

WEST PAPUA AND THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW MELINDA JANKI*

Abstract. In 1969 West Papua, a former Dutch colony, was classified as an Indonesian province following an act of self-determination carried out under Indonesian administration. This paper examines the act of self-determination and concludes that it was a violation of the right of self-determination held by the West Papuan peoples under international law. The paper examines Indonesia's territorial claims and argues that these claims do not justify Indonesian sovereignty over West Papua. The paper concludes that Indonesia's presence in West Papua is illegal and that this illegality is the basis for continuing conflict in West Papua. The paper ends by suggesting that there should be a proper act of self-determination in accordance with international law, to settle finally the international status of West Papua.

1. The historical background

New Guinea, the world's second largest island, lies to the north of Australia. It has been inhabited for thousands of years by Papuan peoples, who are ethnically and culturally distinct from the Asian peoples of the neighbouring Indonesian archipelago. During the 19th century colonial powers divided the island. The eastern part became the two colonies of British Papua and German New Guinea. After the First World War, these two colonies were merged into a single League of Nations mandate which was administered by Australia. This territory attained independence in 1975 as the sovereign state of Papua New Guinea. Also in the nineteenth century, Holland acquired the western half of the island of New Guinea and renamed it the Netherlands New Guinea. Since the Dutch had very little presence on the island they administered the Netherlands New Guinea territory as a part of the Netherlands East Indies.

In 1949, after armed rebellion in parts of the Netherlands East Indies, a Round Table Conference was held in The Hague to discuss independence. The conference resulted in the "Charter for the Transfer of Sovereignty"¹ by which the Netherlands agreed to grant independence to the territories comprising the Netherlands East Indies but not to the Netherlands New Guinea. On 27th December 1949, the Netherlands transferred sovereignty over the territories in the Netherlands East Indies to the newly created federal Republic of the United States of Indonesia. In August 1950, President Sukarno replaced the federal Indonesian state with a unitary Republic of Indonesia which joined the United Nations on 28th September 1950.

The Netherlands New Guinea remained a Dutch colony under Dutch rule. In April 1961, a West New Guinea Council² was inaugurated. In December 1961 this Council adopted a

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¹ Reprinted in *INTERNATIONAL ORGANIZATION* Vol. 4, No. 1. (Feb., 1950) pp 176-183

² The nomenclature is confusing. The Dutch called the territory Netherlands New Guinea, Dutch New

national anthem and a national flag – the Morning Star. The Council also called on all nations to respect the Papuan right of self-determination. In response President Sukarno called for the “liberation” of West Papua from Dutch rule. Armed Indonesians infiltrated West Papua. They were captured by the Papuan Volunteer Corps and handed over to the Dutch authorities. In January 1962 three Indonesian ships entered Dutch waters and fired on a Dutch plane. Dutch frigates sank one of the Indonesian ships. The survivors admitted that their objective had been to land in West New Guinea and destroy the Dutch defences.³ In August 1962, the Netherlands and Indonesia, under diplomatic pressure from the United States to settle the issue, entered into a bilateral treaty - the “Agreement Concerning West New Guinea (West Irian)”⁴ which became known as the New York Agreement. On 1st October 1962, in accordance with this treaty the Netherlands transferred its colonial administration of West Papua to a United Nations Temporary Executive Authority (UNTEA). UNTEA transferred administration to Indonesia on 1st May 1963. The New York Agreement expressly provided for the right of self-determination for West Papua. Article XX stated that:

the act of self-determination will be completed before the end of 1969.

In 1969, Indonesia conducted the act of self-determination exercise, through what it called an “act of free choice.” The Indonesian Minister of Home Affairs reported to the United Nations that the act of free choice:

.....was completed in good order, and the result, unanimously adopted as the wishes of the entire people of West Irian is as follows: to remain united within the Republic of Indonesia and reject separation from the territory of the unitary state of the Republic of Indonesia.⁵

West Papuans have consistently rejected the results of the act of free choice on the grounds that the act was fraudulent and violated their right of self-determination. Indonesia asserts that West Papua had no right of self-determination and that the territory belonged to Indonesia before the act of free choice.⁶ Despite arrangements for special

Guinea and West New Guinea. The West New Guinea council adopted the name West Papua. Indonesia has called the area West Irian, Irian Jaya (victorious Irian) and West Papua. In 2003 Indonesia divided West Papua into two new areas named Papua and West Irian Jaya. Indonesia also refers to West Irian Jaya as West Papua. For simplicity and historical accuracy ‘Netherlands New Guinea’ and ‘West Papua’ will be used for the entire area that was formerly held by the Dutch and which now comprises Papua and West Irian Jaya (West Papua).

³ C PLENDERS *THE WEST NEW GUINEA DEBACLE, DUTCH DECOLONISATION AND INDONESIA 1945 TO 1962*, 344 (University of Hawai’i Press 2002)

⁴ Reprinted as an official document in *57Am. J. Int’l Law* 493-700, No. 2 (April 1963)

⁵ *Report of the Indonesian Government to the Secretary-General concerning the conduct and results of the act of free choice in West Irian*, pursuant to Article XXI of the New York Agreement of 1962, appended to Document A/7641. (hereafter Indonesian Report)

⁶ *Questioning the Unquestionable: An overview of the Restoration of Papua into the Republic of Indonesia*. Permanent Mission of the Republic of Indonesia to the United Nations, New York, 2003 (hereafter *Questioning the Unquestionable*)

autonomy for West Papua, indigenous⁷ Papuan resistance to Indonesian rule continues, often through the simple act of flying the Morning Star flag - an offence punishable with long prison sentences.⁸ There are reports of egregious violations of the rights of Papuans⁹ and Archbishop Desmond Tutu has stated that over 100,000 Papuans have died since Indonesia took over administration in 1963.¹⁰ In 2007, the United Nations Special Rapporteur on Torture, while noting that torture was widespread in Indonesian detention facilities, specifically named the Wamena facility in the Papuan Highlands.¹¹

West Papua's claim to self-determination and Indonesia's competing claim to sovereignty are governed by international, not domestic, law. It is necessary to assess the legal merits of these competing claims and to understand the legal rights held by both parties under international law if there is to be a peaceful solution to the conflict.

2. Self-determination in International Law

The West Papuan claim that the act of free choice was a violation of self-determination is valid only if two conditions are met—

- a) first, West Papua must have possessed a substantive legal right to self-determination at the time of the act of free choice in 1969; and second,
- b) the act of free choice must have clearly violated the procedural requirements set by international law.

(a) *The substantive right*

During the 20th century self-determination evolved from a vague political principle to a substantive, but at times controversial, legal right. As Quane points out:

*The right of peoples to self-determination is an elusive concept. There is no clear definition of "peoples" or of what the right entails. Instead there are numerous and at times conflicting interpretations of self-determination.*¹²

This paper focuses exclusively on one aspect of self-determination – the legal right of the West Papuans, as colonial peoples, to choose their international status i.e. the legal right of West Papua to external self-determination in the context of decolonisation. Legal

⁷Under a transmigration programme funded by the World Bank (<http://go.worldbank.org/DGOJ15R050>) large numbers of Javanese were transferred to West Papua. In this paper the term Papuan or indigenous Papuans is used only to refer to the autochthonous Papuan peoples and not the settlers.

⁸ Two notable cases are those of Filep Karma, a civil servant, and Yusak Pakage a student, jailed for fifteen and ten years respectively for peacefully raising the Morning Star.

⁹ See HUMAN RIGHTS WATCH, *Out of Sight, Endemic Abuse and Impunity in Papua's Central Highlands*, <http://hrw.org/reports/2007/papua0707/>

¹⁰ <http://www.unpo.org/content/view/full/435/236/>;

¹¹ http://search.ft.com/ftArticle?queryText=torture&aje=true&id=071126000267&ct=0&page=2&nclick_ch_eck=1

¹² H QUANE, *THE UNITED NATIONS AND THE EVOLVING RIGHT TO SELF-DETERMINATION* [1998] 47 ICLQ 537; see also James Crawford, *The Right of Self-determination in International Law; Its Development and Future*, in P ALSTON (ED) *PEOPLES' RIGHTS 7* (Oxford University Press, Oxford 2005); M POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* (Martinus Nijhoff, The Hague, 1982);

arguments regarding secession (in the sense of breaking up an existing state), will not be considered since it is trite law that a colony is entitled to independence.¹³ As Emerson notes:

*...the transition from colonial status to independence is not regarded as secession, whether or not it is achieved by force of arms, but rather as the "restoration" of a rightful sovereignty of which the people have been illegitimately denied.*¹⁴

This view is supported by the Supreme Court of Canada which confirmed that:

*The right of colonial peoples to exercise their self-determination by breaking away from the "imperial power" is now undisputed....*¹⁵

The first mention of self-determination in a multilateral treaty is in Article 1 (2) of the Charter of the United Nations (the "Charter") which states that one of the purposes of the United Nations is:

to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.....

