the month of May in the final year of their term. They can be re-elected twice in succession.
2. Eligible are those who have reached the age of thirty years and are registered as Citizen of a State of the Federation during at least seven years.
3. The members of the House of the Citizens have an individual mandate. They carry out this mandate without instructions, in the general interest of the Federation. This mandate is incompatible with any other public function.
4. The right to vote in elections for the House of the Citizens belongs to anybody who has reached the age of eighteen years and is registered as a Citizen in one of the States of the Federation, regardless of the number of years of that registration.

5. The House of the Citizens choose their Chairperson, with the right to vote, and appoint their own personnel.

*Section 3 – The House of the States, or the Senate*

1. The Senate is composed of eight representatives per State. Each Senator has one vote. The Senators are appointed for a term of six years by and from the legislature of the States, provided that after three years half the number of Senators resign. The first appointing of the full Senate takes place within the first five months of the year 20XX. The three-yearly appointments to replace half of the Senators takes place in the first five months of that year. The Senators enter their office at the latest on June 1st of the year of their appointment. They resign on the afternoon of the third day of the month of May in the final year of their term. The Senators who resign are immediately re-appointable for a further term of three years. The Rules of Proceedings of the Senate regulate the way of resigning of one half of the Senate.
2. Eligible as Senator are those who have reached the age of thirty years and who have been registered for a period of at least seven years as a Citizen of a State of the European Federation.
3. The Senators have an individual mandate. They carry out this mandate without instructions, in the general interest of the Federation. This mandate is incompatible with any other public function.
4. The Vice-president of the European Federation chairs the Senate. He has no right to vote unless the votes are equally divided.
5. The Senate elects a Chairperson pro tempore who in the absence of the Vice-president, or when he is acting President, leads the meetings of the Senate. The Senate appoints its own personnel.
6. The Senate holds the exclusive power to preside over impeachments. In case the President, the Vice-president or a member of Congress is impeached the Senate will be chaired by the Chief Justice of the Court of Justice. In case a member of that Court is impeached the President will chair the Senate. No one shall be convicted without a two third majority vote of the members present.
7. Conviction in cases of impeachment shall not extend further than the removal from office and disqualification from holding any office of honor, trust or salaried office within the European Federation. The convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.

*Section 4 – The European Congress*

1. The time, place and manner of electing the members of the House of the Citizens and of appointing the members of the Senate are determined by the European Congress.
2. The European Congress convenes at least once per year. This meeting will begin on the third day of January, unless Congress determines a different day by law.
3. The European Congress settles Rules of Proceedings for its manner of operating.

*Section 5 – Rules of Proceedings of both Houses*

1. Each House settles Rules of Proceedings. They regulate what subjects require a quorum, how the presence of members can be enforced, what sanctions can be imposed in case of structural absence, what powers the Chairperson has to restore order and how the proceedings of meetings and votings are recorded.
2. The Rules of Proceedings regulate punishment of members of the House in the case of disorderly behavior, including the power of the House to expel the member permanently by a two third majority.
3. During meetings of the European Congress no House may adjourn for more than three days without the consent of the other House, nor may it move its seat outside of Brussels.

*Section 6 – Compensation and immunity of members of Congress*

1. The members of both Houses receive a salary for their work, determined by law, to be paid monthly by the Treasury of the European Federation. Next to that they receive a compensation for travel and accommodation expenses in accordance with the real expenses made and confined to the travels and activities justified by their work.
2. The members of both Houses are in all cases, except treason, felony and disturbance of the public order, exempted from arrest during their attendance at sessions of their respective House and in going to and returning from that House. For any speech or debate in either House they are not to be questioned in any other location.

## *Article III – Powers of the Legislative Branch*

*Section 1 – Way of proceeding to make laws*

1. The House of the Citizens has the power to initiate tax laws for the European Federation. The Senate has the power – as is the case with other law initiatives by the House of the Citizens – to propose amendments in order to adjust federal tax laws.
2. Both Houses have the power to initiate laws. Each draft law of a House will be presented to the President of the European Federation. If he/she approves the draft he/she will sign it and forward it to the other House. If the President does not approve the draft he/she will return it, with his/her objections, to the House initiating the draft. That House records the presidential objections and proceeds to reconsider the draft. If, following such reconsideration, two thirds of that House agree to pass the bill it will be sent, together with the presidential objections, to the other House. If that House approves the bill with a two third majority, it becomes law. If a bill is not returned by the President within ten working days after having been presented to him/her, it will become law as if he/she had signed it, unless Congress by adjournment of its activities prevents its return within ten days. In that case it will not become a law.
3. Any order, resolution or vote, other than a draft law, requiring the consent of both Houses – except for decisions with respect to adjournment – are presented to the President and need his/her approval before they will gain legal effect. If the President disapproves, this matter will nevertheless have legal effect if two thirds of both Houses approve.

*Section 2 – Substantive powers of the Houses of the European Congress*

The European Congress has the power:

a. to impose and collect taxes, imposts and excises to pay the debts of the European Federation and to provide in the expenses needed to fulfill the guarantee as described in the Preamble, whereby all taxes, imposts and excises are uniform throughout the entire European Federation;
b. to borrow money on the credit of the European Federation;
c. to regulate commerce among the States of the European Federation and with foreign nations;
d. to regulate throughout the European Federation uniform migration and integration rules, what rules will be co-maintained by the States;
e. to regulate uniform rules on bankruptcy throughout the European Federation;
f. to coin the federal currency, regulate its value, and fix the standard of weights and measures; to provide in the punishment of counterfeiting the securities and the currency of the European Federation;
g. to regulate and enforce the rules to further and protect the climate and the quality of the water, soil and air;
h. to regulate the production and distribution of energy;
i. to make rules for the prevention, furthering and protection of public health, including professional illnesses and labor accidents;

j. to regulate any mode of traffic and transportation between the States of the Federation, including the transnational infrastructure, postal facilities, telecommunications as well as electronic traffic between public administrations and between public administrations and Citizens, including all necessary rules to fight fraud, forgery, theft, damage and destruction of postal and electronic information and their information carriers;
k. to further progress of scientific findings, economic innovations, arts and sports by safeguarding for authors, inventors and designers the exclusive rights of their creations;
l. to establish federal courts, subordinated to the Supreme Court;
m. to fight and punish piracy, crimes against international law and human rights;
n. to declare war and make rules concerning captures on land, water or air; to raise and support a European defense (army, navy, air force); to provide for a militia to execute the laws of the Federation, to suppress insurrections and to repel invaders;
o. to make all laws necessary and proper for carrying out the execution of the foregoing powers and of all other powers vested by this Constitution in the Government of the European Federation or in any Ministry or Public Officer thereof.

*Section 3 – Guaranteed rights of individuals*

1. The immigration of people, by States considered to be permissible, is not prohibited by the European Congress before the year 20XX.
2. The right of habeas corpus is not suspended unless deemed necessary for public safety in cases of revolt or an invasion.
3. The European Congress is not allowed to pass a retroactive law nor a law on civil death. Nor pass a law impairing contractual obligations or judicial verdicts of whatever court.

*Section 4 – Constraints for the European Federation and its States*

1. No taxes, imposts or excises will be levied on transnational services and goods between the States of the European Federation.
2. No preference will be given through any regulation to commerce or to tax in the seaports and airports of the States of the European Federation; nor will vessels or aircrafts bound to, or from one State, be obliged to enter, clear or pay duties in another State.
3. No State is allowed to pass a retroactive law nor a law on civil death. Nor pass a law impairing contractual obligations or judicial verdicts of whatever court.
4. No State will emit its own currency.
5. No State will, without the consent of the European Congress, impose any tax, impost or excise on the import or export of services and goods, except for what may be necessary for executing inspections of import and export. The net yield of all taxes, imposts or excises, imposed by any State on import and export, will be for the use of the Treasury of the European Federation; all related regulations will be subject to the revision and control by the European Congress.
6. No State will, without the consent of the European Congress, have an army, navy or air force, enter into any agreement or covenant with another State of the Federation or with a foreign State, or engage in a war, unless it is actually invaded or facing an imminent threat which precludes delay.

*Section 5 – Constraints for the European Federation*[92]

1. No money shall be drawn from the Treasury but for the use as determined by federal law; a statement on the finances of the European Federation will be published yearly.
2. No title of nobility will be granted by the European Federation. No person who under the European Federation holds a public or a trust office accepts without the consent of the European Congress any present, emolument, office or title of any kind whatever, from any King, Prince or foreign State.
3. No personnel, whether paid or unpaid, of the government, government contractors or entities receiving direct or indirect funding from the government shall set foot on foreign soil for the purpose of hostilities or actions in preparation for hostilities, except as permitted by a declaration of war by Congress.
4. No person or entity, whether living, robotic or digital, may contribute more than one day's wages of the average U.S. laborer to a person seeking elected office in a particular election cycle, in currency, goods, services or labor, whether paid or unpaid. Anyone seeking an elected position that accepts more than this amount in any form, and anyone who seeks to circumvent this statutory limit on campaign contributions, will be barred from holding office for life and will serve a minimum term of imprisonment of five years.
5. No person or entity that has directly or indirectly received funds, favors or contracts from the government during the last five years may contribute to an election campaign under the sanctions described in paragraph 6. In addition, any entity seeking to circumvent this limitation shall be fined five years of its annual turnover, payable on conviction.
6. Any contribution, whether direct or indirect, in cash, goods, services or labour, whether paid or unpaid, made to a person seeking elected office must be made public within forty-eight hours of receipt. The contribution from each entity must bear the name of the person or persons responsible for managing the entity. An entity seeking to circumvent this limitation shall be fined five years on an annual basis, payable on conviction.
7. No individual shall spend more than one month of the average monthly wage of the average worker on his own campaign for an elected office. Anyone wishing to circumvent this statutory limit on campaign contributions will be barred from holding office for life and will serve a minimum sentence of five years imprisonment.
8. No government employee may accept a position in a private entity that has accepted government funding, favors or contracts for a period of ten years after leaving the government office during the last five years.
9. Every institution and agency of government, and every entity or person that has directly or indirectly received government funding, favors or contracts, will be subject to an independent audit every four years, and the results of these forensic audits will be made public on the date of their issue. Any entity attempting to circumvent or avoid this requirement will be fined five years in revenue, payable in the event of a conviction. Any person seeking to circumvent or avoid this requirement must serve a minimum term of imprisonment of five years.

## *Article IV – Organization of the Executive Branch*

*Section 1- Establishing the offices of the President and the Vice President*

[92] For the record: this is the draft of a federal Constitution for a federal Europe, part of the European Federalist Papers, written by Leo Klinkers and Herbert Tombeur in 2012-2013. Paragraphs 3-9 of Article III have been added by Leo Klinkers, from Charles Hugh Smith, 10 Common- Sense Amendments to the US Constitution, 21 February 2019.

1. The executive power is vested in the President of the European Federation. He/she is in office for a term of four years, together with the Vice President who shall also be in office for a term of four years. The President and the Vice President are elected as a duo by the Citizens of the European Federation, which has to that goal one constituency. They are re-electable – forthwith – for one term.
2. The election of the President and the Vice President of the European Federation will be held on the third Friday in the month of October; the first election in the year 20XX. To bridge the period between ratification of the Constitution of the European Federation and the first election of its President and Vice President the European Congress appoints from its midst an acting President. This acting President is not electable as President, nor as Vice President, at the first Presidential election of the European Federation.
3. Electable for President or Vice President is any person who, at the moment of his candidacy, to be set by federal law, has reached the age of thirty-five years, who has the nationality of one of the States of the European Federation and who has been registered as a Citizen of one of the States of the Federation for at least fifteen years.
4. The President receives a salary for this position, set by the European Congress. The salary shall not be increased nor decreased during the term of his/her presidency, and he/she does not receive any other compensation or in kind from the European Federation, nor from any individual State of the Federation, nor from any other public institution within or outside of the Federation, nor from a private institution or person.
5. Before the President enters the office he/she will pledge, in front of the Chief Justice of the Court of Justice, in the month of January in which his/her office begins, the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the European Federation and shall to the best of my ability preserve, protect and defend the Constitution of the European Federation.

*Section 2 – Vacancy and end of the term of the President and the Vice President*

1. The President and the Vice President will be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors. In case of removing the President from office, his/her death or his resignation, the Vice President will become President.
2. Whenever there is a vacancy in the office of the Vice President the President will nominate a Vice President who will take the office upon confirmation by a majority vote of both Houses of the European Congress.
3. Whenever the President transmits to the President pro tempore of the Senate and the Chairperson of the House of the Citizens his/her written declaration that he/she is unable to execute the powers and duties of the office, and until he/she transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Chairperson of the House of the Citizens their written declaration that the President is unable to execute the powers and duties of the office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
5. Thereafter, when the President transmits to the President pro tempore of the Senate and the Chairperson of the House of the Citizens his/her written declaration that no inability exists, he/she shall resume the powers and duties of the office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may provide by law, transmit within four days to the President pro tempore of the Senate and the Chairperson of the House of the Citizens a new written declaration that the President is unable to

execute the powers and duties of the office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to execute the same as Acting President; otherwise, the President shall resume the powers and duties of the office.

6. The terms of the President and the Vice President will end at noon on the 20th day of January in the final year of their term. The terms of their successors will then begin.
7. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President elect is unable to pledge the oath or affirmation for beginning his office, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

*Article V – Powers and tasks of the President*

*Section 1 –Presidential powers*

1. The President is commander in chief of the armed forces, security agencies and militia of the European Federation.
2. He/she appoints Ministers, Ambassadors, other Envoys, Consuls and all public officials of the executive branch of the European Federation whose appointment is not regulated otherwise in this Constitution and whose offices are based on a law. He/she removes from office all public officials of the European Federation after their conviction of treason, bribery or other high crimes and misdemeanors.
3. He/she may seek the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.
4. He/she has the power to grant amnesty and grace for offenses against the European Federation, except in cases of impeachment.
5. He/she has the power to make treaties, by and with the advice and consent of the Senate, provided two thirds of the Senators present concur.
6. He/she nominates and appoints judges of the Constitutional Court of Justice and of Federal Courts, by and with the advice and consent of the European Congress.
7. He/she organizes once per year a consultative referendum among all Citizens of the European Federation with the right to vote in order to obtain the opinion of the European people with respect to the execution of the federal policy domains. The referendum shall be executed under the umbrella of the European Digital Agenda.
8. He/she organizes a decisive referendum among all Citizens of the European Federation with the right to vote on the question of whether or not the European Federation should accede to, or should co-establish, an international organization with compulsory regulating power, after advice of the Senate about this acceding or co-establishing.
9. He/she may organize a referendum among all Citizens of the European Federation with the right to vote on a draft law that has met objections by the President according to Article III of this Constitution and about which the Houses of Congress after these presidential objections do not come to an agreement during two

years. The term of two years begins as of the first plenary vote in the House that did not initiate the draft law.

