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WEST PAPUA EXPOSED: AN ABANDONED NON-SELF-GOVERNING OR TRUST TERRITORY*

JULIAN MCKINLAY KING** WITH ANDREW JOHNSON***

This paper examines the shift in legal status that should have occurred, under the United Nations ('UN') Charter, with the transfer of West Papua from the Netherlands to the United Nations in 1962 via the 'Indonesia and Netherlands Agreement (with annex) concerning West New Guinea (West Irian)'. It advances that this agreement must be a Trusteeship Agreement shifting West Papua's legal status from a Non-Self-Governing Territory of the Netherlands to a Trust Territory of the United Nations. As such, the United Nations via the Trusteeship Council was, and remains, responsible to ensure the West Papuan people attain self-government or independence as required under Article 76(b) of the Charter. The argument is based upon Chapters XI, XII, and XIII of the UN Charter governing decolonisation and is further supported by admissions contained in now-declassified secret American, Australian, and United Nations documents from the period. A legal path to assist the people of West Papua to attain their rightful independence is also advanced utilising the Rules of Procedure of the Trusteeship Council where any UN Member can add an agenda item, and inhabitants from the Territory or other parties can present petitions, to draw the Council's attention to a breach of the International Trusteeship System. This will allow the Trusteeship Council to seek an advisory opinion

* This paper is based on the presentation, 'West Papua: The Geopolitical Context and Legal Recourse', delivered by Julian McKinlay King at 'Beyond the Pacific: West Papua on the World Stage', West Papua Project, University of Sydney (online), 1 September 2017 <<https://youtu.be/gYzsplFZJnY>>.

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from the International Court of Justice as available under Article 96 of the UN Charter and authorised by General Assembly Resolution 171(III) Part B. This legal opinion should also empower the World community to come to the assistance of the West Papuan people as encouraged under General Assembly Resolution 2621(XXV).

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I INTRODUCTION AND BACKGROUND

This paper argues that the *Agreement (with annex) concerning West New Guinea (West Irian)* between Indonesia and the Netherlands ('*Agreement*'), including an accompanying agreement titled *United Nations and Indonesia and Netherlands: Understandings relating to the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*,¹ with respect to international law governed by the *Charter of the United Nations* ('*Charter*'), constitutes a United Nations Trusteeship and advances that West Papua remains a Non-Self-Governing or Trust Territory,² under Indonesian occupation.³ While the *Agreement* is recorded in Volume 437 of the *United Nations Treaty Series* ('UNTS'),⁴ a disclaimer by the Secretariat states that '[t]he terms "treaty" and "international agreement" have not been defined either in the Charter or in the regulations, and the Secretariat follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration'.⁵ The legal status of the *Agreement*, according to the United Nations ('UN') Secretariat, is therefore undefined.

Prior to European colonisation, the island archipelagos of south-east Asia and the Pacific were a vast array of autonomous indigenous tribal groups, chiefdoms, and kingdoms. The Netherlands' colonies extended from the Dayak tribes of Borneo and Batak tribes of Sumatra almost 7,000 kilometres east to the Melanesian tribes of Papua. The borders separating these colonial territories were often arbitrary (straight) lines that dissected

¹ *Agreement (with annex) concerning West New Guinea (West Irian)*, Indonesia–Netherlands, signed 15 August 1962, 437 UNTS 6311 (entered into force 21 September 1962); *United Nations and Indonesia and Netherlands: Understandings relating to the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, 437 UNTS 6312 (registered ex officio 21 September 1962) ('*Understandings relating to the Agreement*').

² West Papua is located on the western side of the island of New Guinea (also known as Papua) and was formally known as West New Guinea, then listed as Netherlands New Guinea in the 1951 revised list of Dutch territories prior to Territory's transfer to the United Nations in 1962.

³ The notion that the *Agreement* is a Trusteeship Agreement was first raised by Andrew Johnson in discussions with Julian McKinlay King in 2012. While Andrew has provided valuable material and critique, the text is entirely the responsibility of the author. The author also acknowledges his supervisors, Dr Wendy Lambourne and Emeritus Professor Stephen Hill for their review and critique of this text.

⁴ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1).

⁵ 'Note by the Secretariat', *Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations* (Web Page, 1962) <<https://treaties.un.org/doc/Publication/UNTS/Volume%20437/v437.pdf>>.

local indigenous tribal groups and their territories. In the case of the Dutch East Indies, such occurred on the islands of Borneo, Timor, and Papua.