This language is repeated in Article 55 and indicates that in 1945 self-determination was a goal of the United Nations, not a right of colonies. Cassese considers that the Charter did not impose legal obligations on Member States¹⁶ and Higgins argues that if any rights to self-determination were created by Article 1(2) these were merely:

*the rights of peoples of one state to be protected from interference by other states or governments....The concept of self-determination did not then, originally, seem to refer to a right of dependent peoples to be independent, or indeed, even to vote.*¹⁷

In 1945, when the Charter came into effect, only States were subjects of international law. The rights established in the Charter were held by States and not by other kinds of territories. In 1949 the various territories which made up the Netherlands East Indies had no legal right, either individually or collectively, to self-determination. They attained independence through military and political pressure. When Indonesia came into existence as a State in 1949, it acquired a Charter right to self-determination i.e. a right to determine its future without interference from other States. Netherlands New Guinea which remained a Dutch colony had no right to self-determination under Article 1(2) or

¹³ KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW*, (Cambridge University Press, Cambridge 2002) p75; Lowe, *International Law*, 47 (Oxford University Press, Oxford 2007)

¹⁴ EMERSON, *SELF-DETERMINATION* 65 Am. J. Int'l L. p465

¹⁵ Reference re Quebec, 37 ILM [1998] page 1372 at paragraph 132; See also CASSESE, *INTERNATIONAL LAW*, 113 (Oxford University Press, Oxford 2001).

¹⁶ CASSESE, *SELF-DETERMINATION OF PEOPLES*, 43 (Cambridge University Press, Cambridge 1995)

¹⁷ R HIGGINS, *PROBLEMS AND PROCESS* 112 (Clarendon Press, Oxford 1994).

Article 55.

The Netherlands New Guinea was dealt with under Chapter XI of the Charter which covered non-self-governing territories such as colonies. Article 73 of this chapter required the administering power to assist the peoples of a non-self-governing territory to attain self-government progressively. This did not amount to a right to self-determination for non-self-governing peoples since a right would be exercisable immediately, and a right to self-determination would include independence not just self-government. Nevertheless, self-determination for colonial peoples evolved through this Chapter and through Chapter XII (trust territories). The turning point was the General Assembly's "Declaration on the Granting of Independence to Colonial Countries and Peoples" (the Declaration)¹⁸ which proclaimed that:

Paragraph 2 All peoples have the right to self-determination; by virtue of that right they freely determine their political status.

.....

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

Although General Assembly resolutions are not legally binding, the Declaration is a statement of general norms of international law and evidence of an emerging legal rule. Brownlie considers that, "The Declaration regards the principle of self-determination as a part of the obligations stemming from the Charter, and is not a 'recommendation' but is in the form of an authoritative interpretation of the Charter."¹⁹ His view is supported by the text of the Declaration. Paragraph 1, states that:

*the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is **contrary to the Charter of the United Nations** and is an impediment to world peace and cooperation.*
(emphasis added)

Paragraph 2 describes self-determination as a right and Paragraph 3 emphasises that the right is not to be delayed:

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

¹⁸ GA Res. 1514 (XV), December 1960

¹⁹ I BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 15 (7th ed. Oxford University Press, 2008)

The implication is that colonial powers have had fifteen years since the Charter came into effect to fulfil their obligations under Article 73 and that by 1960 colonial peoples had a right to independence. Other factors indicate that the Declaration had legal significance. It was passed without any votes against and with only nine abstentions.²⁰ Arguably such abstentions could be regarded as acquiescence since any real objection could have been expressed by a negative vote.²¹ The Declaration followed several resolutions which recommended States to uphold self-government and the right of peoples of non-self-governing territories to self-determination.²² The General Assembly took steps to promote the right to self-determination by establishing in its next session a Special Committee on Decolonisation to:

*...make suggestions and recommendations on the progress and extent of the implementation of the Declaration.*²³

The Declaration was cited ninety-five times in the next six sessions of the General Assembly - evidence of a consensus on the part of States that the Declaration described a general legal standard by which a State's behaviour could be judged. State practice also suggests that States considered themselves to be under a legal obligation. Between December 1960 when the Declaration was made and the end of 1970, colonial powers relinquished their authority over millions of people and twenty-nine new States came into being.

The Declaration was affirmed by the Security Council in several of its resolutions²⁴ and Crawford describes it as having acquired "quasi-constitutional status"²⁵ The International Court of Justice (the Court), confirmed the legal effect of the Declaration, as enunciating "the principle of self-determination as a **right** (emphasis added) of peoples", and as providing the basis for the process of decolonisation.²⁶ In its *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Resolution 276*²⁷ the Court noted the significant role of the Declaration in the development of self-determination as a right:

.....the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.....A further important

²⁰ Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, United Kingdom and United States of America all abstained

²¹ BLEICHER, *The legal significance of the re-citation of General Assembly resolutions*, 63 Am. J. Int'l L. 449, No. 3 (July 1969)

²² For example. GA Res.: 9 (I), 421 (V), 545 (VI), 637 (VII), 83 7(IX), 1314 (XIII)

²³ GA Res. 1654(XVI) *The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples*

²⁴ For example S.C.: 183(1963), 202(1965), 217(1965),218 (1965), 301 (1971), 377(1975)

²⁵ J CRAWFORD *THE CREATION OF STATES IN INTERNATIONAL LAW* 604 (Oxford University Press, Oxford 2006)

²⁶ *Western Sahara (Nature of Legal Ties and their Relation to Decolonisation and Self-Determination)*, *Advisory Opinion* I.C.J. Reports 1975 p12 (at paragraph 57) (hereafter Western Sahara Opinion)

²⁷ I.C.J. Reports 1971 p16 (hereafter *Namibia Opinion 1971*)

stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV)) which embraces all peoples and territories 'which have not yet attained independence'.

The behaviour of the General Assembly as a body, the practice of individual States and the opinions of the Court indicate that by 1960 self-determination had evolved into a legal right held by the peoples of non-self-governing territories and that the Declaration was evidence of the new rule of international law. Even if the new rule did not come into effect in 1960, there is no doubt that self-determination had evolved into a legal right by 1969 when the act of free choice was held in West Papua.

Indonesia not only voted for the Declaration, but was:

a co-sponsor and ardent supporter of the historic landmark resolution on decolonization.²⁸

However, Indonesia has advanced two arguments against West Papua's right to self-determination. The first argument is that West Papua had already exercised self-determination as part of the:

greater "self-determination" of the whole Indonesian people, already pronounced and effectuated with the proclamation of Indonesian independence on 17 August 1945 to free the Netherlands East Indies – from Sabang to Merauke – from colonial rule.²⁹

This 'proclamation' of Indonesian independence was a statement which Sukarno, then leader of a rebellious Indonesian faction, read out at his house. It did not mention Merauke (a part of West Papua) or Sabang. It merely stated:

We the people of Indonesia hereby declare the independence of Indonesia. Matters which concern the transfer of power and other things will be executed by careful means and in the shortest possible time.

The 'proclamation' was a political claim to independence for "Indonesia" an entity which did not exist *de facto* or *de jure* and which was not recognised by a single State in 1945. The 'proclamation' did not mention Netherlands New Guinea and there is no evidence that West Papuans took part in the proclamation. On the contrary, Mohammed Hatta (Indonesia's first vice-president) stated during the Round Table Conference in 1949 that the Papuans were not entitled to self-determination because

the great majority of them were not in a position to express their desires.³⁰

²⁸ *Questioning the Unquestionable* p25

²⁹ *Indonesian Report* paragraph 65

³⁰ M HATTA, *Colonialism and the Danger of War*, *As-ian Survey* Vol. 1, No. 9 (Nov., 1961) p10

It is contradictory for Indonesia to argue that the Papuans were capable of exercising self-determination in 1945 in the 'proclamation' but by 1949 were no longer capable of deciding their future.

The 'proclamation' had no legal effect on any other territory in the Netherlands East Indies. The territories continued to be under Dutch sovereignty until independence in 1949. West Papua's legal right to self-determination under the Declaration in 1960 could not be compromised merely because a separate group of people had made an unsuccessful claim to political self-determination twenty-five years earlier.

Indonesia's second argument³¹ was that the Declaration had no relevance for West Papua because paragraph 6 of the Declaration states that:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

Paragraph 6 is open to different interpretations, none of which supports Indonesia's contention that Resolution 1514 (XV) cannot apply to West Papua. The Declaration deals with the rights of colonial peoples and territories. In 1960 West Papua was legally a Dutch colony, classified under international law as a non-self-governing territory and listed by the United Nations as such. Indonesia was a separate state. Paragraph 6 was not relevant because West Papua was not legally a part of Indonesia and therefore self-determination by West Papua did not affect Indonesia's territorial integrity. As the Netherlands pointed out:

...an independent national unit comprising both Indonesia and New Guinea had never existed and therefore the territorial integrity of the Indonesian Republic could not be disrupted by the recognition of the right of self-determination for the Papuan people.³²

Another possible interpretation of Paragraph 6 is that it establishes the principle that the right to self-determination under the Declaration does not provide a basis for secession. As Emerson points out:

...once the newly created or newly independent state is in existence, no further resort to self-determination is tolerable.³³

Paragraph 6 supports this principle that the self-determination unit is the non-self-governing territory. Since West Papua was not a part of Indonesia in 1960 there was no question of secession from Indonesia. Paragraph 6 could not apply to West Papua, a Dutch colony, but it did apply to the various territories within Indonesia (for example Madura, Aceh, the Moluccas). These areas which were former sultanates and territories

³¹ *Questioning the Unquestionable*, 25

³² UN Doc A4954 quoted in Sureta p146 fn 37

³³ EMERSON *ibid* p464

were part of Indonesia in 1960. They could not rely on the Declaration in order to claim independence - although Paragraph 6 does not extend to prohibiting secession on other grounds.