*Section 2 – Presidential tasks*

1. The President gives the European Congress once per year information about the State of the Federation and recommends measures that he judges necessary.
2. The President may on extraordinary occasions convene both Houses of the European Congress or either of them, and in case of disagreement between them with respect to the time of adjournment he/she may adjourn them to such time as he/she thinks proper.
3. The President receives Ambassadors and other foreign Envoys.
4. The President takes care that the laws are faithfully executed.
5. The President commissions the tasks of all government officials of the European Federation.

## *Article VI – The Judicial Branch*

*Section 1 – Organization*

The judicial power of the European Federation is vested in a Constitutional Court of Justice. European Congress may decide to install lower federal courts in States. The judges of the Constitutional Court of Justice as well as those of the lower federal courts hold their office as long as their conduct is proper. For their services they receive a salary which during their office cannot be reduced.

*Section 2 – Powers of Federal Courts*

1. The federal judicial branch has the power to judge in all conflicts arising under this Constitution; with respect to all laws of the European Federation; to treaties made, or that shall be made under the authority of the European Federation; to all cases affecting Ambassadors, other Envoys and Consuls; to all cases of a maritime nature; to all cases in which the European Federation is a party; to controversies between two or more States, between a State and Citizens of another State, between Citizens of several States, between Citizens of the same State in matters of land in another State and between a State or Citizens of that State and foreign States or Citizens thereof.
2. The Constitutional Court of Justice has the exclusive power in all cases in which only States, Ministers, Ambassadors and Consuls are party. In all other cases, as mentioned in Clause 1, the Constitutional Court of Justice is the court of appeal, unless European Congress decides otherwise by law.
3. Except in cases of impeachment, the trial of crimes, as determined by law, will be by jury. These trials will be held in the State where the crime has been committed. If they have not been committed within any State the trial will be held at such place or places as decided by law by European Congress.

*Section 3 – High treason*

1. High treason against the European Federation shall only consist of levying war against the Federation, or of adhering to its enemies by giving them aid and comfort. No person shall be convicted of high treason without the testimony of at least two witnesses to the crime, or on confession in open court.
2. European Congress has the power to declare the punishment for high treason, but in no way a verdict of high treason shall lead to attainder or confiscation for the offspring of the convicted person.

*ARTICLE VII – The Citizens, the States and the Federation*

*Section 1- The Citizens*

1. The Citizens of each State of the European Federation possess also the Citizenship of the European Federation with all the associated political and other rights. The Citizens of a Member State are also entitled to all rights and favors of the Citizens of any other State of the Federation.
2. A minimum of 300,000 Citizens of the European Federation is required to present a draft law to the European Congress. This draft describes only the contours of the goal or is a draft law. It will be laid down as a People's Initiative at the Registry of the House of the Citizens. Congress and the President decide on the receptivity of the People's Initiative. The House of the Citizens deals with this People's Initiative according to its legislative procedures. Both Houses of Congress make a final decision regarding this proposal within two years of its registration. In case one House accepts a draft law as a result of this People's Initiative, while the other House rejects this draft or does not make a decision within the determined time period, the President presents the accepted draft law with the advice of each House regarding this People's Initiative to the Citizens of the Federation and to the legislatures of the States. In case the presented draft law is accepted, by a simple majority, by the Citizens and by the States, it will become federal law. Should there be no such majority this People's Initiative is rejected. Should neither House decide within the determined time period the President presents the People's Initiative to the Citizens of the Federation. They decide by simple majority whether the People's Initiative should be maintained. In case it is maintained the Peoples' Initiative will again be dealt with by Congress. Congress makes a final decision carrying the overall meaning of the People's Initiative, under the supervision of the President. Congress determines by law the procedure for dealing with a People's Initiative without committing itself to substantive conditions.
3. A person convicted in any State of the Federation for high treason, felony or other crimes, fleeing from justice and found in a different member State, will at the request of the executive authority of the State from which he/she fled, be surrendered to the State with jurisdiction relating to that crime.
4. Slavery or any form of compulsory servitude, except in case of punishment for a crime for which the said person has been lawfully convicted, will be ruled out in the European Federation or in any territory under federal jurisdiction.

*Section 2 – The States*

1. Full faith and credit will be given in each State to the public acts, records and judicial proceedings of all other States. Congress may prescribe by general law the manner in which such acts, records and proceedings will be proved, and the effects thereof.
2. The States of the European Federation have the exclusive power to regulate matters of Citizenship. A State's Citizenship is valid in any other State of the Federation.
3. States may join the European Federation with the consent of a two-third majority of the Citizens of the acceding State, a two third majority of the legislative branch of the acceding States, a two-third majority of the Citizens of the Federation and a two-third majority of each House of the European Congress, in this order. The European Federation takes note of this consent and acts accordingly.
4. States joining the European Federation after the Constitution having come into force retain their debts and are bound to the laws of the Federation as of the moment of their accession.
5. Any change in the number of States of the European Federation will be subjected to the consent of a two-third majority of the Citizens of the concerned States, a two-third majority of the legislative branch

of all States and a two-third majority of each House of the European Congress, in that order.

*Section 3 – The Federation*

1. The European Federation will guarantee a representative democracy for each Member State and will protect them against an invasion and, at the request of the legislative branch, or that of the executive branch in case the legislative branch cannot convene, against internal violence.
2. The European Federation will not interfere with the internal organization of the States of the Federation.
3. The European Congress has the power to have at their disposal and make all necessary regulations with respect to the territory or other possessions belonging to the European Federation.

*Article VIII – Changing the Constitution*

The European Congress is authorized to propose amendments to this Constitution, each time a two third majority in both Houses consider this necessary. If the legislative branches of two thirds of the States consider it necessary Congress will hold a Convention with the assignment of proposing amendments to the Constitution. In both cases the amendments will be a valid part of the Constitution following ratification by three quarters of the Citizens of the European Federation, three quarters of the legislative branches of the States and three quarters of each House of the European Congress, in this order.

*Article IX – Federal Loyalty*

1. This Constitution and the laws of the European Federation, which will be made in connection with the Constitution, and all treaties, made or to be made under the authority of the European Federation, are the supreme law of the Federation. The judges in every State will be bound hereby, notwithstanding any other regulation in the Constitution or the laws of any State.
2. The members of the European Congress, the members of the legislative branches of the States and all executive and judicial officers, both of the European Federation and of the States, will be bound by an oath or affirmation to support this Constitution. But no religious test shall ever be required as a qualification for any office or public trust under the European Federation.

*Article X – Transitional Measures and Ratification of the Constitution*

1. All debts entered, and engagements contracted by States before the ratification of this Constitution will remain valid within the European Federation.
2. The ratification by a simple majority of the Citizens of nine States of the Eurozone will be sufficient for this Constitution of the European Federation to come into force.

## 12. A CITIZENS' CONVENTION FOR DRAFTING THE FEDERAL CONSTITUTION

### 12.1 Why a Citizens' Convention? [93]

The principles of popular sovereignty - described in Chapters 8 and 9 - imply that the state belongs to the people. Whether it is a unitary state, or a federal state makes no difference. If a state is to be created, it is the citizens, who as a people constitute the state; who must lay the foundations for it. Designing a Constitution as a basis under the state is such a foundation.

When this principle became clear a few hundred years before Christ, it was also realized that the people cannot come together every day to make decisions for the whole people. This is only possible in tribal societies of a few dozen inhabitants per tribe. They can meet, weigh up and make decisions together. But as soon as the number of inhabitants runs into the thousands, it becomes necessary to organize a system of representation of the people[94]. And that starts with the drafting of a Constitution. In fact, it says how this system of representation will be put together.

However, the question is: how to organize the Constitution that describes the system of representation of the people? The answer to this question can be found in the best practice of the Philadelphia Convention of 1787, which has already been mentioned several times: assemble a small group of people with an awareness of the general interest to draft a good Constitution. So, install a Constituent Assembly of a small number of people.

However, this immediately raises other questions:

- How do you prevent a small group as a new elite of rulers from making a Constitution that only serves their interests?
- Where do you leave the rest of the people? Aren't they involved in that design? Don't you then miss support from the people?

These are relevant questions and they will be answered below.

### 12.2 How many members should such a Convention have?

The Philadelphia Convention had fifty-five members. Let it be immediately clear that it did not take thousands of people to create a Constitution that laid the foundation of the state that gradually developed into the most influential in the world. The concept of 'best practice', in combination with the concept of 'benchmarking', forces itself upon us here: if you see that someone is successful, and if you want to be so successful yourself, look at how they did it, learn from it, imitate it, improve it, and become better than the one who realized that success with his methods.

[93] This chapter is an abridged and adapted version of Chapter 6 from the book 'Sovereignty, Security and Solidarity' by L.E.M. Klinkers. See the bibliography.

[94] According to Plato, the ideal number of heads of household was 5,040.

**12.3 What mistake should one not make per se?**
So, dare to install a convention of no more than fifty-five people. And put the rest of the people to work in a different way to support the work of the Constituent Assembly. How that commitment of citizens to support the constituent work of the Convention can be organised is discussed in section 12.9.

Drafting a Constitution is a task for professionals. Someone who buys a loaf of bread from a baker does not demand to be involved in that baking beforehand. He assumes that the baker understands his profession as a craftsman. With the risk that it is not good bread after all. Someone who gets on an airplane does not demand to be involved in the construction of that airplane beforehand. He assumes that it was made by professionals, that the aircraft is well assembled and does not fall out of the sky. At the risk of crashing anyway.

Acquiring support for a Constitution has nothing to do with the number of people involved in the drafting of the text, but with (a) finding the right professionals and (b) with the way in which citizens' support for professionals is organised.

**12.4. What is the profile of the members of the Convention?**
The question of the profile of members of the Convention is not about the profile of each member, but about the profile of knowledge necessarily present in the Convention as a whole. The fifty-five members must together guarantee the presence of three complexes of knowledge:
(a) knowledge of basic federalism;
(b) of constitutional law and legislative technique;
(c) and of a handful of common interests such as ensuring a common defence policy, foreign policy, financial and economic policy, climate and energy policy, immigration policy, harmonization of taxes and some other interests which cannot be represented by individual member states and are therefore the reason for setting up a federation.

This third complex of knowledge, the presence of knowledge of some specific policy areas, is necessary because the federal Constitution must have an Explanatory Memorandum. The article-by-article Explanatory Memorandum must clearly state the common interests for which the Federation is to be established.

Here it is important to mention that the common interests are only broadly defined by the Convention. This exhaustive list serves as a context and will be fleshed out later - in a democratic context - on the basis of political negotiations between the parties that are going to populate the parliament.

In the first instance, the Convention concentrates on the construction of the federal system within the federal Constitution. This is a matter for the people in accordance with the principle 'All sovereignty rests with the people'. It will not and must not happen that the Convention is dominated by discussions of policy content. That is a task of political consideration. The content of the federal policy areas belongs in the federal Parliament.

There is another profile that requires attention: the male-female relationship in the Convention. The distribution must be 50-50.

This will not be easy, because many countries do not have a tradition of taking the proportional presence of women in top positions for granted and thus organizing them in a straightforward manner.

**12.5 Who selects the members of the Convention?**
The selection of the fifty-five members of the Convention is the task of the leaders of the peoples who wish to establish the federation together. They make an analysis in order to find, based on the three complexes of knowledge mentioned in section 11.4, the men and women who could be potential members of the Convention. From these, fifty-five people will be selected. This will probably leave many potential members. They are asked to be available to support those who will act as members of the Convention.

As an aside, it is the leaders of the peoples who wish to set up the federation together who will have to organise the Convention and thus determine where it should take place.

**12.6 Are politicians welcome as members of the Convention?**
The answer is, "No, unless..." Generally speaking, it is a typical characteristic of politicians to think from the perspective of local, regional and national interests. But designing a federal Constitution must be based solely and exclusively on the questions: what is the general interest of the whole and with what general binding rules are we going to serve that general interest?

To give an example. Suppose the people of Papua want to form a state in a federation with the South Moluccas and Acheh, and demand that the federal Constitution contains the right to wear penis shafts. Then that's not in the federal Constitution because it doesn't belong there. But that right may at least be in the Constitution of the state of Papua if that people see the wearing of penis shafts as a national heritage that must be preserved and protected by their own people.

The way in which politicians in the run-up to the transfer of sovereignty on 29 December 1949 made (or had made) an extremely bad federal Constitution is a contraindication of the proposition that you should leave that to politicians. A terrifying example from Europe should not be missing here. That it is not self-evident that politicians as such, i.e. in their capacity as politicians, should be given a place in the Convention is evident from the incorrect structure of the European Convention (February 2002-July 2003) under the leadership of the French statesman Valéry Giscard d'Estaing. This Convention - with the aim of creating a European Constitution - was provided for in the Laeken Declaration of 2001, based on the questions of how the European Union should proceed, what improvements were useful and necessary and, above all, what geopolitical position the Union should aspire to. The Convention was to lead to a new text, in the form of a Constitution, to replace all the existing European treaties, capable of a new European Union with flexible governance and capable of enlargement to twenty-five - or more - member states. The product of the Convention would then be assessed in an Intergovernmental Conference and adopted by the

European Council of Heads of State or Government, subject to any amendments.

And then it went wrong:

- No fewer than 217 people took part in the Convention: representatives of the European member states, the national parliaments, the European Parliament and the European Commission; representatives of thirteen countries that were waiting to become members of the EU; representatives of various European institutions and civil society organisations such as employers' and employees' organisations, non-governmental institutions, representatives of universities.

- This large number of members, not selected on the profile set out in paragraph 12.4 above, added to their national backgrounds and institutional interests, guaranteed a motley collection of special interests and the safeguarding of their own interests, rather than thinking from European interests.

- The intention was a document for a draft Treaty establishing a Constitution for Europe. A wrong combination of words: an oxymoron. You make a treaty, or you make a constitution. A constitutional treaty is juridical nonsense.

- After sixteen months - consultation driven by national and private interests - the final product (accepted by 209 of the 217 members) was submitted to an Intergovernmental Conference of representatives of the governments of the then member states and of the states that were to join.

- This Intergovernmental Conference worked on it from October 2003 to June 2004, after which the European Council took a final decision on 18 June 2004. The Treaty, referred to as a Constitution, was signed in Rome on 29 October 2004 by the Heads of State or Government of twenty-five Member States.

- At that time, ratification still had to take place on a country-by-country basis. For ten countries, including France and the Netherlands, this had to be done by means of a referendum. Its history is well known. In France and the Netherlands (2005), the Constitution was rejected by referendum.

- Subsequently, the rejected text was tinkered with politically for several years. This resulted in the Treaty of Lisbon in 2007, which came into force in 2009. Without a doubt the worst legal document ever made in Europe. A legal student who would put something like this in his thesis would immediately receive the 'consilium abeundi': the advice to leave.

Here we come across an incomprehensible aspect of human behaviour. Most people find it normal that everything that is made - be it a loaf of bread, or a house, or a car, or a rocket, or a computer - must be made by professionals. They buy it because the support for that decision is based on science, or the assumption, that no amateurs or bunglers have been at work. And so, the product does not suffer from system errors. Or that the presence of system errors is limited as much as possible.

Therefore: in the Convention, allowing politicians to participate in the composition of a constitution - a political document of the highest order - simply because they are politicians is an error of the highest order. Knowledge, knowledge and more knowledge must be the basis of the political foundation for a prosperous, safe and just life in and around the South Moluccas. Only politicians who meet one of the knowledge complexes of the profile in section 12.4 can be members of the Convention. The appropriate adage is: "When science talks, bullshit walks."

**12.7 What is the Convention's task?**

The task of the Convention of fifty-five members is to improve the draft federal constitution of only ten articles contained in Chapter 11. We took that U.S. Constitution as the best practice - our benchmark. This includes various aspects of the twenty-seven Amendments that were added to the American Constitution in later years. It also introduced elements of direct democracy from the Swiss Federal Constitution.

And yet that draft Constitution contains no more than ten articles. That is all you need. It can serve any federation in the world. As more articles are added, its strength diminishes. A Constitution of only ten articles is not only a practical argument from the point of view of careful legislative technique. It is also an argument of principle. When legislating, there is one all-important criterion that must be repeated over and over again: design only generally binding regulations. The more parties are affected by legislation, the more they all want to regulate matters on the basis of their own - national or institutional - interests, the more exceptions they demand to the generally binding rules, the smaller the number of common interests and thus the smaller the number of rules to be made: therefore, only make the rules that all stakeholders believe should be binding on all.

**12.8 How much time does the Convention need?**

The Convention only must last a week, from Monday to Friday. The daily schedule is as follows:

Monday: arrival of members and discussion of work for the next few days.

Tuesday: the members decide by majority on the content of each of the ten generally binding articles: five in the morning and five in the afternoon. This is thoroughly prepared in advance.

Wednesday: members shall decide by a majority on the content of the Explanatory Memorandum on the draft Constitution. This concerns a General Explanation, as well as an Article by Article Explanation.

Thursday: on this day, the members decide how the draft federal Constitution will be submitted to the participating peoples with the aim and request to ratify it.

Friday: on the last day the outcome of the Convention will be presented for information to representatives of the peoples, to representatives of the United Nations, Indonesia, the Netherlands

and America, and to representatives of civil society, knowledge institutes and the media.

**12.9 Overall period covered by the Convention and specific activities**

The success of a Convention of only one week depends mainly on its preparation. Think of a turnaround time of one year. After the selection of the fifty-five members of the Convention, they will have to prepare themselves. This implies:

- Study of material that plays a role in the drafting of the Constitution, including this report on the Moluccan case.
- Organizing advice and assistance from the citizens, the people.
- Conducting consultations with citizens and fellow members of the Convention on the possibility or desirability of amending this draft federal constitution already, including its Preamble and the ten articles.
- Submitting reasoned amendments in good time to an organizing committee.
- To enable this committee to assess the value of these amendments and to incorporate them into the draft federal constitution.
- So that an updated draft of the Federal Constitution can be discussed and decided on during the Convention of one week according to the timetable of paragraph 12.8.

In that year, systematic and extensive contact between the members of the Convention and citizens will thus take place. The aim is to make clear to citizens what participation in the federal state entails, what the purpose of the federal Constitution is, what the existing draft already looks like, what they might want to change or improve on it so that the members themselves - supported by a support base of citizens who are involved - can give form and content to their own contribution to improving the draft constitution.

**12.10 How do citizens ratify the draft federal Constitution?**

After a week, the Convention produced an improved draft of the federal Constitution. This must be submitted to the people for ratification. The way in which this will take place is part of the process of a year in which members of the Convention consult and deliberate with citizens. In that contact it should become clear how the people can best vote on the draft constitution, without fear of fraud. Such a ratification process could take place by means of block chain technology.

**12.11 What happens after the ratification of the federal Constitution?**

If a majority of the people of the envisaged federated member states ratify the draft federal constitution, the leaders of the collaborating peoples form a Committee that organises the

establishment of the federal state. Including consultation with the Republic of Indonesia on the manner and pace of withdrawal of Indonesia from the Occupied Territories under the restitution of the property of the federated peoples. In accordance with the so-called 'actus contrarius' principle - about which more in Chapter 14 - the 'de iure' acquisition of the independent state of the South Moluccas will have to take place through a formal transfer of sovereignty from Indonesia to the South Moluccas.

## 13. SETTING UP POLICIES ON THE BASIS OF CIRCULAR POLICY MAKING

Knowing how to make good policies is an essential prerequisite for the functioning of a successful federation. We cannot elaborate on this in detail in this report. Chapter 13 therefore only contains indications of a few key points.

### 13.1 Why is having a policy vision relevant?

Member states that are part of a federation must determine which powers they hold as a sovereign state and which powers they entrust to the federal body. In order to give a clear answer to this question, the state in question will first have to make it clear what it is trying to achieve in terms of policy, what is needed in order to determine, finally, who is to bear the responsibility for this. In other words, it is first about the content and then about the organisation.

In the case of the South Moluccas, the peculiarity is that this country does not have an independent content-related vision of the future, other than as a province of Indonesia.

In short, the South Moluccan people must decide where they want to be in 10-15-25 years' time. How will the archipelago look like then? Subsequently it is necessary to indicate what should be done to realize that ambition. Finally, the question arises as to which powers should be allocated to the federal level.

Other states that will become part of the United States of Oceania (see Chapter 10) will have to take the same route.

### 13.2 What is circular policy making?

Circular policy making is a process within the 'Society Policy Method' that ensures that policy is developed in the most sustainable way[95]. In this context, sustainable means in the first place that maximum efforts are made to acquire the necessary knowledge from society in order to bring about change. Secondly, based on thorough analyses of problems and causes, activities, actions, plans and legislation are developed with the highest possible degree of effectiveness and efficiency; superfluous rules and procedures are omitted. In the third place, the activities create support in society; the participation of citizens in a better world is a matter of course rather than a necessity to enforce things. In short, all the energy invested in such a process leads to social results without policy waste being produced: a social contract in optima forma.

Preventing policy waste is the reason why we call this circular policy. Compare it to circular economics, in which all waste materials are reused as raw materials, so nothing is lost.

### 13.3 The basic idea behind the Society Policy Method

The basic idea is: just as the federal organization of states - in accordance with the views of the political philosopher Johannes Althusius - to organize societies and public bodies from the

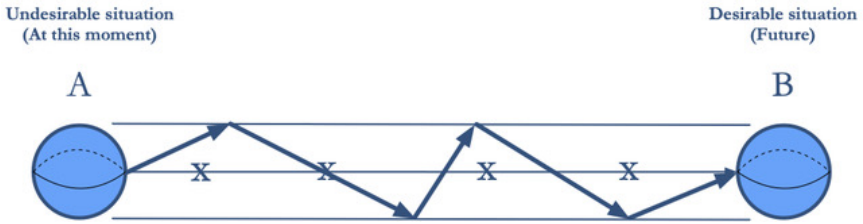
[95] See www.samenwereld.nl.

bottom up, so too is the development of policies.[96] From the outside in and from the bottom up.

### 13.4 Setting objectives and achieving objectives

It is not easy to determine in a scientifically responsible way the objective that society is striving for (point B in the figure below). The goal must be supported by the general will of the people, as we have seen in Chapter 8. This requires some well-thought-out steps.

To set an objective is one, but achieving the goal is a separate art. We have developed standards for this. The application of these requires a great deal of knowledge and discipline.




### 13.5 The organisation

When one has set a goal correctly and know what is needed to achieve it, the question remains how to organise it in order to get social results. In this context, the questions are also raised: who will take care of what? And what powers and resources are needed.

Based on the subsidiarity principle, the powers are at the lowest possible level, i.e. that of the state. Only those powers that are better placed at a higher level go to the federation.

Only after the process of circular policymaking has been completed can sensible statements be made about this.

### 13.6 Setting up knowledge centers

Making policy using the Society Policy Method requires thorough knowledge of several standards. Policymakers who work with these standards will need to be trained for this. Policy making is a profession. As with any subject, this must be learned.

The application of the method has a craft-character and is therefore labor-intensive. That is why a sufficient number of people must be trained.

More knowledge about the method can be found in the book by Peter Hovens, *SamenWereld, Hoe het geloof in de politiek en het vertrouwen in de overheid terugkeert*.

[96] Leo Klinkers, 'Policy begins with society, A quest for the human dimension, About the essence of interactive policy making', Lemma, Utrecht, 2002.

## PART IV WHAT NEEDS TO BE DONE TO DO JUSTICE?

Part IV outlines who is in charge to do justice to the people of the South Moluccas and how they should do so.

## 14. AFTER THE REGAINED FREEDOM: ROBUST PEACEKEEPING AND OPERATIONAL IUS POST BELLUM

### 14.1 From cold case to hot case

At the root of the tragedy of the South Moluccas lies a mixture of bad faith, lies, deceit, double standards, violence, lack of knowledge, legal tampering, treaty weakness and political cowardice. Precisely the ingredients needed by substandard functionaries to convince others that economic interests must take precedence over the happiness, connectedness, security and prosperity of a people who cannot defend themselves against autocracy. And so is at the mercy of committing loss-making resistance.

That resistance will never cease[97]. Certainly not now that in more and more places in the world citizens are calling autocratic and dictatorial government to account. With growing violence on both sides.

After 75 years, the goals of the United Nations seem increasingly difficult to achieve. World wars have given way to uncontrollable series of acts of violence in regions, where it is not easy to recognize where the heaviest emphasis lies in the trilogy: fundamentalism-radicalization-resistance.

As far as the South Moluccas are concerned, the emphasis is still on resistance. Not radicalization, let alone fundamentalism. And in the Moluccan people wish to give up this resistance in exchange for peaceful coexistence – as an independent and sovereign nation - with Indonesia. No matter how much violence, oppression, slavery, torture, imprisonment and loss of property, there is always room for reconciliation.

However, the question is: who can lead that? Who is willing and able to start a process that can do justice after 75 years? The answer to that question is simple: the parties who messed up this around 1950 - under the auspices of the United Nations – should feel being in charge to do justice to what they have done in crookedness. But as simple as the answer to that question is, as complicated as it will be to start it, persevere it and bring it to a peaceful end.

Here lies a major task for the United Nations to turn a cold case into a hot case after 70 years: sustainable peace as the basis for a sustainable federal state, aimed at making sustainable policy. But the weight of that task is also an opportunity to fulfil the treaty promises of aid to oppressed peoples. It is an opportunity to give a signal to a world full of regional conflicts through autocratic governance: 'to here and no further'. If the UN lets this opportunity pass it shows itself to be a giant on clay feet. And then there will be enough parties to wash away that giant's feet with lots of water. The bottom line is that the United Nations is in

[97] In the eyes of Henry David Thoreau, civil disobedience can be justified when the observance of laws results in injustice. See Henry D. Thoreau-Walden, 'Civil Disobedience', translated and epilogue by Anton Haakman, Atheneum-Polak & Van Gennep, Amsterdam 2005.

charge to proving that the articles of the Charter are meant to be used to protect the values enshrined in the Preambles of the UN treaties. If the people of the South Moluccas cannot rely on this, the question arises: who can?

In this chapter we make recommendations as to which actions should take place if, and when, the UN has called Indonesia to order pursuant to the detailed Requisitory set forth in Chapter 15.

In accordance with the principle 'Ex factis ius oritor' (it is the facts that create justice) we first list some important facts.

**14.2 The Moluccan issue in brief perspective**

Chapters 5, 6 and 7 describe the facts, the political manipulations, the legal shortcomings and the treaty omissions which form the basis for the right of the Moluccas to reopen their case. They can be summarized as follows:

- The provisional federal Constitution came into force on 27 December 1949. Its purpose was to make a definitive federal Constitution with the deployment of a Constituent Assembly.

- It was no secret that Sukarno et al. had cooperated in the drafting and signing of the provisional federal Constitution with the aim of establishing a legally – 'de iure' - sovereign Indonesia. But with the actual goal of subsequently dissolving the federation in order to establish a unitary state.

- Immediately after the transfer of the sovereignty Sukarno started to dismantle the federation step by step with the help of articles from the federal Constitution. He used the powers from those articles to achieve a purpose other than that for which those powers had been granted: abuse of rights.

- The provisional federal Constitution did not contain checks and balances that prevented the executive power under the leadership of the President and Vice President from attracting absolute power and thus obtaining a position above the rule of law. Together with the inviolability of federal laws (= is unconstitutional verifiability of federal laws to the constitution) and the illegally promulgation of a federal emergency law, that position above the law constitutes the 'toolbox' of a dictator.

- The South Moluccas had joined one of the states of the federation, the Negara Indonesia Timur. They joined with the reservation that they would resign if it turned out that the government of the state would not take enough account of the interests of the South Moluccas.

- When in the months of January to April 1950 it appeared that Sukarno had started dismantling federal structures and procedures, and when it also appeared that the government of the state of Negara Indonesia Timur did not oppose this and therefore did not offer any protection to the South Moluccas, the competent authority of the South Moluccas decided on 25 April 1950 to declare its own independence. This was the only and, in all respects, legitimate act of the South Moluccas to emerge from the constitutional vacuum created by Sukarno.