An alternative interpretation is that the purpose of Paragraph 6 is to stop a colonial power from dividing up a territory with the intention of defeating the self-determination of the peoples within that territory. Applying this interpretation to the facts does not affect West Papua's legal rights. Paragraph 6 came into effect in 1960. It cannot be backdated to 1949 in order to make it illegal for the Netherlands to separate Netherlands New Guinea from the rest of the territories in the Netherlands East Indies. Such backdating is forbidden by the inter-temporal rule by which the effect of an act has to be determined by the law at the time when the act was carried out, and not according to the law at some later date.³⁴ Secondly, the Dutch made no attempt to divide the non-self-governing territory of West Papua into smaller units after the Declaration. Indonesia's argument, that Paragraph 6 could take away West Papua's right to self-determination as a non-self-governing territory, is incompatible with the basis of self-determination as set out in the rest of the Declaration and as such this argument conflicts with the entire decolonisation process.

Indonesia's argument that West Papua did not have a right to self-determination is untenable for another reason. The 1962 New York Agreement expressly provided for the right of self-determination for West Papua and imposed a treaty obligation on Indonesia under Paragraph (d) of Article XVIII to conduct the act of self-determination "in accordance with international practice." Both the Netherlands and Indonesia undertook to be bound by West Papua's decision. The text and effect of the New York Agreement negate any subsequent claim by Indonesia that West Papua did not have a right to self-determination under customary international law or under Indonesia's specific treaty obligations. On the contrary, West Papua's legal right to self-determination in 1960 was more firmly entrenched by 1969 with strict procedural requirements imposed under international law.

(b) *The procedural requirements*

If the above analysis is correct, then West Papua had a substantive legal right to self-determination in 1969. The next question is whether that right was validly exercised in the act of free choice. The procedural requirements for self-determination were developed by the General Assembly through its interpretations of Article 73 of the Charter. Article 73e provides that administering powers have an obligation to transmit to the Secretary-General statistical and other technical information relating to social, economic and educational conditions in the non-self-governing territory. This obligation applies to member states which "have" or which "assume" such responsibilities. In the case of West Papua, Article 73 imposed obligations on the Netherlands from 1945 and on Indonesia from 1963 when Indonesia took over as the administering power.

³⁴ *Island of Palmas Case (Netherlands/United States of America)* RIAA Vol. II(1949), p829; see also BROWNLIE, *ibid* p124-5

An administering power has to know when a territory has achieved self-government in order to know when its reporting obligation under Article 73e has come to an end. The General Assembly addressed this issue in Resolution 567 (VI)³⁵ which listed two factors as “essential” - political advancement and the opinion of the population. Political advancement had to be sufficient to enable the population to decide upon the future destiny of their territory with due knowledge. Their opinion had to be freely expressed by informed and democratic processes as to the change in status which they desired. These conditions were repeated in General Assembly Resolutions 648 (VII)³⁶ and 742 (VIII). General Assembly Resolution 637 (VII) specified that the freely expressed wishes of the people concerned should be ascertained through plebiscites or other democratic means, preferably under the auspices of the United Nations.

Although not legally binding, these resolutions are evidence of an emerging rule of international law, particularly as colonial powers and the United Nations applied these principles and held plebiscites in British Togoland Trust Territory (1956), French Togoland (1958) and British Northern Cameroons (1959). These principles were reinforced in 1960 by Resolution 1541(XV) “Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e” which clarified the obligations imposed on States by Article 73e. This resolution was passed the day after the Declaration and was an interpretation of the Charter; as such, it amounts to a statement of existing law. The Court considered that:

*certain of its provisions give effect to the essential feature of the **right of self-determination** (emphasis added) as established in Resolution 1514 (XV).*³⁷

General Assembly Resolution 1541(XV) confirmed that after 1960:

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

- (a) emergence as a sovereign independent state;*
- (b) free association with an independent state; or*
- (c) integration with an independent state.*

The resolution did not set any procedure for independence, this being the fullest expression of self-determination and therefore the desired result. It set strict procedural requirements for free association as a limited form of freedom. Principle IX set even stricter requirements for integration:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the

³⁵ Future procedure for the continuation of the study of factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a measure of self-government

³⁶ Factors which should be taken into account in deciding whether a Territory is or is not a Territory to whose people have not yet attained a full measure of self-government;

³⁷ *Western Sahara Opinion*, paragraph 57

capacity to make a responsible choice through informed and democratic processes;

*(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on **universal adult suffrage** (emphasis added).*

At any time in its existence as a non-self-governing territory, West Papua could have attained independence without following any strict procedural requirements. But by 1969, a decision to integrate with an existing State could be legitimate only if it met the requirements of Principle IX of General Assembly Resolution 1541(XV).

3. Assessment of the Act of Free Choice

Having assessed the procedural requirements under international law it is now necessary to consider whether the act of free choice met these requirements for universal adult suffrage, freely expressed wishes, advanced self-government, free political institutions, full knowledge of the change in status and the need for the exercise of self-determination to be conducted impartially. This assessment of the act of free choice is based on the facts set out in the Indonesian Report and the "Report by the Representative of the Secretary-General in West Irian, submitted under article XXI, paragraph 1, of the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)."³⁸

The United Nations did not implement the act of free choice but provided advice through a team headed by a representative of the Secretary-General (the United Nations representative) as provided for in the New York Agreement. On the question of universal adult suffrage the United Nations representative advised Indonesia that he:

could suggest no other method for this delicate political exercise than the democratic, orthodox and universally accepted method of "one man one vote."³⁹

Indonesia argued this was not possible because:

In West Irian there exists, as is generally known, one of the most primitive and underdeveloped communities in the world.⁴⁰

Indonesia's argument is untenable. International law does not permit a State to use primitiveness as a reason for preventing dependent peoples from deciding their future.⁴¹

³⁸ Appended to UN Document A/7723. Hereafter, UN Report.

³⁹ UN report Paragraph 82

⁴⁰ Indonesian Report paragraph 65

⁴¹ POMERANCE, *METHODS OF SELF-DETERMINATION AND THE ARGUMENT OF "PRIMITIVENESS."* 12 Can. Y.B. Int'l. 38 1974

That principle was established as early as 1946 when South Africa attempted to integrate South West Africa (now Namibia). Integration was to take place on the basis of a tribal referendum in which the chief gave the decision of his tribe to a native commissioner appointed by the Government of South Africa. Individual Africans were not allowed to vote. The General Assembly refused to accept that South West Africa could be incorporated into South Africa:

*the African inhabitants of South West Africa have not yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognise on such an important question as incorporation of their territory.*⁴²

If the people were “too primitive” to take part in the self-determination exercise, they were also “too primitive” to understand the nature of the change being proposed. The General Assembly refused to approve the integration on the grounds that no valid decision could be made until the people of South West Africa were sufficiently advanced to understand the meaning of incorporating their territory into South Africa. Resolution 1541(XV) was further evidence of a legal principle that dependent peoples should be protected against integration until they could make a valid choice on the basis of universal adult suffrage. Indonesia’s argument that the Papuans were too primitive for universal adult suffrage does not make the act of free choice legitimate, but reinforces the fact that both the process and the result were invalid.

In reality there was no evidence in 1969, that the Papuan peoples were any less competent than other peoples to decide their future. Between 1959 and 1961 when the colony was still under Dutch administration, West Papuans voted directly for regional councils. In December 1968, the General Assembly, including Indonesia, reaffirmed the inalienable right of the peoples of Papua and New Guinea to self-determination, and called upon Australia, the administering power, to:

*hold free elections under United Nations supervision on the basis of **universal adult suffrage** (emphasis added) in order to transfer effective power to the representatives of the people of the Territories.*⁴³

If universal adult suffrage was possible for Papua and New Guinea, how it could be legitimately denied to West Papuans who were essentially the same peoples living on the same island and separated only because of a border created by the colonial powers?

By 1969, the United Nations had developed ways to accommodate populations at different educational levels. The United Nations legal counsel in his “Note on the Question of Self-determination for Western New Guinea”⁴⁴ advised the United Nations Secretary-General that literacy was not considered a necessary qualification as ballots

⁴² UNGA65(I)

⁴³ GA Res. 2427 (XXIII)

⁴⁴ UN: Series 100, Box 2, File 7, under cover of a note dated 29 June 1962 from C. A. Stavropoulos Legal Counsel to U Thant Acting Secretary-General.

bearing symbols or having different colours had been used in other situations. Therefore it would have been possible to conduct the act of free choice on the basis of “one man: one vote” as required by international law, international practice and the terms of the New York Agreement.