- The Moluccan proclamation of independence was violently answered by Sukarno et al., after which a guerrilla war broke out. This faded away after the execution – on April 12th, 1966 - of the leader of the resistance, Dr. Chris Soumokil. However, the resistance against the continuation of oppression, exploitation and violation of human rights continues to this day - passively - in the South Moluccas. Indonesia's response to date has been to violate human rights.

- The procedure for the transfer of sovereignty from the Netherlands to the Republic of the United States of Indonesia at the end of December 1949 was led by the United Nations Commission for Indonesia (UNCI). The UNCI knew of the fact that Sukarno et al. abused the federal Constitution in order to dismantle the federation. As well as Sukarno's military force against resistance in order to liquidate the federation definitively and establish the unitary state on 17 August 1950.

- In its three interim reports to the Security Council, the UNCI did refer – superficially - to what actually took place but did not recommend or ask the Security Council to take action against the violation of federal law and human rights. Repeated requests by the Netherlands to the UNCI - as the author of the legislation guaranteeing the external self-determination of peoples within Indonesia - to assume its responsibility and to stop Sukarno's actions, were dealt with by the UNCI with the message that disputes about the judicial process after the transfer of sovereignty had to be resolved by the two parties themselves - i.e. the delegations of the Netherlands and Indonesia. The UNCI chose, for unknown reasons, to adopt a distant position, although it had sufficient powers to intervene, in the sense that it could and should have advised the Security Council to call Indonesia to the rule of law.

- Already one month after the unlawful establishment of the centralized unitary state, the Republic of Indonesia was admitted to the United Nations by the Security Council and the General Assembly as a member 60. The speed with which this took place, partly against the background of the UNCI's refusal to intervene, suggests that interests other than those of the people of the South Moluccas were of a higher order. For the UN, for example, the importance of being able to score geopolitically with a completed decolonization (although the colonization was continued by another colonizer) and the entry of a new member for the UN that still had to prove itself as a young international organization. For America, in addition to the importance of engaging in federal conflict resolution (without recognising how wrongfully the federal Constitution was designed), there was also the importance of preventing Indonesia from falling into the hands of communism[98].

[98] America's policy in this area still raises questions. There is some logic in the attention America had in Indonesia to fighting communism, because it started the Korean war in the same year 1950. On the other hand, in 1945, it refused Ho Chi Minh's request for help against re-colonizing France, a request based on the American Declaration of Independence of 1776. After France lost the battle of Dien Bien Phu in 1954 and America became increasingly involved in that conflict between 1954 and 1964, America pushed Vietnam into the hands of communist support by taking over the struggle in Vietnam and rejecting the birth certificate of Vietnamese independence - the American Declaration of Independence. See

- As a member of the United Nations, Indonesia has persistently violated the International Covenant on Civil and Political Rights (ICCPR), the instrument with which the Human Rights Committee must do its work. The continuing violation is, on the one hand, the refusal of the 1950 Indonesian Constitution to recognise the right to self-determination of people on their own soil, although this obligation is enshrined in Article 1 of the ICCPR. On the other hand, the violation of conventionally protected human rights takes place through, inter alia, torture, executions, forced displacement and political prisons.

- The Committee on Human Rights has never condemned the abuse of rights that has led to the liquidation of the federation in favour of the establishment of the unitary state. The Committee did, however, inform Indonesia on one occasion that it still had a long way to go in terms of human rights. To the best of our knowledge, Indonesia's subsequently failed to report on what it had done with those recommendations. Nor is it known whether the Committee has attempted to put Indonesia on the right track in terms of respect for human rights. Reports from Amnesty International and Human Rights Watch point each year to the continuation of these violations throughout the territory of Indonesia, including the western part of New Guinea.

- Since 1950, the leadership of Indonesia has stated that the proclamation of independence of the Moluccas on 25 April 1950 was unlawful. Analysis of the law applicable at that time - including the federal Constitution and the Transitional Agreement of 2 November 1949 - makes it clear that the proclamation was, and still is, legally valid. It has been confirmed by court rulings several times after 1950.

- That is why it is fully justified when the people of the South Moluccas ask the United Nations - via the complaint procedure of the Human Rights Council - to reopen the Moluccan case. With this report as a basis, the South Moluccas can ask for the case to be reopened at the constitutional level of 27 December 1949: the level of the federal Republic of the United States of Indonesia, with a Constitution that - annexed to the Transitional Agreement - gave the South Moluccas the right to external self-determination. The South Moluccas could then opt for the creation of a state of their own or for a member state within a federation with other member states - perhaps including the Republic of Indonesia on a smaller geographical scale. If Indonesia were to oppose this course of justice - perhaps with even more violence and repression than is already the case - the South Moluccas can request that Indonesia be expelled as a member of the United Nations under Article 6 of the Charter for persistent violation of treaty principles.

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Fredrik Logevall, 'Embers of War. The fall of an empire and the making of America's Vietnam', Random House, 2012, p. 313 and 402.

**14.3 Building a strong federal state with strong policy making**
Chapters 8, 9, 10, 11, 12 and 13 contain the elements to build up the Moluccan state, with a strong policy basis. They can be summarised as follows.

- Everything begins and ends with the concept of popular sovereignty. It is the politico-philosophical basis for the right to self-determination, the international law basis for asserting that right, and the political basis for building a state from the bottom up.

- The core of popular sovereignty is expressed by a Constitution of, by and for the people. The Constitution begins with a Preamble describing the values to be protected, followed by articles containing the norms to protect those values.

- The content of the Constitution must contain only general binding rules and a clear division of powers between the legislative, executive and judicial powers. As well as system of checks and balances to guarantee the separation of these three powers. Where previous constitutions included fundamental rights and human rights, this is no longer necessary, as the necessary treaties to which the Constitution may refer have been adopted for that purpose.

- There are two types of states: unitary states and federal states. Unitary states can be centralized (France) or decentralized (the Netherlands). Federal states can be symmetrical or asymmetrical. In a symmetrical federal state, the federal states all have the same powers (America). In an asymmetric state, the powers can be different (Belgium).

- The most important characteristic of a federal state is that the federal member states retain their sovereignty, remain in charge of their own affairs and only interests that they cannot look after themselves entrust to a federal body.

- Establishing a federal state must take place according to standards. The less one takes these standards seriously, the weaker the federation becomes, which makes it vulnerable and eventually causes collapse.

- Based on the concept of popular sovereignty, a federation should be built from the bottom up. This implies the involvement of the people in designing the federal Constitution and in ratifying it.

- An example of a federal Constitution that has proved its worth is included in this report. A Citizens' Convention should adapt and improve it in order to make it recognizable as a Moluccan federal Constitution, in which other peoples in the vicinity of the South Moluccas can also identify themselves. The procedure for organising the Citizens' Convention and the way in which the people can be involved in the Constitution has also been outlined.

- Once the federal state is established, effective and sustainable policies will have to be put in place. The building blocks for this are set out in this report.

## 14.4 Robust peacekeeping and 'ius post bellum'

The United Nations has gained a great deal of experience with the deployment of military peacekeepers in conflict areas. Experience in the sense of: what works or what doesn't. The result was not always the intended peace and security, but the prolongation of armed conflicts during the presence of a Peace Force, or immediately after its departure.

If the UN takes the Chapter 15 Requisitory and the Chapter 16 Complaint, based on the content of Chapters 1-14, seriously, the South Moluccas will be restored to their sovereign independence. As a result, they are entering a period in which (a) peace and security and (b) the constitutional and institutional building blocks for state building must be guaranteed. Peace and security require so-called 'robust peacekeeping'. State building - in line with the principles and procedures set out in previous chapters - requires 'ius post bellum': a legal system that guarantees proper political and constitutional relations immediately after war/conflict - as an intermediate stage to the establishment of the actual state (either a unitary or federal state). These two concepts are set out in the following paragraphs.

### *14.4.1 Robust peacekeeping*

In 2020, the United Nations is in the third generation of peacekeeping, based on the so-called 'Brahimi report'.[99] This 2000 report takes stock of the results of past peacekeeping missions, outlining the contours for new - robust - generation peacekeeping missions.[100] It contains practical recommendations to enable the UN to play a more effective role in the field of peace and security. The core of the recommendations focuses on exactly what is at stake in the relationship between Indonesia and South Moluccas, namely a very long-term intra-state conflict: a conflict within a state. According to that report, the problem with an intra-state conflict is that the UN could not rely on the parties involved in that conflict to keep to the agreements. As a result, peacekeepers were often unable to do their job. Gruesome examples of this are the genocide in Rwanda in 1994 and the murders in Srebrenica (1995). Van Genugten et al. say about this[101]:

> "In both investigations this led to serious criticism of the functioning of all those involved and to the depicting of moral dilemmas with which UN soldiers, in view of their mandates, had to deal in the performance of their duties. The Brahimi report elaborated on this criticism. The time of good intentions in the application of peacekeeping is now definitely over. Thus, the tenor of the report. From now on, the UN must be judged on its

[99] 'Report of the Panel on United Nations Peace Operations', VN Doc. A/55/305-S/2000/809.

[100] Willem van Genugten, Fred Grünfeld en Dick Leurdijk, 'Internationale Rechtshandhaving, in: Handboek Internationaal Recht', (red.) Nathalie Horbach, René Lefeber & Olivier Ribbelink, p. 392 e.v.

[101] Van Genugten, ibid., p. 398.

credibility in carrying out peacekeeping missions: 'no amount of good intentions can substitute for the fundamental ability to project credible force'." (Brahimi report, part 3).

The term 'credible force' is then understood to mean[102] :

- Sufficient military strength to carry out the mandate 'professionally and successfully', guaranteeing the safety of both the blue helmets and the civilian population.
- Reformulation of the necessary impartiality of the UN peacekeeping in the sense that it is no longer a question of neutrality or equal treatment of the warring parties, but of taking firm action if one of the parties violates the agreements made: no 'weak-knee-policy'.
- This implies that mandates must better specify the authority to use force, deploy larger troops, with better equipment, and make these peacekeeping forces a deterrent threat to parties that oppose the UN.
- Countries that supply troops must be prepared to accept the risk of casualties among their own military personnel.
- Mandates must be 'clear, credible and achievable', which should only be formulated once it is certain that countries will provide sufficient troops.
- The need for peace building in the context of the restoration of law and order.
- "In short, in conclusion, the key conditions for the success of future complex operations are political support, the rapid deployment of troops that can act robustly and a well-considered 'peacebuilding' strategy in the period following a UN military mission."[103]

*14.4.2 Ius post bellum*

Immediately after the intended sovereign independence of the South Moluccas, peace, security and constitutional construction of the South Moluccan state must be guaranteed. To this end, the 'ius post bellum' (rights after war/conflict) doctrine needs to be applied: rapid provision of a temporary system of rules, institutions and procedures to complete the success of peacekeeping with everything needed to give the free state a chance of success.

We are not going to describe the contours of that 'post bellum' system and will limit ourselves to a few expert[104] observations on this relatively new area of international law.

[102] Van Genugten, ibid. p. 398.
[103] Van Genugten, ibid. p. 399.

[104] Eric de Brabandere, 'The Resonsibility for Post-Conflict Reforms: a Critical Assessment of Jus Post Bellum as a Legal Concept', Vanderbilt Journal of Transnational Law 43 (1), 2010: p. 119-149. And: 'The Concept of Jus Post

Setting up such a system is not easy when one realizes that it is about rebuilding a society that needs new life after years of oppression and freedom fights. Precisely because it is a relatively new phenomenon in international law, questions arise such as: what are the rights and obligations of the parties involved now that the conflict is over? And how should the rebuilding of society as an independent state be given form and content? These are questions about the degree of maturity of the 'ius post bellum' as a mature and rounded doctrine within international law.

Strictly speaking it is about the evolution from peacekeeping to peacebuilding. And this can only succeed if one starts from a thorough analysis of the root causes of the conflict. In the words of De Brabandere:

> "Operations in the 1990s underestimated the importance of political, economic, social and civil reconstruction in building sustainable peace. The growing interrelatedness of political affairs, economy, social services, and governance resulted in the gradual introduction of such elements in peacekeeping activities. A report by former Secretary-General Kofi Annan summarized the evolution from peacekeeping to peacebuilding as follows:
>
> > 'While United Nations efforts have been tailored so that they are palpable to the population to meet immediacy of their security needs and to address the grave injustices of war, the root causes of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future'." [105]

Well, with our report on the root causes of the Moluccan conflict, the Human Rights Council has a solid basis for peacebuilding after the United Nations forced Indonesia to restore the Moluccas to their sovereign independence. A basis for respecting all provisions of international law and political philosophy on self-determination and human rights. As well as the duty of reparations, the return of lawful ownership of raw materials, the restoration of actual and not the claimed civil liberties in the field of fundamental rights such as freedom of expression, association and assembly, administration and justice, the release of all political prisoners, the safe return of exiles and refugees, the provision of sustainable living, working, movement and transport, education and culture. In short, the creation of a situation that is generally referred to as a democratic state under the rule of law with a complex of facilities aimed at the happiness of the population.

For the record, we reiterate that, in addition to peacebuilding facilities, the basic conditions for building a federal state must be met if that will be the will of the population:

- Composing a Citizens' Convention.

Bellum in International Law, A Normative Critique', in: Jus Post bellum: Mapping the Normative Foundations, (red.) Carsten Stahn, Jennifer S. Easterday and Jens Iverson, 2014. Both publications passim.

[105] The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, delivered to the Security Council, U.N. Doc. S/2004/616, August 23, 2004.

- Let the Convention work with the people on a federal Constitution.
- Let the Convention decide on a federal Constitution.
- Ratify the Constitution by the people.
- Holding elections, by member state and for the federation.
- Setting up state apparatus, federated member states.
- Set up the institutes of the federation.
- Set up centers of expertise per member state and federation in order to learn to make sustainable policy.

It is up to the United Nations to assess whether, and if so how, a temporary administrative organisation with far-reaching powers, under the protection of the peacekeeping forces, should be set up for this comprehensive task. If such a decision is taken, it would be advisable to include the Moluccan Muhabbat (= Love) Foundation residing in the Netherlands in the relevant organisational structures. This is capable of offering care, welfare, education, intercultural coaching, empowerment, and global education in the Moluccas themselves (www.muhabbat.nl).

## 15. THE REQUISITORY

### 15.1 The foundation of this Requisitory

Every day, people try to turn unwanted situations into desired ones. To that end, they use means, instruments. Someone who is ill consults the doctor, takes medication and can thus become healthy again: doctor and medication as the cohesive instrument to convert something undesirable into something desired.

The undesirable situation of this cold case is clear: the land of the Moluccas is occupied by military force; the people are oppressed by means of structural violation of their rights and their raw materials are exploited. The desired situation is also clear: restoration of the sovereign independence of the Moluccan people. No more and no less. This cannot be achieved by consulting a doctor and taking medicines. The only instrument that can realize this conversion is constitutional law, the most fundamental form of law. That's the foundation of a state. That determines the livability of the people in that state. In this cold case, it's a federal Constitution.

Well, the federal Constitution as the foundation for the conversion of sovereignty in 1949 was fundamentally wrong for the occupied, oppressed and exploited people of Indonesia. We have shown in this report that it was a product of legal tampering, political cowardice and economic interests. As a result, Indonesia was able to take over the role of the former colonizer, block the constitutionally granted sovereignty of the Moluccas, occupy their land, oppress the people and exploit the territory. To this day. We also showed how, with a correct (federal) Constitution, the UN can still force Indonesia to convert this undesirable situation into the situation originally intended in 1949: restoration of the inalienable right to self-determination of the Moluccan people.

Everything we have described in Chapters 1-14 we now summarize in a Requisitory.

### 15.2 The Requisitory

**The Federalism for Peace Foundation**,

1. Acting on its own authority, with the aim of supporting oppressed peoples in conflict areas in their pursuit of sovereign freedom, self-determination and independence through federal state formation.

2. After analyses, as objective as possible, of avoidable and culpable mistakes made by the parties in the period 1949-1950 on the occasion of the transfer of sovereignty of the territory of Indonesia to the Federal Republic of the United States of Indonesia, as contained in this report 'From Cold Case to Hot Case. Why and how the United Nations can and must liberate the Moluccan people'.

3. In the light of:
   - The unlawful way the Unitary State was established under the name of the Republic of Indonesia on 17 August 1950,
   - The subsequent annexation, repression, exploitation and other violations of the inalienable human rights of the

people of the South Moluccas and their persistence to date,
    - The legality of the Moluccan Proclamation of Independence of 25 April 1950,

4. Guided by the principles:
    - Factis ius oritor: it is the facts that (should) lead to law.
    - Iniuria ius non oritor: from injustice no right arises.
    - Pacta servanda sunt: treaties must be observed,
    - Rule of law: nobody is above the law.
    - Trias politica: mandatory separation of the three powers of the state.
    - Checks and balances: the constitutional instruments to guarantee the trias politica.
    - Actus contrarius principle: use the same procedure to rectify what went wrong in the past.
    - Habeas corpus: prohibition of illegal detention and the right to a fair trial.
    - Ius cogens: mandatory law.
    - Ius post bellum: law after conflict.
    - The right to self-determination is an inalienable right.

5. And aimed at effective peacemaking alongside the UN instruments of peacekeeping and peacebuilding,

**Informs** the Human Rights Council of the United Nations as follows:

**A. CONSIDERING** that the South Moluccas under the name Maluku Selatan:

6. Are a Melanese-Austronesian people of more than two million inhabitants in an archipelago of more than a thousand islands (approximately 75,000 km2) in Oceania, made up of various tribes with their own cultures and customs and religions partly Christian and partly Muslim, but all united in their 'adat', which traditionally espouses the principles of trias politica and federal state formation.

7. That they were already visited a few centuries before Christ for their spices and were occupied from the 16th century onwards:
    - By Portugal and Spain from 1511 to 1600,
    - By the Netherlands from 1599 to 1796,
    - By England from 1796 to 1803,
    - By France and the Netherlands from 1803 to 1810,
    - By England from 1810 to 1817,
    - By the Netherlands from 1817 until the Japanese occupation in 1942, which ended with the capitulation of Japan on 15 August 1945,
    - Again, through the Netherlands from August 15, 1945 until December 27, 1949,

8. That between August 15, 1945 and December 27, 1949, as part of the Dutch-controlled colony of the East Indies (later Indonesia), they prepared for the radical political - decolonizing - reforms, which had already been announced during the Second World War by the Dutch Queen Wilhelmina in exile in London, in her speech of December 6, 1942.

9. That from August 1945 onwards, they saw the promised decolonization as a full-fledged opportunity - after centuries of occupation and oppression by foreign powers - to establish an independent sovereign state Republik Maluku Selatan.

10. They - true to the authority of Her Majesty the Queen of the Netherlands[106] - sided with the Netherlands in the violent conflicts between the Netherlands and Indonesia between 1945 and December 1949.

**B. CONSIDERING** the developments in the period 1945 - 1949:

11. That Sukarno, as the political leader of part of the Dutch colony of Indonesia, proclaimed the independent unitary state of the Republic of Indonesia, two days after the capitulation of Japan on 15 August 1945.

12. That this proclamation was reinforced by violence against the recovering Dutch authority and against Dutch citizens in Indonesia.

13. That the Netherlands attempted to suppress the uprising by military force - under the misleading name of 'police actions' – by that time understanding that decolonization was inevitable.

14. That the Netherlands, under increasing pressure from the international community - through the intervention of the United Nations - from 1946 onwards decided to cooperate in the transfer of sovereignty to Indonesia, with the proposal that this transfer of sovereignty should be in the constitutional form of a federation.

15. That both Sukarno et al. and the parties that led and supervised the process of decolonization under the auspices of the United Nations agreed to the choice of a federal state structure for Indonesia after the transfer of sovereignty.

16. That despite this, the cooperation in the composition of the intended federal state was interrupted several times by new military violence from the Dutch and Indonesian sides.

17. That from 1946 onwards negotiations took place under the auspices of a UN Commission of Good Offices, which was

[106] After the transfer of sovereignty to the Federal Republic of the United States of Indonesia, cracks arose in the loyalty to the House of Orange: "Among the most sensitive issues for the loyalists was that of national symbols. Many Ambonese, particularly the soldiers and raja, held the Dutch tricolor and the [anthem] Wilhelmus in great reverence as they symbolized the allegiance to the crown". Richard Chauvel, Nationalists, Soldiers and Separatists, The Ambonese Islands from colonialism to revolt, 1880-1950, p. 246. This fidelity led to 12,500 Moluccans, mainly former soldiers in the Royal Dutch East Indies Army (KNIL), being brought to the Netherlands with their families in 1951. Where, by the way, they were handed over to a Dutch government that grossly failed in its responsibility for the living, working and development of these Moluccans. Behold: Henk Smeets and Fridus Steijlen, In the Netherlands Living, The History of the Moluccans 1951-2006, Bert Bakker 2006.

replaced from 28 January 1948 by the United Nations Commission for Indonesia (UNCI).

18. That the parties involved in this process decided to effectuate the transfer of sovereignty to Indonesia in the constitutional form of a federation - under the name of the Republic of the United States of Indonesia - by the end of 1949 at the latest.

19. That the mandate of the UNCI consisted of diplomatic direction of the process of negotiation and intervention when the UNCI considered it necessary, including exerting pressure on the parties to accept positions, procedural conditions and legal constructs.

20. That UNCI's mandate was strongly supported by Australia and the United States of America.

21. That the transfer of sovereignty to the Republic of the United States of Indonesia took place on 27 December 1949 in The Hague, in the Knights' Hall of the parliamentary buildings of the Dutch government, in the presence of Queen Juliana.

**C. CONSIDERING** the weakness of (the creation of) the federal Constitution, as it appears:

22. That the Provisional Federal Constitution had the force of law on 27 December 1949 with the aim of making a definitive federal constitution through a Constituent Assembly.

23. That it was no secret that Sukarno et al. had cooperated in the drafting and signing of this provisional federal Constitution with the aim of establishing a legally - 'de iure' - sovereign Indonesia, but with the actual aim of subsequently dissolving the federation in order to establish a centralized unitary state.

24. That as early as January 1950, President Sukarno began to dismantle the federation step by step by means of articles of the Federal Constitution, using the powers from those articles to achieve a purpose other than that for which those powers had been granted, which is a form of abuse of rights.

25. That the President, who was also Head of Government, could afford that abuse of power because the Provisional Federal Constitution provided that the President was inviolable, as well as the inviolability of his decrees and federal laws.

26. That the President was thereby placed above the law.

27. That, furthermore, the Provisional Federal Constitution did not contain checks and balances to guarantee the trias politica that could prevent the executive, under the leadership of the President, from assuming absolute power and thus obtaining a position above the law.

28. That President Sukarno could thus use emergency laws to dismantle federal structures and procedures with impunity, even though the power to enact an emergency law for the purpose of dismantling federal structures and procedures did not accrue to him constitutionally.

29. That the people of the South Moluccas could not use legal instruments to oppose the wrongful use of emergency laws.

30. That the people of the South Moluccas thus found themselves in a legal vacuum and had to form a state on their own, by means of the Proclamation of the Republic of Maluku Selatan.

31. That the fact that the South Moluccas thus became occupied territory and the pursuit of freedom by the people cannot be regarded as acts of extremist separatistism.

32. That Secretary General Kofi Annan, in his 'Report of the Secretary-General' of 23 August 2004, S/2004/616, page 4, categorically rejects the placing of a person in authority above the rule of law. Quoted again:

> "The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

33. That this position of the former Secretary-General on the 'rule of law' is not without obligation and legitimizes the South Moluccas to demand that the Secretary-General put the organs of the United Nations to work accordingly to remedy the injustice inflicted on the South Moluccas by the violation of the 'rule of law'.

34. That in a speech to the Security Council on 9 January 2020, the current Secretary-General António Guterres said, among other things, the following about the important principles that underlie the United Nations:

> "But when these principles have been flouted, put aside or applied selectively, the result has been catastrophic: conflict, chaos, death, disillusionment and mistrust. Our shared challenge is to do far better in upholding the Charter's values and fulfilling its promises to succeeding generations.

35. That the people of the South Moluccas may state that the failure of the United Nations in the period 1949-1950 resulted in the words 'conflict, chaos, death, disillusionment and mistrust' used by the Secretary-General, that this has been going on for 70 years and that the speech of this Secretary-General on 9 January 2020 is not without obligation either.

**D. CONSIDERING** also the indisputable right to self-determination, in the sense:

36. That the Provisional Federal Constitution contained provisions on the right of self-determination of states and peoples within Indonesia.

37. That this constitutionally guaranteed right to self-determination was supported and supplemented by a Transitional Agreement concluded by the parties on 2 November 1949, in which the right to external self-determination for states was explicitly laid down on the authority of the UNCI.

38. That the right of external self-determination for federal states was surrounded by various articles that also granted the right of external self-determination to peoples within federal states.

39. That the South Moluccas, through its representative body of the legally constituted South Moluccas Council (ZMR), had joined one of the federation's member states, the Negara Indonesia Timur, under the express reservation that they could resign if it turned out that the government of that member state did not take sufficient account of the interests of the South Moluccas.

40. That the South Moluccas - in order to get out of the constitutional vacuum - let the reservation enter into force as a resolutive condition when in the months of January to April 1950 it appeared that the government of the state Negara Indonesia Timur did not oppose Sukarno's policy of dismantling the federation and as a state did not offer the South Moluccas any protection; as a result, the South Moluccas had to decide to declare their own independence on 25 April 1950, with its own constitution, parliament and government, embedded in their centuries-old adat.

**E. FURTHERMORE CONSIDERING** the consequences of the weakness of the Constitution for the right to self-determination, according to the evidence:

41. That discussions about the right to self-determination became irrelevant when - through the dismantling of the federation - all civil and political rights of peoples in Indonesia were destroyed.

42. That instead of making a definitive federal Constitution, Indonesia established a centralized unitary state eight months after the transfer of sovereignty on 27 December 1949, accompanied by a Constitution for the unitary state in which the right to self-determination for peoples no longer existed.

43. That in the period from 27 December 1949 to 17 August 1950, Indonesia failed to comply with its constitutional obligation to give peoples the opportunity to express their views on their desired political position by means of plebiscites: to remain within the federation or, externally, to enter into an independent political relationship with Indonesia and/or the Netherlands.

44. That the discussion about whether a people has the right to external self-determination is no longer relevant now that the

Charter of the United Nations recognizes that right in Article 73b on Non-Self-Governing Territories and the International Covenant on Civil and Political Rights (ICCPR) has enshrined it in so many words in Article 1.

**F. FURTHERMORE CONSIDERING** the structural violation of human rights, as evidenced by the fact:

45. That the proclamation of the independence of the South Moluccas was met by Sukarno with violence, after which a guerrilla war broke out, fading away in 1966 after the execution of the leader of the resistance, Dr. Chris Soumokil, after which the South Moluccan resistance against oppression, exploitation and violation of human rights continued in a passive manner.

46. That military violence continues to this day, accompanied by systematic violations of the civil and political rights of the people of the South Moluccas.

47. That the government of the Republik Maluku Selatan (RMS) was forced to choose exile in the Netherlands. An exile that continues to this day.

**G. TAKING INTO ACCOUNT** the acting on the one hand and the failing to act on the other hand by the UNCI, given the fact:

48. That the procedure for the transfer of sovereignty from the Netherlands to the Republic of the United States of Indonesia on 27 December 1949 was led by the United Nations Commission for Indonesia (UNCI).

49. That the UNCI knew of the fact that Soekarno abused the federal Constitution to dismantle the federation and resisted it by military force in order to finally liquidate the federation and establish the unitary state on 17 August 1950.

50. That the UNCI in its three Interim Reports to the Security Council:
    - Superficially referred to what was actually happening but did not recommend or request the Security Council to take action against the violation of federal law and human rights,
    - Mentioned repeated requests by the Netherlands to the UNCI - as the author of the legislation guaranteeing the external self-determination of peoples within Indonesia - to assume – being the leader of this process - responsibility and to stop Sukarno's actions,
    - That the UNCI responded with the message that disputes about the judicial process after the transfer of sovereignty had to be resolved by the two parties themselves - i.e. the delegations of the Netherlands and Indonesia,
    - That the UNCI thus chose to adopt a distant position, although it had sufficient reasons and powers to intervene, in the sense that it could and should have advised the Security Council to call Indonesia to the rule of law,

51. That Moluccan authorities - in order to get out of the constitutional vacuum - had no choice but to make use of the legally valid reservation to join the federation and therefore on 25 April 1950 proclaimed their own sovereign state of the South Moluccas, the Republik Maluku Selatan (RMS). With its own constitution, parliament and government, fundamentally anchored in their 'adat'.