However, the Indonesian government dismissed universal adult suffrage as propaganda by the Free Papua Organisation⁴⁵ and instead, Indonesia created eight consultative Assemblies covering the regions of Merauke, Djajawidjaja, Paniai, Fak-Fak, Sorong, Manokwari, Tjenderawasih and Djajapura. Each assembly consisted of individuals from three different groups which had been selected by Indonesia as groups that represented Papuan society. The first group comprised appointees of various political, social, cultural and religious organisations. The role of the appointees was not to express the wishes of the Papuan people, but to represent the views of the organisation which had appointed them. Indonesia decided which organisations were eligible to take part. Organisations which favoured an independent West Papua were not legally recognised and therefore could not take part. The second group comprised tribal chiefs chosen by local councils in consultation with those concerned. It is unclear who was actually involved. The third group of members of the consultative assembly comprised members of the existing regional councils with some additional representatives being elected by the people of the district.

United Nations observers witnessed the election of one hundred and ninety five (195) members and were informed of the results for the other eight hundred and thirty-one (831) members. Instead of universal adult suffrage, the consultative assemblies comprised one thousand and twenty-six people (1026) out of a population estimated by the United Nations representative at the time to be approximately one million people.

The requirement for “freely expressed wishes” suggests an atmosphere in which Papuans could discuss and debate freely. This was not the case. The United Nations representative noted that:

*...the Administration [Indonesia] exercised at all times a tight political control over the population.*⁴⁶

“Freely expressed wishes” requires a decision without fear of reprisals. The act of free choice took place against a background of intimidation. A few months before the act of free choice, it was reported that Major Soewondo of the Indonesian army had told two hundred village chiefs:

*I am drawing the line frankly and clearly. I say I will protect and guarantee the safety of everyone who is for Indonesia. I will shoot dead anyone who is against us.*⁴⁷

⁴⁵ Indonesian Report paragraph 31

⁴⁶ UN Report paragraph 251

⁴⁷ JOHN SALTFOED, *THE UNITED NATIONS AND THE INDONESIA TAKEOVER OF WEST PAPUA, 1962-1969* (RoutledgeCurzon 2003) p148

During the act of free choice, tribal chiefs were taken from their communities to the district capital. Some of their families remained behind “in the care of the Government”⁴⁸ to be released when the act of free choice was completed.

“Freely expressed wishes” also suggests a vote usually a secret ballot. However the participants in the act of free choice were not permitted to vote. They were required to reach their decisions through the Javanese system of *musyawarah* which aims for group consensus. *Musyawarah* does not record positions for or against. The discussion continues until each person accepts the final decision which is then the collective decision of all. Indonesia argued that *musyawarah* had to be used for the act of free choice because under the New York Agreement the method had to have:

*a reasonable chance of being accepted (by way of musyawarah) by the local representative councils in West Irian itself as explicitly required by article XVIII (a) of the New York Agreement.*⁴⁹

This is a misrepresentation of Article XVIII (a) which merely required Indonesia to consult the representative councils on the procedures and methods to be followed for ascertaining the freely expressed wishes of the population. The New York Agreement specifically required arrangements to be made for the eligibility of all adults to participate in the act of self-determination and for the act of self-determination to be carried out in accordance with international practice (Article XVIII (d)). The role of the representative councils was to provide advice on how to comply with international practice given the conditions in West Papua. These councils were prohibited by the New York Agreement from suggesting a process that did not meet international standards. Their advice should have been about the procedures that would ensure universal adult suffrage given the terrain, the remoteness of some areas, the numbers of people, the available modes of communication and transportation etc.

Furthermore Indonesia informed the councils that the act of free choice was not necessary, that West Papua was already a part of Indonesia, that the system of “one man, one vote” was not possible and that the act of free choice would be carried out through consultative assemblies using *musyawarah*.⁵⁰ This made it impossible for the councils to fulfil their role under the New York Agreement. By this action Indonesia violated its treaty obligations under the New York Agreement as well as the rights of the Papuan peoples to self-determination under international law.

The deliberations of the eight assemblies were not held in a free atmosphere. They took place in the presence of high ranking Indonesian officials including the Minister of Home Affairs, the Governor/Head of the West Irian Provincial Government, the Chairman of the West Irian Provincial House of Representatives, a Brigadier-General and the Chief of the Information Service. These officials did not merely observe the act of self

⁴⁸ *Indonesian Report* paragraph 48

⁴⁹ *Indonesian Report* paragraph 27

⁵⁰ *UN report* paragraph 95

determination - they informed the different assemblies what the “right” decision would be. The Governor informed each assembly that the peoples of West Papua had already expressed their desire not to be separated from Indonesia and that the right answer was to remain with Indonesia. The Minister informed the assemblies that the act of free choice was the finishing touch in the efforts to safeguard the unity of the nation and there was no alternative but to “remain within the Republic of Indonesia.”⁵¹

Instead of the act of self-determination taking place on a single day, it was spread over several weeks so that each representative would know what the previous assemblies had decided. The deliberations of the first assembly in Merauke were broadcast on all radio stations throughout West Papua so that:

*people in all regions of West Irian had been enabled to follow all the proceedings, speeches and decisions of the session.*⁵²

After the first three assemblies had made their decisions, President Suharto sent a telegram to the Minister of Home Affairs expressing his gratitude to the people of West Irian. This telegram was read out during the proceedings of the remaining five assemblies. Even so, at Manokwari the Governor felt it necessary to remind the assembly of the unanimous decisions made by the previous four assemblies. The Indonesian government frankly admitted that the individuals who took part were not able to express their views freely through the *musyawarah* system:

*Those who observed the prevailing atmosphere and spirit of the consultative assembly sessions for the act of free choice in the eight Regencies and those who possess a keen knowledge about the political background of the dispute on West Irian, will understand why it would have been very difficult, politically and psychologically, for anyone to contradict and go against the overwhelming desire of the consultative assembly sessions supported by very strong arguments to maintain the established political status of West Irian safeguarding the unity and territorial integrity of the free and independent Republic of Indonesia, from Sabang to Merauke.*⁵³

In order to act with full knowledge of the change in their status, the peoples of a non-self-governing territory must have adequate information. This condition was not met in the act of free choice. The United Nations representative reported that:

*During my tours of the Territory I noticed with concern that the people had not been given adequate information regarding the forthcoming act of free choice.*⁵⁴

Indonesia asserted that it had adequately performed its duty to inform the people by

⁵¹ UN Report paragraph 195

⁵² Indonesian Report Paragraph 50

⁵³ Indonesian Report paragraph 65

⁵⁴ UN Report paragraph 49

putting information in the newspapers and using radio broadcasts. However in its report the Indonesian government admitted that newspapers and radio were not sufficient to overcome the severe communication difficulties:

*....everything has to be explained orally and personally to the people; especially in the interior the people cannot be called by radio or television, nor can they be informed by means of newspapers. Most of the adult population in the interior are illiterate; radios are very rare.*⁵⁵

Not satisfied with the Indonesian efforts, the United Nations representative requested the Indonesian authorities to prepare and disseminate to the West Papuans, a document explaining the act of free choice in brief and simple terms. The Indonesian authorities refused on the grounds that the act of free choice had been “a source of controversy and conflict” among politically minded people in West Papua. Instead the government would disseminate information:

*.....taking due account of the political and psychological situation [and] in a manner that would not disturb the normal working of the Provincial Government.*⁵⁶

The Indonesian position as explained to the United Nations was that:

*In the interior [of West Papua] in particular it was obviously not easy to make simple illiterate people understand what the New York Agreement and the act of free choice really meant. One could not talk much about these things.*⁵⁷

If, as Indonesia claimed, the Papuans were not able to understand the issue, then they could not make the informed decision required by international law, and therefore the act of free choice was invalid.

In order to make a free choice the dependent peoples must understand their options. The Papuan representatives were asked to choose:

*(a) whether they wish to remain with Indonesia or (b) whether they wish to sever their ties with Indonesia.*⁵⁸

The legal effect of each choice is obscure. To “remain” with Indonesia implies that there is no change in status. It does not suggest any further surrender of sovereignty. If the Netherlands had asked the Papuan peoples whether they wished to remain with the Netherlands or to sever their ties, a decision to remain with the Netherlands would not have been accepted by the General Assembly or Indonesia as integration with the Netherlands. It could only have meant the continuation of Dutch administration until such

⁵⁵ *Indonesian Report* paragraph 43

⁵⁶ *ibid* paragraph 51

⁵⁷ *ibid* paragraph 24

⁵⁸ UN Report paragraph 248

time as West Papua achieved independence or made a decision for free association or integration in accordance with international law.

Indonesia was in a similar position to the Netherlands since Indonesia took over “administration” from the Netherlands via UNTEA. Indonesia possessed no recognised legal rights over West Papua, only the obligations of an administering power as well as the obligations set out in the New York Agreement. Indonesia could not validly acquire sovereignty over West Papua unless the Papuans were asked in unambiguous terms whether they wished to surrender their sovereignty and become a part of Indonesia and not merely whether they wished to “remain with Indonesia”.

A further defect in the act of free choice is that the Papuans were not offered independence. Higgins considers that in self-determination:

*What is important is that a proper range of choice is laid before a dependent people and that they are given the opportunity to express their choice.*⁵⁹

Resolution 742 (VIII)⁶⁰ recommended that a population should have freedom of choice between several possibilities including independence. While this is not a legally binding requirement it suggests that independence should be offered unless there are appropriate reasons for not offering it. According to the United Nations representative:

The petitions opposing annexation to Indonesia, the cases of unrest in Manokwari, Enarotali and Waghete, the flight of a number of people to the part of the island that is administered by Australia, and the existence of political detainees, more than 300 of whom were released at my request show that without doubt certain elements of the population of West Irian held firm convictions in favour of independence.

The history of West Papua suggests that a proper choice would have included independence - the Papuans did not join the Indonesians in their fight for independence in 1945, they resisted Indonesian attempts to “liberate” them from Dutch rule in 1961 and they called on all States to recognise their right to self-determination.

The process for selecting the questions in the act of free choice was defective in that it differed from international practice. In 1962 the United Nations legal counsel advised⁶¹ that the usual procedure for self-determination was for the United Nations to seek the views of the local population in order to permit a precise formulation of the questions to be asked. The major opposition groups would be consulted so that the questions would reflect the full range of political demands. The questions would then be included in a General Assembly resolution and incorporated into a special law. In contrast, the

⁵⁹ HIGGINS p119

⁶⁰ Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government.

⁶¹ UN: Series 100, Box 2, File 7, *Note on the question of self-determination in relation to Western New Guinea*, under cover of a note dated 29 June 1962 from C. A. Stavropoulos, Legal Counsel to U Thant, Acting Secretary-General.

questions in the act of free choice were taken verbatim from the New York Agreement. The Papuans were not asked in 1962 when the treaty was made, nor in 1969 when the questions were set, nor at any time in between, for their views on what questions should be put in their act of self-determination.

At the time of the act of free choice, Papuan political parties were banned and decisions in West Papua were made through official bodies whose members were appointed by the Indonesian government, not elected by the Papuans. The apparent decision to integrate West Papua with Indonesia could not be valid since international law, as stated in Resolution 1541(XV), and as established by international practice required self-government and free political institutions for such a decision to be valid, and these conditions were not met.

Resolution 1541(XV) required the act of self-determination to be impartially conducted and provided that the United Nations could supervise when necessary. By 1969 state practice was for the administering power to conduct a plebiscite or elections with United Nations involvement and supervision. But in West Papua the act of self-determination was not supervised by the United Nations or carried out by the Netherlands as the administering power. It was conducted by Indonesia, a neighbouring state which had for twenty years asserted a territorial claim to West Papua and which at the time of the act of free choice claimed that West Papua was already a part of Indonesia. Although officials of the United Nations were present, their role was limited to advising, assisting and participating in the arrangements for the act of free choice but not carrying out the act of free choice itself. The United Nations did not ensure that the act of free choice met the requirements of international law and practice⁶² and:

*UN participation probably served merely to lend respectability to a questionable “act of self-determination.”*⁶³

The act of free choice failed to meet any of the criteria for a valid act of self-determination under international law. Forcing 1022⁶⁴ individuals (or less than 0.2% of the Papuan population) to declare in favour of ‘remaining with Indonesia’ is not a legally valid decision to integrate. In commenting on the act of free choice, Sureda concluded that:

*there was a blatant disregard for the necessary freedom and the required information to make the “act of free choice” meaningful.*⁶⁵

Pomerance dismisses the act of free choice as “a pro forma and spurious exercise.”⁶⁶ Cassese describes the integration of West Papua into Indonesia as “a substantial denial of

⁶² For a full description see SALTFRD, *The United Nations and the Indonesian Takeover of West Papua, 1962-1969* (RoutledgeCurzon 2003)

⁶³ POMERANCE p35

⁶⁴ Four did not take part

⁶⁵ SUREDA p316

⁶⁶ POMERANCE p20

self-determination, a pseudo-choice, a charade and a substantive betrayal of the principle of self-determination.”⁶⁷ The flaws in the act of free choice and the consensus of legal commentators indicates that West Papuans are correct to say that the act of free choice was not a valid exercise of their right to self-determination under international law.

4. Indonesia’s territorial claims

Since the act of free choice was invalid, it cannot provide a legal basis for Indonesia to exercise sovereignty over West Papua. Indonesia’s sovereignty would have to be legally validated in some other way. In “The Restoration of Irian Jaya into the Republic of Indonesia”, issued in 2001 by the Indonesian Permanent Representative to the United Nations, Indonesia states that:

*Indonesia’s right of sovereignty rests on two grounds: first it had succeeded to Dutch sovereignty over the whole of the Netherlands East Indies, including Irian Jaya; second, there were historical ties between the rest of Indonesia and Irian Jaya.*⁶⁸

These two assertions rest on a number of legal and political arguments, some of which are contradictory. Indonesia claims that it possessed sovereignty before the act of free choice because:

*...sovereignty over Papua had already been transferred to Indonesia under the terms of Article 1 [of the Charter of the Transfer of Sovereignty] and that the issue was only how the administration of Papua would be transferred.*⁶⁹

Article I of the Charter of the Transfer of Sovereignty has two parts. Article I(1) stated that the Netherlands unconditionally and irrevocably transferred its sovereignty over Indonesia to the Republic of the United States of Indonesia. Article I(2) provided that

The Republic of the United States of Indonesia accepts said sovereignty on the basis of the provisions of its Constitution.

This Constitution established the Republic of the United States of Indonesia with sixteen states and territories. The Netherlands New Guinea was not one of the sixteen states or territories; neither did it form a part of any of them. The Netherlands refused to transfer the Netherlands New Guinea so this territory was dealt with in Article 2. This article stated that since Indonesia and the Netherlands could not agree:

The status quo of the residency of New Guinea shall be maintained with the stipulation that within a year from the date of transfer of sovereignty to the Republic of the United States of Indonesia the question of the political status of

⁶⁷ Cassese, *Self-determination*, p84 -85

⁶⁸ http://www.indonesia-ottawa.org/current_issues/papua/Restoration%20of%20Irian%20Jaya.pdf

⁶⁹ *Questioning the Unquestionable* 15

New Guinea be determined through negotiations between the Republic of the United States of Indonesia and the Kingdom of the Netherlands.

A subsequent exchange of letters confirmed that under this article West Papua would continue under the government of the Netherlands.⁷⁰ Indonesia's argument that sovereignty (but not administration) had been transferred may be a misunderstanding of the position under international law. Since West Papua was, in 1949, a non-self-governing territory under Article 73, the Netherlands's position, as the colonial government, was more accurately described as that of an administering power in relation to the Papuan peoples although it exercised sovereignty as against other States, including Indonesia. The text of Article 1 and Article 2 make it clear that the Netherlands did not transfer sovereignty or any other interest in the Netherlands New Guinea to Indonesia.

Article 2 did not impose any legal requirement on the Netherlands to transfer the Netherlands New Guinea to the Republic of the United States of Indonesia at a later date. It is arguable that at most this article merely obliged the Dutch to continue negotiations with the Republic of the United States of Indonesia for one year. In August 1950, when President Sukarno unilaterally replaced the federal state with the unitary Republic of Indonesia he violated the terms of the Charter of Sovereignty. President Sukarno's action removed any possibility of West Papua becoming a state within the federal system created under the Charter of Transfer of Sovereignty, and therefore removed the basis upon which the Dutch had agreed to continue negotiations.

The year for negotiations expired without the Netherlands and Indonesia reaching any agreement over the Netherlands New Guinea. The Charter did not provide for more negotiations, for arbitration or for the dispute to be submitted to the Court. Under international law and domestic law, the Netherlands New Guinea continued to be a Dutch colony and the Netherlands continued to exercise sovereignty. On 11th September 1956, Article 1 of the Dutch Constitution was amended to include West Papua:

The Kingdom of the Netherlands comprises the territory of the Netherlands, Surinam and the Netherlands Antilles and Netherlands New Guinea.

After gaining independence in 1949, Indonesia was unable to assert any rights or perform any actions that would indicate it had any sovereignty over the Netherlands New Guinea. Instead, in 1962, Indonesia was forced to concede in a legally binding treaty, the New York Agreement, that the Netherlands New Guinea had a right to the free exercise of self-determination and that Indonesia would be bound by that decision.