**H. FURTHERMORE TAKING INTO ACCOUNT** to question Indonesia's membership of the United Nations in September 1950:

52. That already one month after the unlawful establishment of the centralized unitary state, the Republic of Indonesia was admitted to the United Nations as member 60 by the Security Council and the General Assembly.

53. The speed with which this took place, partly against the background of the UNCI's refusal to intervene, suggests that interests other than those of the people of the South Moluccas were of a higher order:
    - For the UN, which still had to prove itself as a young organisation, the importance of being able to score geopolitics with a completed decolonization (although the colonization was continued by Indonesia) and the entry of a new member with the largest Muslim population,
    - For America, in addition to the importance of engaging in federal conflict resolution - without noticing and/or opposing the extremely bad federal Constitution - the importance of preventing Indonesia from falling into the hands of communism,
    - For the Netherlands, the importance of not damaging the intended economic benefits of the Dutch-Indonesian Union by persisting in doing justice to the Moluccas,

**I. ALSO CONSIDERING** the failure of the Human Rights Committee to intervene regarding Indonesia's continued deviant behaviour since 1950:

54. That Indonesia, as a member of the United Nations, continues to violate the International Covenant on Civil and Political Rights, the judicial instrument with which the Human Rights Committee must do its work.

55. That the continuing violation consists, on the one hand, of the failure by the 1950 Constitution to recognise the right to self-determination of peoples on its own soil, although this is laid down in Article 1 of the Covenant. That, furthermore, under the Indonesian Constitution of 2002, the violation of the conventionally protected human rights is taking place through, inter alia, torture, executions, forced displacement and political prisons.

56. That Indonesia's failure to recognise the right to self-determination under Article 1 of the International Covenant on Civil and Political Rights (ICCPR), as reviewed by the Human Rights Committee, was reiterated by Indonesia on 19 January 2012.

57. That the Human Rights Committee under the International Covenant on Civil and Political Rights once made recommendations to Indonesia to take measures to improve human rights. But that so far it has not condemned the fact that Indonesia, as a member state of the Covenant, violates Article 1 of that Covenant by not recognising the right of self-determination of peoples in Indonesia.

58. That Indonesia has subsequently failed to report to the Committee what it has done with those recommendations.

59. That the Human Rights Committee has never condemned this non-recognition and the abuse of rights with which the Federation was liquidated in favour of the establishment of the unitary state.

60. That numerous petitions and similar initiatives from the Moluccas, addressed to organs of the United Nations, have never had any effect.

61. That this violation by Indonesia of the Covenant is even more unlawful because it is also a violation of Article 5 of the Covenant, which prohibits abuse of rights.

62. That a court in administrative law, when establishing abuse of rights, stipulates that the contested government decision is null and void.

63. That we are not dealing here with administrative law, but with international law, in which bodies that monitor compliance with treaty law may advise to adjust decisions that are deemed incorrect, but have no enforceable power to annul decisions of states that violate treaty obligations by means of abuse of rights.

64. That therefore the Human Rights Committee does not have the power ex post to annul Indonesia's decision to establish the unitary state, but does have the power to draw the Human Rights Council's attention to the facts:
    - That the abuse of rights by the Indonesian authorities in 1950 led to a unitary state without the right to self-determination instead of the prescribed and constitutionally guaranteed federal state with the right to self-determination,
    - That Indonesia is violating the Covenant by not recognizing self-determination under Article 1 of the Covenant; and is violating Article 5 of the ICCPR Convention for abuse of rights,
    - That Indonesia, from 1950 to the present day, has responded to any opposition, including peaceful opposition, to oppression and exploitation by means and measures prohibited under the Covenant,
    - That the Secretary General of the United Nations has powers to make known to the Security Council and to the General Assembly that, in this urgent situation, they have the authority to intervene independently to ensure peace and security,
    - That the Security Council and the General Assembly have the authority to assert that the right of self-determination for peoples in Indonesia remains valid, since self-

determination under Article 1 of the Covenant, including in the context of Article 73b of the Charter, is inalienable,

- That thus the South Moluccas are entitled to take the constitutional status of the moment of the transfer of sovereignty to the Federation of the United States of America of Indonesia on 27 December 1949 as the date on which the South Moluccas may still exercise their right to choose between internal and external self-determination in accordance with the provisions of the Federal Constitution then in force, in accordance with Article 1 of the Covenant, and in accordance with the intentions of Article 73b of the Charter on Non-Self-Governing Territories,
- That a provisional government of the Moluccas may thus ask – under the auspices of the United Nations - the people of the South Moluccas, by means of a plebiscite - derived from the Provisional Federal Constitution - whether they still wish to be an independent state,
- That in the event of a confirmation of that people's wish to become an independent state, the people of the South Moluccas may, on the basis of the original Provisional Federal Constitution, determine whether that independent state of the South Moluccas will have the political status of a unitary state of the South Moluccas, or that of a federal state of which the South Moluccas are a state with other states, for example those of Papua and Western Papua, Acheh, and - possibly also - the Republic of Indonesia and other peoples in Oceania,
- That the Human Rights Council cannot ignore this issue, because otherwise the abuse of the right to oppression and exploitation will be condoned, and because such a renewed failure of United Nations bodies is a poor response to autocratic governance which is developing in many parts of the world and thus activating increasing forms of population resistance,

**J. Considering,** regarding points A to I above:

65. That since 1950 the leadership of Indonesia wrongly stated that the proclamation of independence of the Moluccas on 25 April 1950 was unlawful and that repeated attempts by the South Moluccas to establish their own sovereign independent state are wrongly judged by Indonesia as extremist separatism.

66. Furthermore, by virtue of the The Hague Regulations of 1907 and the Fourth Geneva Convention of 1949, this sovereignty is not transferred to the occupier in the event of occupation of the territory of a sovereign people.

67. That analyses of the law applicable at that time - including the Federal Constitution and the Transition Agreement of 2 November 1949, as well as developments in international law in the field of external self-determination since then - make it clear that the Moluccan proclamation of 25 April 1950 was and still is legally valid, and that its legitimacy after 1950 has been confirmed several times by court rulings.

68. That the Federal Constitution of 27 December 1949 would not exist according to standards of correct constitutional federal law because of fundamental errors in this federal legislation.

69. That it was so wrongly composed that a leader who wanted to establish totalitarian autocracy could draw absolute power to himself through the combination of:
    - Being inviolable, with inviolable federal laws,
    - The unauthorized promulgation of an emergency law outside the control of the judiciary and the House of Representatives,
    - An unlawful emergency law applicable to the whole territory of the Federation and to all parts of its political subdivisions,
    - To enforce it using the armed forces,
    - With elimination of own army and police organisation of member-states,
    - To suspend civil and political liberties,
    - As a result of the absence of fundamental articles which could and should have prevented this,
    - What was wrongly neither noticed nor challenged by the parties who should have sounded the alarm, including in particular the UNCI which was responsible for the proper conduct of proceedings,

70. That it is true that organs of the United Nations do have immunity for their acts or omissions, but - partly in the light of modern insights of international law - this should not lead to shrugging shoulders, but to an increased degree of moral awareness - the condition of existence of the United Nations - to do justice to the Moluccan people in accordance with the instruments available to the United Nations.

71. That the South Moluccas can be considered a people.

72. That the United Nations grants sovereignty to peoples with the right to external self-determination.

73. That Indonesia's disregard for the sovereignty and right to self-determination of the Moluccas is contrary to Indonesia's own constitution (popular sovereignty) and goes against their explicitly formulated aversion to colonialism and autocracy.

74. That the desire to form one's own independent sovereign Moluccan state is based on the inalienability of popular sovereignty, the politico-philosophical basis for the right to external self-determination, the international legal basis for asserting that right, and the political basis for building a state from the bottom up.

75. That it is therefore fully justified that the people of the South Moluccas, through the Human Rights Council, ask the Secretary-General of the United Nations to reopen the cold Moluccan case.

76. That the reopening of the Moluccan case on the constitutional level of 27 December 1949, i.e. the level of establishment of the federation of the United States of Indonesia with a Constitution which - annexed to the Transitional Agreement of 2 November 1949 - should give the South Moluccas the right

to external self-determination, whereby they can opt for the creation of a unitary state or for a state of a federation with other states.

77. That - in view of the weak political and economic position of the South Moluccas after the acquisition of their own sovereignty - the choice for a unitary state is not advisable and authority and strength can be better built up if it appears from the outset that the choice for sovereignty takes the constitutional and institutional form in a federal system.

78. That the most important characteristics of a federal state are:
    - That the federated states retain their sovereignty, remain in charge of their own affairs and only have interests that they are not able to look after themselves by a federal body,
    - That the establishment of a federal state should take place based on standards and that the less seriously one takes these standards, the weaker the federation becomes and the more it can disintegrate,
    - That, on the basis of the concept of popular sovereignty, a federation should be built from the bottom up, which implies involvement of the people in designing the federal constitution and in ratifying it, a principle that has been known for many centuries in the 'adat' of the Moluccas,

79. That the South Moluccas, as a Non-Self-Governing Territory, have the right to external self-determination under Article 73b of the Charter of the United Nations, and that Indonesia must fulfil this right.

80. That the South Moluccas have the right, through the Human Rights Council, to request the Secretary-General of the United Nations to make the General Assembly decide to expel Indonesia as a member of the United Nations under Article 6 of the Charter for persistent violation of the principles of treaty law if Indonesia opposes Article 73b of the Charter and Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and opposes this course of justice to reopen the Moluccan issue and to restore the Moluccans' sovereignty.

81. To order Indonesia to remove its military forces from the territory of the South Moluccas with immediate effect and to accept that during a moratorium peace and security will be guaranteed by a UN peacekeeping force with the aims of peacemaking, peacekeeping and peacebuilding.

82. That the United Nations should interpret refusal by Indonesia as yet another refusal to comply with treaty obligations and respond by proposing to the General Assembly to expel Indonesia as a member of the United Nations under Article 6 of the Charter.

83. That, furthermore, the General Assembly may have the opportunity to examine the appropriateness of establishing a Truth Commission as an attempt at reconciliation for the great suffering inflicted by Indonesia on the Moluccan people since 1950.

84. That, in the context of peacebuilding, an independent commission of experts could be established to make

agreements with Indonesia on the return or compensation of stolen raw materials and other valuable property of the South Moluccas.

85. That in addition to the deployment of a UN peacekeeping force to ensure peace and security, the General Assembly could make personnel, knowledge and funds available for the reconstruction of the South Moluccas and to partners wishing to join the Federation as member states.

86. That the General Assembly can make provisions so that, during the moratorium, a provisional and informal federal government of authorities of potential member states can set to work in order to build up the federal state, as described in this report with the concepts:
    - Composition of the Citizens' Convention,
    - Working with the people on a federal Constitution,
    - Convention to decide on the Constitution,
    - To have the Constitution ratified by the people,
    - Holding elections by state and for the federation,
    - Establish institutions for the federated states,
    - Set up a federation of state apparatus,
    - Set up centers of excellence per federated state and federation to learn to make sustainable policies,

87. That the power of the United Nations to intervene on its own authority in the process of decolonization in Indonesia in 1946 and even to take the lead in that process for the establishment of the transfer of sovereignty in December 1949, is still fully valid in 2020, also strengthened by progressive insight into the applicable international law and the supplemented treaties, which legitimizes the UN - using the 'actus contrarius principle' - to intervene on behalf of the Moluccan people and forces Indonesia to return sovereignty over Moluccan territory to the Moluccan people, as a result of which the sovereign independence of the Moluccas is legally established and that people themselves can take the lead in setting up their state as they see fit.

88. That the fight against populist/nationalist-driven autocracy, which has caused indescribable human suffering over the past centuries, has been the birth certificate for the establishment of the United Nations and therefore requires the same United Nations to bear unconditional, calm and distinguished witness to the fact that that birth certificate still has human value.

**K. REQUESTS** the Human Rights Council, through the Secretary-General - also based on the quotations in paragraphs 32 and 34 of the former Secretary-General Kofi Annan and Secretary-General Guterres - to submit the following decisions to the General Assembly:

89. Regarding the South Moluccas:
    - Confirmation of the accuracy of the facts and arguments set out in A - I,
    - Confirmation of the correctness of the Considerations under J, numbers 65-88.

- Applying the 'actus contrarius principle' to compel Indonesia - under penalty of expulsion from the United Nations under Article 6 of the Charter:
  - To turn back the legal clock to 27 December 1949, the moment exactly after the signature at 10.17 a.m. of the transfer of sovereignty to the Federal Republic of the United States of the United States of Indonesia and then transfer the sovereignty of the Moluccan people over Moluccan territory to a representation of the Moluccan people.
  - To allow the Moluccan people, after the legally acquired sovereignty of their own independent sovereign state, to choose either a sovereign unitary state or a sovereign member state of a federal state to be established with other parts of Indonesia and/or islands or parts of islands within Oceania.
  - To make this form of transfer of sovereignty to the people of the South Moluccas take place in the Peace Palace in The Hague, the house of the International Court of Justice of the United Nations.
  - To end the military occupation of the South Moluccas with immediate effect in a UN peacekeeping force on the South Moluccas.
  - To comply with all actions that the United Nations deems useful and necessary to restore the sovereign rights of the people of the South Moluccas, with the aim of peacebuilding.

90. Regarding the Human Rights Committee or the Human Rights Council:
  - Add to the Human Rights Committee or to the Human Rights Council a body which, in addition to the treaty system of the International Covenant on Civil and Political Rights, has the objective of promoting federalism for peace.
  - Establish this body as a centre of expertise on federal state formation, equipped with personnel, competencies and budgets to be actively deployed in the context of peacebuilding alongside military forces in the sense of peacekeeping.
  - Based on this point 90, draw up a consistent action plan to help the thirty-eight Unrepresented Nations and Peoples Organization (UNPO) to resolve conflicts and secure peace in their region through federalism whereas this is feasible.

## 16. The Complaint Procedure Form

# Human Rights Council

# Complaint Procedure Form

- You are kindly requested to submit your complaint in writing in one of the six official UN languages (Arabic, Chinese, English, French, Russian and Spanish) and to use these languages in any future correspondence;
- Anonymous complaints are not admissible;
- It is recommended that your **complaint does not exceed eight pages**, excluding enclosures.
- You are kindly requested not to use abusive or insulting language.