Indonesia has argued that:

...the decolonisation process was incomplete since the Netherlands, by keeping Papua under its control, failed to fully transfer the sovereignty and territorial integrity of Indonesia.⁷¹

⁷⁰ L. Metzemaekers *The West New Guinea Problem*, 24 *Pacific Affairs*, 137, No. 2 (June 1951)

⁷¹ *Questioning the Unquestionable* 7

This argument conflicts with the previous claim that sovereignty over Netherlands New Guinea was transferred under the Charter of Transfer of Sovereignty. Indonesia cannot simultaneously argue that sovereignty was transferred but not transferred. The decolonisation process would be incomplete only if the Netherlands was under a legal obligation in 1949 to grant independence to the Netherlands East Indies as a whole unit, but this was not the case. In 1949 colonial peoples may have had a political and moral right to independence but the legal right to self-determination was still evolving. Indonesia's claim to West Papua was political, not legal, and it was inherently contradictory. As As Sureda points out,

*The Indonesian argument of territorial integrity relies on two assumptions: first it implicitly accepts the constitutive recognition by the Netherlands of an entity administered under the name of Netherlands East Indies; second it assumes that this entity at a certain moment acquired such a personality that the administering country was stopped from making further territorial changes to it.*⁷²

In order to identify the Netherlands East Indies as the only valid entity for independence, Indonesia would have to concede that the Netherlands had the power over a period of three hundred years to arrange a variety of territories and states into the Netherlands East Indies. Indonesia would then have to demonstrate that by 1949 the Netherlands had legally lost the power to add territory to or subtract territory from the Netherlands East Indies. But in 1949, there was no legal rule which prevented the Netherlands from continuing to alter the boundaries of the territories in the Netherlands East Indies. As the Commission of Jurists in the *Aaland Islands Case* stated:

*...in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.*⁷³

The Netherlands therefore had the legal competence to dispose of any part of the Netherlands East Indies and to retain the Netherlands New Guinea. A further difficulty with the Indonesian argument is that even after Resolution 1514 (XV) in 1960, there was no legal obligation to preserve the integrity of a colonial unit if division was considered to be a better means of promoting self-determination - the British Cameroons was separated into two territories which voted separately on their future; Rwanda and Burundi emerged as two independent sovereign states out of the Belgian administered territory of Rwanda-Urundi.⁷⁴

Indonesia claimed that the Netherlands should have transferred sovereignty in 1949

⁷² Sureda P 146

⁷³ *Report of the Commission of Jurists*, 5-6, LNOJ Sp Supp No 3 (October 1920)

⁷⁴ Resolution 1746 (XVI)

because the Netherlands New Guinea was then a part of Indonesia's territory. In an explanatory memorandum for the General Assembly in 1954 Indonesia asserted that:

*West Irian [West Papua] is and always has been - historically as well as constitutionally (legally) – an integral part of Indonesia, that is to say, also, the Netherlands East Indies.*⁷⁵

This statement assumes that Indonesia is the same as the Netherlands East Indies but that is the very claim which has to be proved. Before the Dutch created the Netherlands East Indies there was no historical entity called Indonesia, only various kingdoms, sultanates and chiefdoms. After the Second World War, there were three separate entities called Indonesia, none of which was the same as the Netherlands East Indies and none of which included the Netherlands New Guinea. In December 1946 the Netherlands created the state of East Indonesia (Timur Besar) over the islands to the east of Borneo and Java but excluding the Netherlands New Guinea.⁷⁶

On 25th March 1947, in a ceasefire known as the Linggadjati Agreement, the Dutch recognised a republic of Indonesia as having *de facto* authority over Java, Madura and Sumatra, but no authority anywhere else in the Netherlands East Indies and certainly not over West Papua which lay to the east of East Indonesia. The Dutch retained *de facto* control of the rest of the Netherlands East Indies and *de jure* sovereignty over all of the constituent territories, including the *de facto* republic of Indonesia. In December 1949 the Netherlands created and recognised the Republic of the United States of Indonesia (Republik Indonesia Serikat) which did not include the Netherlands New Guinea. At no time then was West Papua a part of any entity called "Indonesia."

Indonesia has argued that the Netherlands violated the legal principle of *Uti Possidetis Juris* by retaining the Netherlands New Guinea because it meant that the borders of Indonesia were different to the borders of the Netherlands East Indies colony. This is merely a variation of the above argument that West Papua was a part of the new Indonesian simply because it was part of the Netherlands East Indies. It is also a misapplication of the legal principle. *Uti Possidetis Juris* applies to the settlement of post-colonial boundary disputes.⁷⁷ As explained by the Court in the Burkino-Faso/Mali case the purpose of *Uti Possidetis Juris* is:

*to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power...the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.*⁷⁸

⁷⁵ UN Doc A/2694, 143, quoted in Sureda

⁷⁶ H Arthur Steiner *Post War Government of the Netherlands East Indies*, 9 *The J. of Politics* 624-652, No. 4 (Nov. 1947)

⁷⁷ Harris, *Cases and Materials on International Law*, p227 (Sweet and Maxwell, London 2004)

⁷⁸ ICJ Reports 1986, 566

Uti Possidetis Juris cannot be used to redraw the boundaries of the newly independent State to conform to pre-independence boundaries - the principle specifically forbids territorial changes based on the notion of a pre-colonial entity:

*While it is clear that colonial territories have a 'separate and distinct status', they do not possess separate sovereignty and the line that is protected is that in existence at the moment of independence not that existing at some unclear point in the past.*⁷⁹

Uti Possidetis Juris protected the borders of the new Indonesia against an external threat from any other State which might claim part of Indonesia's territory on the grounds that it belonged to an entity that existed before colonisation. The principle also protected Indonesia against the threat of internal secession from smaller units claiming a right to independence on the basis of a historical entity. Conversely *Uti Possidetis Juris* required Indonesia to respect the boundaries of other States including the boundaries of their colonial possessions, such as the Netherlands New Guinea and Portuguese Timor (East Timor), irrespective of any historical association that might be claimed.

Indonesia has asserted that the Security Council:

*...clearly acknowledged the true question of Indonesia and the inseparability of Papua from the young republic.*⁸⁰

This is a political, not a legal, argument, and it is contradicted by the behaviour of the Indonesian representatives. When they lobbied the Security Council in August 1947 their list of Indonesian territories did not include Netherlands New Guinea and the colony was therefore not included in the concept of "Indonesia"⁸¹ as defined by the Indonesian representatives themselves. Furthermore none of the Security Council resolutions mentions Netherlands New Guinea. Several resolutions are instructions to the Netherlands and the *de facto* republic of Indonesia (which excluded the Netherlands New Guinea) to cease hostilities.⁸² Resolution 30 (1947) approves the Linggadjati Agreement. Resolutions 41(1948) and 55 (1948) approve the "Truce Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia signed at the Fourth Meeting of the Committee of Good Offices with the Parties on 17 January 1948"⁸³ (Renville Principles). The Renville Principles did not mention Netherlands New Guinea. They restated Dutch sovereignty over all of the Netherlands East Indies (which included the Netherlands New Guinea) and provided for self-determination through a plebiscite in Java, Madura and Sumatra by which these populations could decide whether they wanted to be a part of the *de facto* republic of Indonesia or whether they wanted to form different states in the proposed Republic of the

⁷⁹ Shaw, *The Heritage of States: the principle of Uti Possidetis Juris today*, British Yearbook of Int'l Law p113 (Oxford University Press, Oxford, 1996)

⁸⁰ *Questioning the Unquestionable* p17

⁸¹ Saltford p5

⁸² Resolutions 27 (1947), 32(1947), 36 (1947), 63(1948), 65 (1948)

⁸³ Reprinted in 2 *Int'l Organisation*, No. 2 (Jun., 1948), pp.404-406

United States of Indonesia. The Renville Principles endorsed the Linggadjati Agreement and did not affect the status of the Netherlands New Guinea.

In Resolution 67 (1949) the Security Council approved the Linggadjati Agreement and the Renville Principles and authorised the United Nations Commission for Indonesia to invite Indonesian representatives to take part in the independence negotiations to be held in the Netherlands. This Commission was authorised to observe the elections to be held throughout Indonesia for the delegates to a constituent assembly for the proposed new state. No elections were held in Netherlands New Guinea and no Papuan representatives were sent to the conference. This strongly indicates that the Security Council and the United Nations Commission for Indonesia did not consider Netherlands New Guinea to be a part of Indonesia or of any settlement between the Netherlands and its Indonesian territories.

Indonesia's second argument that there were historical ties is incorrect. The basis of this claim is that:

*In 1660 a treaty was concluded between Tidore and Ternate, under the auspices of the Dutch East Indies Company, which stated that the Papuans, and all of their islands, belonged to the King of Tidore.*⁸⁴

However the authority of the Sultan of Tidore was not recognised by the Papuans. In 1858, a Dutch steamer visiting Humbolt Bay, on the northern coast, was met with hostility from the Papuans even though the son of the Prince of Tidore, their supposed ruler, was on board.⁸⁵ The British Foreign Office, which examined the matter closely in 1884, concluded that:

*There is an entire absence of official evidence as to the nature, extent and duration of the supremacy exercised, or claimed, by the Sultan of Tidore on any part of the Mainland, or even in the Peninsula, of New Guinea*⁸⁶ ...