### I. Information concerning the author (s) of the communication or the alleged victim (s) if other than the author

Individual ☐ Group of individuals ☐ NGO ☑
Other ☐
Last name:
Klinkers
First name(s):
Leo Eugène Mechtild
Nationality:
Netherlands
Address for correspondence on this complaint:
Haverkamp 118, 2592 BK, The Hague, The Netherlands
Tel and fax: (please indicate country and area code)
+31(0)620083586
E-mail:
klinkers@federalismforpeace.org
Website:
www.federalismforpeace.org
Submitting the complaint:
On the author's own behalf: ☑
President of the Federalism for Peace Foundation
On behalf of other persons: ☑ (Please specify)
The people of the Moluccas

### II. Information on the State concerned

Name of the State concerned and, as applicable, name of public authorities responsible for the alleged violation(s): Indonesië, Regering van Indonesië.

### III. Facts of the complaint and nature of the alleged violation(s)

**The complaint procedure addresses consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances**.
Please detail, in chronological order, the facts and circumstances of the alleged violations including dates, places and alleged perpetrators and how you consider that the facts and circumstances described violate your rights or that of the concerned person(s).

#### A. The reason for this Complaint

As one of the members of the Unrepresented Nations and Peoples Organization (UNPO), the Moluccan people have suffered - since 1950 - from occupation, oppression, exploitation and human rights violations by Indonesia. The Federalism for Peace Foundation has undertaken to write a comprehensive report on this subject. In order to avoid this NGO being an extension of a Moluccan action group, no substantive consultations were held with representatives of the Moluccan

people. Nevertheless, the Foundation represents the feelings of that people.

The exceptionally large number of crimes committed by Indonesia against the people of the Moluccas cannot be summarised in eight pages. That is why Section VII of this Complaint Form refers to the Appendix to this Complaint, entitled 'From Cold Case to Hot Case. Why and how the United Nations can and should liberate the Moluccan people'.

**B. The summary of the report**

The report describes in detail:

1. How, after the transfer of sovereignty over Indonesia by the Netherlands to the Federal Republic of the United States of Indonesia on 27 December 1949, President Sukarno immediately from January 1950 - with blatant abuse of the federal constitution - began to dismantle the newly established federal state in favour of the establishment of a centralized unitary state.
2. In this way - inviolable, and thus ruling above the law, with inviolable laws, and thus not subject to judicial review under the constitution, and even with an illegal emergency law - he dismantled the federal democratic structures and procedures and thus began to occupy, oppress and exploit the legally autonomous people of the South Moluccas.
3. How he had already, after eight months, completely destroyed the Federal Republic of the United States of Indonesia in favour of the establishment of the unitary State of the Republic of Indonesia, on 15 August 1950, which was admitted to the United Nations a month later as the 60th member.
4. How thus under the auspices of the United Nations - more specifically under the auspices of the United Nations Commission for Indonesia (UNCI) - the Moluccas were transferred from one colonizer to another. In doing so, the UN violated its own birth certificate - the fight against injustice and the realization of peace.
5. How the United Nations - on the basis of its own treaties, annexed to international principles of law - can and must free the people of the Moluccas from this occupation, oppression and exploitation that has lasted for seventy years, partly as a clear signal to populist/nationalist autocrats who first master democratic procedures and then destroy democracy.
6. How the free, sovereign, independent people of the South Moluccas, after vigorous action by the United Nations, can still opt for external self-determination, as was legally laid down in the federal constitution of 27 December 1949.
7. How that choice consists of two options: either opting for a unitary Moluccan state of its own or opting for a federal state with partner states from the region/Oceania.
8. What the standards of federalism are and why they lead to the advice to choose for the establishment of a federal state, based on a correct federal constitution, other than the legal monster that, as an alleged federal constitution, heralded the downfall of the Moluccas in December 1949.
9. How the United Nations with the instruments of peacemaking, peacekeeping and peacebuilding can assist the Moluccas on this path of correct federalization.
10. How the Federalism for Peace Foundation can assist the people of the Moluccas if desired.

**C. The substantiation of the report**

For a proper understanding of this Complaint, we advise the investigators to first to study Chapter 15, the Requisitory. The

term 'Requisitory' is legitimized by the seriousness of the crimes Indonesia has been guilty of since 1950. On the basis of 88 facts and considerations, paragraph 89 contains the concrete request to the United Nations to force Indonesia - using the 'actus contrarius' principle - to transfer sovereignty over the Moluccas to the Moluccan people, under penalty of expulsion from the United Nations ex Article 6 of the United Nations Charter. In paragraph 90 follows the request to add the instrument of federalism to the instruments of peacemaking, peacekeeping and peacebuilding of the Human Rights Council. Federalism is a unique instrument for conflict resolution and peacebuilding and is unjustifiably absent from the Human Rights Council's 'toolbox'.

The report mentioned in *Annex VII. The checklist of supporting documents*, contains the detailed foundations of the Requisitory.

## IV. Exhaustion of domestic remedies

**1-** Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies– please provide details on the procedures which have been pursued, including recourse to the courts and other public authorities as well as national human rights institutions[107], the claims made, at which times, and what the outcome was:

For 70 years, the people of the Moluccas resisted illegal occupation, oppression, exploitation and violation of human rights. From 1950 until April 1966 in the form of a struggle for freedom. After April 12, 1966, the execution of the leader of the resistance, Dr. Chris Soumokil, the resistance became passive. Among other things with numerous petitions and requests to the UN. Also, by stationing a representative of the Moluccan people at the UN in New York. No result. Not even with Karen Parker's report - titled *Republik Maluku. The Case for Self-determination. Presented to the United Nations Commission on Human Rights*, March 1996 Session, Geneva (see the annexes to the report, mentioned in VII). No request for help has ever been granted. That is why this comprehensive report has now been written by this independent NGO, the Federalism for Peace Foundation.

**2-** If domestic remedies have not been exhausted on grounds that their application would be ineffective or unreasonably prolonged, please explain the reasons in detail:

Every step taken to make use of national resources is punished by Indonesia with imprisonment, torture and disappearance. See for example the pictures in the Prologue of the report.

## V. Submission of communication to other human rights bodies

**1-** Have you already submitted the same matter to a special procedure, a treaty body or other United Nations or similar regional complaint procedures in the field of human rights?

No.

**2-** If so, detail which procedure has been, or is being pursued, which claims have been made, at which times, and the current status of the complaint before this body:

……

## VI. Request for confidentiality

In case the communication complies with the admissibility criteria set forth in Council resolution 5/1, kindly note that it will be transmitted to

[107] National human rights institutions established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.

the State concerned so as to obtain the views of the latter on the allegations of violations.

Please state whether you would like your identity or any specific information contained in the complaint to be kept confidential.

Request for confidentiality (*Please tick as appropriate*): Yes ☐ No ☑

Please indicate which information you would like to be kept confidential

Date: April 12th, 2020

Signature: 

N.B. The blanks under the various sections of this form indicate where your responses are required. You should take as much space as you need to set out your responses. Your complaint should not exceed eights pages.

## VII. Checklist of supporting documents

Please provide copies (not original) of supporting documents (kindly note that these documents will not be returned) in one of the six UN official languages.

- Decisions of domestic courts and authorities on the claim made (a copy of the relevant national legislation is also helpful): ☐
- Complaints sent to any other procedure mentioned in section **V** (and any decisions taken under that procedure): ☐
- Any other evidence or supporting documents deemed necessary: ☑

Annex the report:
"From cold case to hot case. Why and how the United Nations can and must liberate the Moluccan people'.

## VIII. Where to send your communications?

Office of the United Nations High Commissioner for Human Rights
Human Rights Council Branch-Complaint Procedure Unit
OHCHR- Palais Wilson
United Nations Office at Geneva
CH-1211 Geneva 10, Switzerland
Fax: (+41 22) 917 90 11
E-mail: CP@ohchr.org
Website: http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx

# PART V ANNEXES

## 17. THE TIMELINE

The table below outlines the course of events.

| Date | Event | Significance |
|---|---|---|
| 15-08-1945 | Capitulation of Japan | End occupation |
| 17-08-1945 | Proclamation Republic Indonesia | Sukarno claims the independence of the Republic |
| 24-10-1945 | Charter United Nations gets into force | It provides, inter alia, for respect for the principles of equal rights and self-determination for peoples. |
| 15-11-1946 | Agreement of Linggadjati | Agreement on Indonesia's authority, agreements on working towards a federal state with the member states Republic of Indonesia, Borneo and the Great East and working towards a Dutch-Indonesian Union. |
| 20-08-1946 | Regulation concerning the political unit South Moluccas | This Dutch regulation granted powers to a South Moluccan Council (ZMR) elected by and from the people:<br>. to express the wishes of the people regarding political organisation<br>. making reservations on aspects of political organisation |
| 24-12-1946 | The Den Passar Agreement | Establishment of the sovereign state of East Indonesia (Negara Indonesia Timur). |
| | | . the various autonomous people's communities were given the opportunity to choose self-determination |
| 11-03-1947 | Provisional accession of the South Moluccas to the member State of Negara Indonesia Timur (NIT) | The Moluccas retained the right to resign if the NIT did not take sufficient account of the interests of the South Moluccan people |
| 25-03-1947 | Ratification NIT | The NIT acquires judicial status |
| 20-07-1947 | The Linggadjati Agreement is denounced by the Netherlands | Previously made agreements no longer have any meaning. Rights continue to apply |
| 27-07-1947 | Start first 'police action' | Part of Indonesia is dominated by Sukarno, another part is occupied by the Netherlands |
| 01-08-1947 | Security Council adopts Resolution 27, promoting a ceasefire | The Netherlands succumbs to this political pressure |
| 05-08-1947 | Security Council establishes a Commission of Good Offices | The three members of the committee are working towards a peaceful resolution of the conflict |
| 27-10-1947 | The Good Offices Committee starts its work | The consuls of Australia, Belgium, China, France, the United Kingdom and the United States are involved and form the Consular Commission |

| | | |
|---|---|---|
| 17-01-1948 | Establishing the Renville-agreement | The Agreement contains a number of principles, which form the basis for the political discussions |
| 09-03-1948 | The Netherlands transforms its own government into a Provisional Federal Government | This was contrary to the Renville Agreement |
| 27-05-1948 | Federal Conference organised by the Provisional Federal Government | Consultation with the member states of the areas controlled by the Netherlands as a prelude to the future federal state structure |
| 08-07-1948 | Federal Consultation Meeting (BFO) | Initiative of the leaders of the member states to neutralize the hostile attitude towards Indonesia without the presence of the Dutch authority |
| | End of the Renville-agreement | The Netherlands will be on its own after - in addition to disputes with the federal states and Indonesia - there will also be disagreement with the Commission of Good Services and America |
| | The Netherlands designs scheme under the name Government Indonesia in Transition | With this, the Netherlands wants to put together a federal Interim Government |
| 19-12-1948 | Start second 'police action' | Member states drop out as a result, which meant that an Interim Government could not be formed. |
| 24-12-1948 | Security Council adopts resolution to halt fighting and release political prisoners | The Netherlands ignores the resolution |
| | Proposal by the Netherlands to get out of the impasse | The Netherlands wants to safeguard its economic interests in this way |
| 10-01-1949 | Federal Consultation Meeting | The Republic of Indonesia also has to participate in the consultations in order to arrive at a federal Interim Government. |
| 28-01-1949 | Security Council establishes the United Nations Commission for Indonesia (UNCI) | This is a strengthened Commission of Good Services, placing the Netherlands under guardianship |
| 04-08-1949 | Interim report 1 of the UNCI | Deals with the implementation of the Security Council Resolution. The role of the UNCI is mainly diplomatic in nature. |
| 23-08-1949 | Start Round Table Conference in The Hague | Objective: regulating the transfer of sovereignty |
| 29-10-1949 | Charter of Conformity adopted at Scheveningen, the Netherlands | Participants: (1) delegation of the Republic of Indonesia and (2) delegation of the BFO; no Dutch delegation; also no input |

| | | |
|---|---|---|
| | | from the UN, America and Australia. Result: Agreement on the Transitional Constitution, called Constitution of the Republic of the United States of Indonesia. |
| Nov/dec 1949 | Two Round Table Conferences | Deal:<br>. Name Federal Republic of the United States of Indonesia<br>. Full departure Dutch armed forces<br>. Army Republic of Indonesia will become Armed Forces of the Federation |
| 02-11-1949 | Covering resolution | The following documents shall be adopted by the Round Table Conference:<br>. Transfer of Sovereignty Charter<br>. Union Statute<br>. Transitional agreement (had force of law)<br>. Large number of exchanges of letters between the parties<br>. Protocol<br>. Act of Transfer of Sovereignty<br>. UNCI had to monitor compliance with these agreements |
| 21-12-1949 | Sovereignty Transfer Act | Carriers of this law are:<br>. Covering resolution<br>. Renville principles |
| | | . UNCI supervision of compliance with, among other things, the right to self-determination |
| 27-12-1949 | Act of Transfer of Sovereignty of the Covering Resolution | Sovereignty transferred from the colonial Netherlands to the federation, thus legally establishing the Federation of the United States of Indonesia. |
| 15-01-1950 | Announcement by Sukarno that he wishes to dissolve the federation and establish the unitary state of the Republic of Indonesia | Sukarno wants to return to the situation of 17-08-1945: the unitary state of the Republic of Indonesia |
| 16-01-1950 | Interim report 2 of the UNCI | It covers the period from 5 August to 28 December 1949. The UNCI is pleased with the progress made |
| 07-03-1950 | Sukarno issues Emergency Law | Some member states are placed under the rule of the Central Javanese state called Republic of Indonesia. Official start of dismantling the federation |
| 05-04-1950 | Sukarno occupies by military force the capital Makassar of the East Indonesian state | This was the reason for Dr. Chris Soumokil to propose to leave the member state NIT |