*.....there is no evidence of the Sultan's authority having ever been recognised by the natives on any part of the Mainland [of the island of New Guinea], or of his people having ever visited any part of it.*⁸⁷

The Sultan of Tidore could not transfer sovereignty over the territory of West Papua to the new state of Indonesia if he did not have it. Furthermore whatever claims Tidore might have had were mostly extinguished by the Dutch who annexed West Papua in 1828 and recognised Tidore's interest in only four small areas.⁸⁸ The Dutch also made treaties

⁸⁴ *Questioning the Unquestionable* p9

⁸⁵ Alfred W Wallace, *The Malay Archipelago Vol II*; available at <http://www.authorama.com/malay-archipelago-2-14.html>

⁸⁶ Memorandum by Sir Rawson W. Rawson on the Claims of Holland to New Guinea, 1884 Public Record Office Kew FO 881/5002 p11 (hereafter *FCO memo*)

⁸⁷ *FCO Memo* p12

⁸⁸ *FCO Memo* p5

directly with Papuan chiefs and tribes⁸⁹ thereby suggesting some legal recognition of indigenous Papuan sovereignty at that time. An Indonesian claim that Tidore had historical ties to West Papua would either fail on the facts or it would apply to only a small part of West Papua. But even if such historical ties existed, they were not legally capable of overriding the legal right held by the Netherlands to retain the Netherlands New Guinea in 1949.

5. The impact of Indonesia's territorial claims

Although Indonesia's territorial claim is weak, and therefore unlikely to be recognised as giving rise to a legal right to West Papua, it is still important to consider whether a territorial claim is legally capable of trumping West Papua's right to self-determination and therefore capable of overcoming the invalidity of the act of free choice. In 1962, after considering Indonesia's claim to West Papua the United Nations Legal Counsel advised that:

*There appears to be a strong presumption in favour of self-determination in situations such as that of West New Guinea **irrespective of the legal stands or interests of other parties** to the question.⁹⁰ (emphasis added)*

This opinion is consistent with the evolution of international law. Sureda considers that by 1969 the constant practice of the General Assembly in referring to Resolution 1514 (XV) and the right to self-determination:

gives evidence of a new rule of international law whereby title to a colonial territory cannot validly be opposed to the claims of self-determination by the people of that territory.⁹¹

The legal rule as elaborated by the Court in the *Western Sahara case* is that once the right of self-determination exists, the State which claims the territory must allow the people of the territory to have a free and genuine choice. As Judge Dillard explained in his separate concurring opinion:

It seems hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people.⁹²

Exceptions to this rule have been limited to cases such as colonial enclaves (e.g. Goa, Ifni and Walvis Bay,) or more controversially to territories such as Las Malvinas/Falklands and Gibraltar where, it is argued, there is no indigenous population. In dealing with

⁸⁹ *FCO Memo* p21

⁹⁰ UN: Series 100,Box 2, File 7, Stavropoulos to U Thant, 29th June 1962; attached to a memorandum from Stavropoulos to Rolz-Bennet 17th July 1969

⁹¹ Sureda p222

⁹² *Western Sahara* p114

exceptions the Court noted that:

The validity of the principle of self-determination defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary in view of special circumstances.⁹³

West Papua does not fall within either of these exceptions. The West Papuans were recognised as peoples for the purposes of Resolution 1514 (XV) by the Netherlands, the United Nations General Assembly, the Decolonisation Committee, and Indonesia. The United Nations was involved in the discussions that lead to the New York Agreement and the confirmation of West Papua's right to self-determination. The General Assembly took note of the New York Agreement and authorised the Secretary-General to appoint a representative to assist and participate in the arrangements for self-determination.⁹⁴ As Blay points out:

The terms of the New York Agreement and the UN's involvement unambiguously reflected the rejection of the territorial integrity principle in favour of self-determination for West Irian...the West Irian case illustrates the legal proposition that, in decolonisation, the principle of self-determination generally pre-empt claims of territorial integrity.⁹⁵

On that basis even a strong territorial claim by Indonesia would not justify the acquisition of sovereignty which was not based on the wishes of the population freely expressed in accordance with international law.

6. The legalisation of sovereignty over West Papua

Indonesia did not acquire sovereignty under the New York Agreement or the Charter of the Transfer of Sovereignty. Neither the act of free choice nor Indonesia's territorial claims provides a legal basis for Indonesia to exercise sovereignty over West Papua. Indonesia's acquisition of West Papua must therefore be an illegal annexation similar to Indonesia's temporary acquisition of East Timor in 1975.⁹⁶ The question is whether that annexation has since become legitimate.

It has been suggested that the international community has validated the act of free choice and therefore by implication the annexation. According to Franck

⁹³ *Western Sahara* paragraph 59

⁹⁴ UNGA 1752(XVII)

⁹⁵ S K BLAY *Self-determination versus territorial integrity in decolonisation* 18 N.Y.U.J. Int'l L. & Pol. 441 (1985-1986)

⁹⁶ CASSESE, SELF-DETERMINATION, p79.

*In the decolonisation of West Irian, the United Nations, in a controversial, deeply divisive vote.....voted to accept as valid the Indonesian-organised "act of free choice."*⁹⁷

This view conflicts with the history, text and purpose of Resolution 2504(XVII). Article XXI of the New York Agreement required the United Nations representative and Indonesia to report to the Secretary-General who was then required to report to the General Assembly on the conduct and results of the act of self-determination. The United Nations General Counsel advised the Secretary-General to present the actual reports to the General Assembly rather than summarising them because

*...whether justified or not, there have been widespread doubts as to whether a really genuine opportunity is being provided for a free expression of the popular will in the present case and the Secretary-General should therefore avoid the impression that any evidence or material is being suppressed or altered....*⁹⁸

The two reports were attached to the report which the Secretary-General presented to the General Assembly. Resolution 2504 (XVII) merely states that the General Assembly:

Takes note of the report of the Secretary-General and acknowledges with appreciation the fulfilment by the Secretary-General and his representative of the tasks entrusted to them under the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian).

The tasks given to the United Nations representative were limited to advising, assisting and participating in the arrangements for the act of free choice. The actual arrangements were Indonesia's sole responsibility under the New York Agreement and the United Nations representative had no authority to approve or disapprove. The United Nations representative had carried out his tasks even if, as the Secretary-General pointed out, the Indonesian Government did not always follow the advice given.

The General-Assembly's role was restricted under the New York Agreement to receiving the Secretary-General's report. The General Assembly had no authority to approve or disapprove of the act of free choice. As the United Nations General Counsel pointed out:

*It is difficult, in any circumstances, to see what useful action the General Assembly could take the Agreement is one between Indonesia and the Netherlands, and the United Nations is in no way a party to it.*⁹⁹

Resolutions approving something less than independence contain language noting that the population has freely exercised its right to self-determination.¹⁰⁰ For example, resolution

⁹⁷ FRANCK, *THE STEALING OF THE SAHARA* 70 Am. J. Int'l L. 694, (1976)

⁹⁸ UN: Series 100, Box 2, File 7, Memorandum from Stavropoulos to Rolz-Bennet (17th July 1969)

⁹⁹ Stavropoulos to Rolz-Bennet UN inter-office memorandum 17 July 1969

¹⁰⁰ ADD RESOLUTIONS

849(IX) which approves the integration of Greenland into Denmark provides a clear contrast:

[The General Assembly]

Paragraph 3. Commends the action of [Denmark] in including in its delegation to the General Assembly representatives elected by the national council of Greenland for the purpose of furnishing information on constitutional changes in Greenland;

*Paragraph 4. [Took] note that when deciding on their new constitutional status, through their duly elected representatives, the people of Greenland have **freely exercised their right to self-determination**. (emphasis added).*

Similarly, Resolution 748 (VIII) confirming that the United States no longer has an obligation to transmit information on Puerto Rico under Article 73e of the United Nations Charter, notes that the people of Puerto Rico have “expressed their will in a free and democratic way” and have “effectively exercised their right to self-determination.”

Resolution 2504(XVII) does not mention self-determination or that West Papua has ceased to be a non-self-governing territory. It does not amount to United Nations approval of the act of free choice or even to approval of the reports that were presented. There is no other resolution of the General Assembly (or of the Security Council) which approves the act of free choice or confirms that West Papua has freely exercised its right to self-determination. In the absence of any resolution approving the act of free choice, it is difficult to conclude that the United Nations has expressed its approval of the integration of West Papua into Indonesia.

It is doubtful whether even an explicit approval by the General Assembly could validate Indonesia’s presence in West Papua. As Cassese points out:

..as a result of the principle of self-determination it is no longer possible for valid legal title to be acquired where territories are annexed in breach of self-determination.¹⁰¹

He cites as an example Indonesia’s incorporation of East Timor where there was no direct expression of the will of the people and Indonesia relied on a decision made by an unelected assembly while East Timor was under Indonesian military occupation.¹⁰² Similar conditions existed in West Papua. Less than 0.2% of the population in West Papua took part in the act of free choice and they were not allowed to vote. Secondly West Papua was under Indonesian military occupation. As early as 1963 when UNTEA transferred administration to Indonesia there were 15,000 Indonesia troops in West

¹⁰¹ CASSESE, *INTERNATIONAL LAW* (OUP 2001) p108

¹⁰² CASSESE, *SELF-DETERMINATION* (CUP)p 224

Papua.¹⁰³ The United Nations Decolonisation Committee even states that the Netherlands New Guinea joined Indonesia in 1963 as Irian Jaya.¹⁰⁴ If so it means that Indonesia annexed West Papua before the act of free choice. The same factors which made the annexation of East Timor illegal existed in the case of West Papua. Why then is the annexation of East Timor illegal but not the annexation of West Papua? Cassese argues that:

*...in some exceptional instances the acquisition of authority over a territory in breach of self-determination can be subsequently validated by the recognition or acquiescence of other member states of the international community.*¹⁰⁵

He cites only two examples - Goa and West Papua. The case of Goa can be distinguished on the grounds that it was a colonial enclave which did not have a right to self-determination. The illegality was in India's use of force. West Papua is a completely different legal question. The General Assembly, the Netherlands and Indonesia all confirmed that West Papua had a legal right to self-determination. One consequence of Cassese's argument would be to create a rule of international law which applies to only one situation - West Papua.

It is also doubtful whether recognition and acquiescence by States are capable over time of validating Indonesia's sovereignty. By accepting administrative responsibility for a non-self-governing territory, Indonesia became bound by Article 73 of the Charter which provides that administering powers which acquire responsible for non-self-governing territories:

*recognise that the interests of the inhabitants of those 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 (emphasis added).*

The Court has confirmed that the existence of the sacred trust puts legal restrictions on what a State may do. Although its opinions relate to the sacred trust under the mandates system established by the Covenant of the League of Nations, the principles declared by the Court are general principles of international law on the nature of the sacred trust. The sacred trust is not merely a moral obligation but has a binding legal character¹⁰⁶ and

*...two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form "a sacred trust of civilisation."*¹⁰⁷

¹⁰³ SALTFFORD p61

¹⁰⁴ <http://www.un.org/depts/dpi/decolonization/trust2.htm>

¹⁰⁵ CASSESE, *SELF-DETERMINATION* p188

¹⁰⁶ *Namibia Opinion 1971*, paragraph 47

¹⁰⁷ *International Status of South West Africa: Advisory Opinion, I.C.J. Reports 1950. p128* at 131

Indonesia's annexation of West Papua is incompatible with the sacred trust. More importantly for West Papua, the sacred trust can only come to an end when it has achieved its purpose.¹⁰⁸ The sacred trust is not static but evolves:

*The Court must take into account the changes which have occurred in the supervening half century and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law ... these developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.*¹⁰⁹

On this basis Indonesia is still under a legally binding obligation to permit a genuine act of self-determination in West Papua. Sir Muhammad Zafrulla Khan, the President of the Court, in a separate opinion, stated that autonomy or any other form of local self-government amounts to a denial of self-determination as envisaged in the Charter of the United Nations. Indonesia's attempts to establish special autonomy for West Papua within the framework of the Indonesian State are a denial of West Papua's right to self-determination. The sacred trust continues until West Papua has validly exercised self-determination. It follows that even if other States recognise Indonesia's *de facto* control of West Papua, that recognition does not make West Papua a legal part of Indonesia's territory, since such States would be acting contrary to the legal requirements of the sacred trust.

The New York Agreement provided for the future self-determination of West Papua and indicates that the sacred trust continued even though the territory was under temporary administration by the United Nations. As Ralph Wilde points out

*In considering the effect of territorial administration by international organisations on status and territorial title, therefore, it is not enough merely to consider the degree of administrative prerogatives exercised. One must also establish the basis on which the prerogatives are exercised. In particular, one must consider whether or not they are exercised on behalf of the territory as a juridical unit and, if so, what assumption about the status of the unit is being made.*¹¹⁰

The status of West Papua was that of a non-self-governing colony with a right to self-determination. Indonesia assumed administration of West Papua as the inheritor of colonial duties from the Netherlands via UNTEA, including the sacred trust to ensure self-determination for West Papua and the treaty obligations in the New York Agreement.

Until West Papua freely exercises its right to self-determination it remains a colony and Indonesia's presence in West Papua is illegal. The General Assembly has declared:

¹⁰⁸ *Namibia Opinion 1971*, paragraphs 55 and 61

¹⁰⁹ *Namibia Opinion 1971* paragraph 53

¹¹⁰ RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION* P104, (Oxford University Press, 2008)

*the further continuation of colonialism in all its forms and manifestations a crime which constitutes a violation of the Charter of the United Nations and, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the principles of international law.*¹¹¹

And as Sureda points out:

*...the presence of the metropolis in its colonies has gradually been considered to be illegal unless confirmed by an act of self-determination. This seems to indicate that, within the context of colonialism, self-determination has become a peremptory norm of International Law whereby a state's title to a territory having colonial status is void.*¹¹²

Orakhelashvili also considers that:

*The right of peoples to self-determination is undoubtedly part of jus cogens because of its fundamental importance even if its peremptory character is sometimes disputed.*¹¹³

Since self-determination is a peremptory norm in the context of decolonisation only the West Papuans (and not the General Assembly or States) can justify Indonesia's presence in their territory and convert Indonesia's status from colonial power to legitimate sovereign.

In the *Namibia Opinion 1971*, the Court held that South Africa had created an illegal situation and was under a legal obligation to put an end to the illegality by withdrawing its administration.¹¹⁴ It is arguable that since Indonesia as an illegal administering power Indonesia is also under a legal obligation to terminate its presence in West Papua. In the same opinion the Court held that other States should not recognise the illegal situation and should refrain from lending support to South Africa. The Court repeated this principle of non-recognition in its opinion on the *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory*¹¹⁵ stating that the construction of the wall was a breach of Israel's obligation to respect Palestine's right to self-determination and therefore:

*...all States are under an obligation not to recognise the illegal situation arising from the construction of the wall in the Occupied Palestine Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.*¹¹⁶

¹¹¹ Resolution 2621(XXV)

¹¹² SUREDA p353; See also Cassese *ibid* p111

¹¹³ ORAKHELASHVILI, *Peremptory Norms in International Law*, p50 (Oxford University Press, Oxford, 2006)

¹¹⁴ paragraph 118

¹¹⁵ I.C.J. Reports 2004 p136 hereafter *Construction of the Wall*

¹¹⁶ Para 159

Applying the Court's reasoning to West Papua suggests that States should not recognise Indonesia's presence in West Papua nor act in ways that support the current occupation.

The Court has also confirmed that the right of self-determination has evolved so that today it is a right *erga omnes*:

*Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irrefragable...it is one of the essential principles of international law.*¹¹⁷

The ICJ repeated this principle in its opinion on the *Construction of the Wall*:

*The Court indeed made it clear that the right of peoples to self-determination is today a right erga omnes.*¹¹⁸

A right *erga omnes* is a concern of all States and therefore all States have a legal interest in its protection.¹¹⁹

7. Conclusion

In 1949, after the creation of the Republic of Indonesia, West Papua was a non-self-governing colony and was recognised as such by the United Nations and by the Netherlands, the then administering colonial power. In 1963 when Indonesia took over administrative responsibility for West Papua, the territory remained a non-self-governing colony with a substantive right to self-determination under international law. That right was recognised by Indonesia in the New York Agreement – a bilateral treaty that was approved by the United Nations – thereby reinforcing the fact that Indonesia did not legally have sovereignty over West Papua.

Indonesia's presence in West Papua is that of a colonial administration which can be made permanent only if the peoples of West Papua vote for integration through a self-determination exercise held in accordance with the procedural requirements of international law. The only self-determination exercise has been the invalid act of free choice held in 1969 which does not authorise Indonesia's presence in West Papua and cannot legally convert Indonesia's administrative responsibility to sovereignty. Indonesia's acquisition of West Papua in 1969 remains an illegal annexation which cannot be validated by the international community since it was a violation of the sacred trust under the Charter. Since the acquisition cannot be validated, West Papua is not legally a part of Indonesia's territory but a non-self-governing territory under occupation. Independence for West Papua would be the restoration of Papuan sovereignty and not a violation of Indonesia's territorial integrity. Indonesia therefore would not be able to rely on paragraph 6 of the Declaration.

¹¹⁷ East Timor (Portugal v. Australia), Judgment I.C.J. Reports 1995, at paragraph 29,

¹¹⁸ paragraph 88

¹¹⁹ *Barcelona Traction Light and Power Company Ltd, Second phase* I.C.J. Reports 1970 p3 at paragraph 33

Since the right of self-determination in a colonial context has become a **peremptory norm and since it is a right *erga omnes*, the interests of the international community as a whole are violated by Indonesia's illegal presence in West Papua.** Indonesia's use of the army to pacify West Papua amounts to a forcible denial of the right of self-determination and is a further violation of international law. Resolution 2625 (XXV) states that

In their actions against, and resistance to, such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

States should therefore recognise that West Papua is an Indonesian colony with a separate and distinct status and act to ensure that the egregious violations of human rights are brought to an end.

As the ICJ stated in relation to the Namibian peoples:

...all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goal for which the sacred trust was instituted.

It follows that the international community of States are also under an obligation to ensure that Papuans are allowed to exercise freely their right to self-determination.