| | | |
|---|---|---|
| 18-04-1950 | Meeting of thousands of Moluccans on Ambon to ask the state of NIT to declare its own independence | The state NIT does not respond to the call from Soumokil and the gathering of the Moluccans |
| 25-04-1950 | Proclamation of the Free and Sovereign Republic of the South Moluccas (Republic of Maluku Selatan, RMS) | The 'lightning congress' decides to separate the Moluccas from the state of East Indonesia (NIT) and from the United States of Indonesia |
| 05-1950 | Autonomous units disbanded | Further dismantling of the federation |
| 09-05-1950 | Order the Minister of Defence of the Federal Republic to intervene militarily | |
| 19-05-1950 | Launch talks to bring the federal states into the envisaged unitary state | |
| 24-06-1950 | Ruling of the Association for International Law | *'(...) that the Republic of South Moluccas has rightly declared independence and is therefore entitled to maintain that independence in relation to everyone, whereas the Republic of the United Nations and the Kingdom of the Netherlands are obliged to recognise the power of the Republic of South Moluccas to negotiate freely its special relationship with those two States.'* |
| 20-07-1950 | The Governments of the Federal State and the Republic agree on the constitutional structure | . Java is divided into the provinces of West Java, Central Java and East Java<br>. Sumatra is divided into the provinces of North Sumatra, Central Sumatra and South Sumatra.<br>. Borneo becomes a province<br>. East Indonesia is divided into the provinces of Sunda Islands, Celebes and Moluccas |
| 15-08-1950 | In his capacity as President of the Federal State, Sukarno proclaims the Unitary State of the Republic of Indonesia | The federated states are definitively dissolved, the Federal United States of Indonesia is wound up |
| 17-08-1950 | The Provisional Constitution of the Republic of Indonesia enters into force | This is exactly five years after the first proclamation of the Unitary State of Indonesia |
| 26-09-1950 | Indonesia is admitted to the United Nations | Decision by the Security Council with 10 votes in favour and one abstention (China) |
| 28-09-1950 | The Moluccan capital Ambon is under attack | |

| | | |
|---|---|---|
| 16-10-1950 | Provisional Constitution of the Republik Maluku Selatan is adopted | In addition, a government established under the leadership of Manuhutu, a national flag, an army of its own. External relations organised and a delegation sent to the UN in connection with the discussion of the UNCI report in the Security Council. |
| 02-11-1950 | Ruling of the President of the Amsterdam Court of Appeal | Confirmation of the right to self-determination of the Moluccas |
| 15-11-1950 | Ambon entirely in the hands of the army of the RI, Sukarno's army | |
| Nov 1950 | Moluccans living on Java advocate the recognition of the self-determination of their people | This argument lodged with the Republic and the UNCI |
| 08-02-1951 | Judgment of the Amsterdam Court of Appeal | Again a confirmation of the right to self-determination of the Moluccas |
| 03-04-1951 | The United Nations Commission for Indonesia (UNCI) ceases to exist | |
| 13-04-1951 | Interim report 3 by the UNCI | It covers the period from 28 December 1949 to April 1951. The first chapter describes the cessation of hostilities. The second chapter mentions the right to internal self-determination, namely that the people of any territory have the freedom to determine their own political status |
| 07-03-1952 | Ruling of the Supreme Court of New Guinea | Signatories to the right of self-determination are also responsible for making legitimate efforts to implement the right of self-determination |
| 10-02-1954 | Dutch court ruling | Ruling of the Association for International Law of 24-06-1950 is confirmed |
| 02-12-1963 | Dr. Soumokil captured | This happened on the island of Ceram |
| April 1964 | Dr. Soumokil sentenced to death | This was done by a military court |
| 12-04-1966 | DR. Soumokil executed | This happened on 12 April 1966 |
| March 1996 | *Republic Maluku. The Case for Self-determination* by Karen Parker presented to the Commission on Human Rights | *"It is patently clear that the Round Table Conference Agreements gave the Molukan people the prerogative to refuse incorporation into the Republic of the United States of Indonesia either by exercise of a negative vote in a pre-incorporation plebiscite or by refusing to ratify the Provisional Constitution."* |

## 18. Literature

### 18.1 The online Annexes

In addition to the literature consulted below and the information in footnotes, important documents that are too extensive for inclusion in this report can be consulted online: https://www.federalismforpeace.org/report-south-moluccans-annexes/.

These are the following documents:

- Ontwerp-Constitutie van de Republiek van de Verenigde Staten van Indonesië 1949.
- Draft Federal Constitution of the Republic of the United States of Indonesia 1949.
- The Provisional Constitution of the Republic of Indonesia 1950.
- Indonesia Constitution 2002.
- Round Table Conference, Results as accepted in the Secondary Plenary Meeting, held on 2 November 1949 in the 'Ridderzaal' at The Hague.
- Admission of the republic of Indonesia to membership in the United Nations
- UNCI, First Interim report of the Commission to the Security Council, 10 August 1949.
- UNCI, Second Interim report to the Security Council of the United Nations Commission for Indonesia, 9 January 1950.
- An isolated war, The twofold suppression of the Moluccan Right of Independence, Sahalessy, D.O.
- Indonesia the most prominent abuser of laws and truth, A Memorandum by D.O. Sahalessy.
- Turning Back to the Natural and Spiritual Laws, by D.O. Sahalessy.
- Republik Maluku, Briefing Paper presented to the UN-Commission on Human Rights by Karen Parker of the Humanitarian Law Project International Educational Development and Association of Humanitarian Lawyers, March 1996.
- Enkele opmerkingen over het zelfbeschikkingsrecht van volkeren, Gesina van der Molen.
- International Covenant on Civil and Political Rights.
- International Verdrag inzake Burgerrechten en Politieke Rechten (IVBPR).
- Human Rights Committee-International Covenant on Civil and Political Rights.
- Human Rights Committee-Considerations of reports submitted by States parties under article 40 of the Covenant.
- Subsidiary Organs of the Security Council (among which the UNCI).
- Human Rights Bodies-Complaints Procedures.
- De Rapportageprocedure op basis van het IVBPR, door I. Boerefijn.
- Special Procedures of the Human Rights Council & Human Rights Council Complaint Procedure.
- Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, United Nations 23 August 2004.
- HRC Concluding Observations on the initial report of Indonesia 2013.

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# 19. DE FEDERALISM FOR PEACE FOUNDATION

## 19.1 Objective of the Federalism for Peace Foundation

The objective of the foundation is:

- To support and guide states and peoples in processes of federal state organization with a view to conflict resolution for lasting peace, democracy and policy.
- Supporting organs of the United Nations to use federalism as instrument for conflict resolution in the context of peacemaking.

It cooperates with federalist movements and other organizations that support these goals. These include, in particular, the Federal Alliance of European Federalists (FAEF).

## 19.2 The authors of this report

Leo Klinkers (1943), scientist in public administration, is concerned with making policy from the basis of society according to the adage: 'All sovereignty rests with the people'. Working for

governments in The Netherlands and abroad, the United Nations and the European Union, he has designed a methodology on bottom-up policymaking and, together with Peter Hovens, developed it further in www.samenwereld.nl. With Herbert Tombeur he wrote the 'European Federalist Papers' as a foundation for the federalization of Europe. He is a co-founder of the Federal Alliance of European Federalists (FAEF) and of the Federalism for Peace Foundation. Among other publications on federalism he wrote 'Sovereignty, Security and Solidarity' dedicated to European federalism.

Peter Hovens (1959) is scientist in public administration and an expert in managing processes of change. He has held various

positions in local public administration: civil servant, registrar and alderman. He has a great deal of experience as a social volunteer. He also provides training in the method on bottom-up policymaking. Furthermore, he is co-founder of the Knowledge Centre for Population Decline and Policy, Coöperatie SamenWereld, the Federal Alliance of European Federalists FAEF) and the Federalism for Peace Foundation. Hovens is the author of the book *SamenWereld, Hoe het geloof in de politiek en het vertrouwen in de overheid terugkeert*.

## 20. Epilogue

### 20.1 Only the cause of the tragedy counts

There are many publications dedicated to the Moluccan cause. Why would that be? Answer: because this matter has never been solved. That leads to a new question: why? Answer: because it has never been researched and analyzed at its core. That made it a cold case. The characteristic of a cold case is the fact that over the years questions arise again and again about the true cause of that case. We believe we have sufficiently demonstrated that that cause was in the federal constitution. It was so badly constructed that President Sukarno, who was above the law, was able to misuse – by illegal measures - the purpose of that constitution to achieve the opposite.

Unlike the many publications about the theft of the Moluccan right to self-determination, we have exposed the source, the cause itself. This is deeply hidden in the legal tampering that made abuse of rights possible. It is therefore also the cause of all the misery that took place afterwards - from 1950 to the present day. On the Moluccas and in the Netherlands. But this report does not deal with the latter. We had to confine ourselves to an analysis of what happened in 1949-1950.

Faced with the manipulations on the Indonesian side, the United Nations Commission for Indonesia (UNCI) chose the role of Pontius Pilate. America - an expert on a federal constitution - let the legal tampering pass in order to safeguard his interests in the fight against communism. The Security Council and the General Assembly of the United Nations considered the arrival of Indonesia as the 60th member more important than the right to self-determination of autonomous peoples in Indonesia. The Netherlands protested a little but stopped doing so in order not to damage the economic interests of the Netherlands-Indonesian Union. To experience in 1956 that not only collaborating in the fraudulent federal constitution but also endorsing that Union had only been a ruse by Indonesia to acquire its own sovereignty. Thus, the Moluccas fell into the hands of a new colonizer. Nobody paid attention to the requirement that the foundation of a democratic and viable state should prove itself in the form of an impeccable constitution. Instead, for 70 years, futile energy has been spent on discussions about the inalienable right to self-determination. So without analyzing the root cause of this problem.

The fact that the real cause of seventy years of occupation, oppression and exploitation hasn't been analysed kept on haunting the Netherlands. The community of more than 12,000 Moluccans - now grown to about 70,000 - who were shipped to the Netherlands from 1951 continued to ask questions under the leadership of the Moluccan government in exile - the RMS. Without receiving a satisfactory answer. Partly due to the increasingly poor relationship between the Dutch government and the second generation of Moluccans in particular, serious riots arose in the 1970s, such as an attack on the Indonesian residence in Wassenaar, train hijackings and a hostage-taking of a school.

These cases could always be traced back to the unresolved nature of what had happened in 1949-1950. As long as the United Nations does not rectify what was done wrong then the pursuit of freedom in the Moluccas will remain a burden for all actors who are to blame.

Our report devotes extensive attention to the Moluccas' right to self-determination. This is an inalienable right under the treaties of the United Nations. And so, to this day the Moluccan people ask: give us that right. That question will not be silenced. Until the root cause is eliminated. How this can and must be done we have explained in detail in Chapter 15.

## 20.2 Publications about what happened after 1950

Because the heart of the matter was in 1949-1950 - and because this report in English is intended for the Human Rights Council of the United Nations - we will not discuss the Dutch debates and publications that took place in the Netherlands after 1950 around the theme of Moluccan self-determination. We can imagine that some people would still like to take note of some of the publications. That is why we put below a small list of documents that can be consulted on the internet. They show, among other things, how the Dutch government is twisting itself in all kinds of ways in order not to have to take the blame for this human tragedy. Literature:

- Tweede Kamer, 'De problematiek van de Molukse minderheid in Nederland', zitting 1977-1978, nr. 14 915, 29 juni 1978.
- Wetenschappelijke Raad voor het Regeringsbeleid, 'Etnische minderheden', Staatsuitgeverij 1979.
- Beleidsnota Zuid-Molukkers 1978.
- Ministerie van Binnenlandse Zaken, Binnenlandse Veiligheidsdienst, 'Molukse notities', 8 februari 1978.
- J. Veenman en L.G. Lansma, 'Molukkers in Nederland: beleid en onderzoek'.
- J. Koster, Boekbespreking 'De Commissie Köbben/Mantouw en de geschiedschrijving over de Zuid-Molukse kwestie'.

## 20.3 The letter of the Government of the RMS of 8 March 2020

At the beginning of this report we stated that we wanted to approach the Moluccan issue as objectively as possible and, for that reason, did not hold any substantive consultations with representatives of the Moluccan people. That does not alter the fact that we are aware of the efforts of prominent leaders of that people: the government of Republik Maluku Selatan (RMS), residing in exile in the Netherlands.

On 8 March 2020, this government sent an extensive letter[108] to the Dutch Minister of Foreign Affairs, Stef Blok. It did so on the occasion of the state visit of King Willem Alexander and Queen Maxima to Indonesia in the week of 9 March 2020.

[108] See the letter with some important translations in English: http://www.republikmalukuselatan.nl/portal/. Click also Beritanegara.com.

The contents of that letter are a sharp but justified reminder to the governments of the Netherlands and Indonesia about the illegal occupation, oppression and exploitation of the South Moluccas, added to a declaration of liability for the suffering caused - and still continuing - and the theft of raw materials. And the equally justified demand to be restored to sovereignty.

On 25 August 1950, the South Moluccas had declared their independence, after which the government of the RMS considered itself 'de iure' competent to lead that independent state. However, a people are only 'de iure' an independent and sovereign state if there are signatures under a transfer of sovereignty. In this case from Indonesia to the Moluccas.

The tragedy of the Moluccan issue began under the leadership of the United Nations. Under pressure from the United Nations, which was supported by the international political community, the Netherlands had to sign transfer of the territory of Indonesia to representatives of Indonesia on 27 December 1949. At that exact moment (thus not on 17th August 1945) Indonesia became 'de iure' a sovereign state. Though based on trickery and deceit, but nevertheless 'de iure' a sovereign, independent state of its own, which after a month was welcomed with great pleasure by the General Assembly of the United Nations as the 60th member.

## 20.4 The United Nations must take responsibility

At the opening of PART I of this report, we quoted former UN Secretary-General Kofi Annan. It seems justified to conclude this Epilogue with a repetition of that quote, accentuating two words:

"While United Nations efforts have been tailored so that they are palpable to the population to meet immediacy of their security needs and to address the grave injustices of war, the **root causes** of conflict have often been left unaddressed. Yet, it is in addressing the causes of conflict, through legitimate and just ways, that the international community can help prevent a return to conflict in the future."

Well, we've exposed the root causes. And the path that needs to be taken to eliminate those root causes. So, it's up to the United Nations. Prove your right to exist.

Now the United Nations is back on. One can try to cover this report up. The Human Rights Council can also opt for serious treatment in the spirit and letter of the UN treaty system. The new facts of this report, added to everything that has already been put forward by earlier writers between 1950 and today, can only be weighed up by deciding to use the 'actus contrarius principle' to force Indonesia to sign a document transferring the sovereignty of the Moluccas to an authoritative body of the Moluccas themselves.

The United Nations has the compulsory power to enforce this. In the sense that under Article 6 of the United Nations Charter, the UN may expel Indonesia from the UN if the transfer of sovereignty order is not carried out and Indonesia persists in the occupation, oppression and exploitation of the Moluccan people.