Following the creation of the *Charter* in 1945, colonial territories were designated Non-Self-Governing Territories with the sovereign colonial power accepting a 'sacred trust' to deliver a 'full measure of self-government' to the inhabitants.⁶

At the completion of the Pacific War, the Netherlands was unsuccessful in re-establishing authority over the Dutch East Indies where predominantly Javanese militants, with the support of deserting Japanese soldiers and military hardware,⁷ were forcefully taking control across the island archipelago.⁸ These amalgamated Territories gained United Nations recognition in 1949 as the United States of Indonesia,⁹ but within one year they succumbed to be incorporated into the Republic of Indonesia,¹⁰ under a quasi-military dictatorship led by Sukarno.¹¹

West Papua and East Timor, however, remained Non-Self-Governing Territories under the sovereignty of the Netherlands and Portugal respectively. The Netherlands was liaising with Australia (who held the eastern side of Papua) with a view to reunite the Papuan people. In 1957, the *Joint Netherlands/Australian Statement* recognised that the people in the Papuan territories are 'geographically and ethnologically related' with the Netherlands and Australia agreeing to strengthen cooperation between these territories 'until such time as their inhabitants ... will be in a position to determine their own future',¹² including the possibility of being re-united as one nation.¹³

⁶ *Charter of the United Nations* ch XI art 73.

⁷ Christine T Tjandraningsih, 'Japanese Recounts Role Fighting to Free Indonesia', *The Japanese Times* (online, 9 September 2009) <<https://www.japantimes.co.jp/news/2009/09/09/national/japanese-recounts-role-fighting-to-free-indonesia/#.WecmCEXl1Jk>>.

⁸ John S Bowers, 'Japanese Nationalists Prepare to Make Guerrilla War on Dutchmen, Former Masters', *The Berkshire Eagle* (Pittsfield, Massachusetts, 15 September 1945) 1.

⁹ *Question of Indonesia*, GA Res 301, UN Doc A/RES/301 (2 December 1949) para IV.

¹⁰ 'Indonesia Drops Federation; It's a Unitary State — Soekarno Proclaims Centralized Rule', *Chicago Daily Tribune* (Chicago, 15 August 1950) 13.

¹¹ While Sukarno was never a military soldier and the Indonesian Parliament consisted of multi-party civilian cabinets, he nonetheless maintained a quasi-military-dictatorship until his replacement in 1967 by General Suharto.

¹² Note, 'Joint Netherlands/Australian Statement' (1957) 28(11) *Current Notes on International Affairs* 888.

¹³ 'Special Study on New Guinea', *National Archives of Australia* (Web Page, 1958) pt 3, 201 <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/ViewImage.aspx?B=558075>>.

By 1961, the Netherlands had created the New Guinea Council — the first national Papuan people’s representative body — to assist with the planning towards independence. On 19 October 1961, the New Guinea Council proclaimed to the world the people’s desire to become a new nation called West Papua.¹⁴ This was followed by the inaugural raising of the West Papuan flag alongside that of the Netherlands on 1 December 1961 as the people of West Papua strode confidently along the path to independence which, in agreement with the Netherlands, was set to be declared on 1 December 1970.¹⁵

Sukarno, however, claimed the Territory of West Papua was part of Indonesia simply on the basis that it was a Dutch colony and, while the vast majority of Indonesians at the time ‘do not know where [West Papua] is and are not interested in it’,¹⁶ the issue was an ‘obsession’ for Sukarno.¹⁷ The Netherlands offered to have the dispute resolved by the International Court of Justice (‘ICJ’) ¹⁸ as ‘the principle judicial organ of the United Nations’.¹⁹ However, Indonesia rejected this legally binding solution arguing that the dispute was ‘political rather than juridical’.²⁰ With separatist movements across the archipelago seeking to break away from Sukarno’s quasi-dictatorship,²¹ the issue of West Papua was used by Sukarno as ‘a rallying point for national unity’.²²

Numerous Indonesian military incursions into West Papua leading up to the *Agreement* were repulsed by the Netherlands.²³ Indonesia’s threat of alignment with the communist

¹⁴ ‘Colony’s Name Changed’, *New York Times* (Chicago, 1 December 1961).

¹⁵ *Land of the Morning Star* (Film Australia, 2003) 0:17:17.

¹⁶ ‘Inward Cablegram from Australian Embassy Djakarta’, *National Archives of Australia* (Web Page, 10 July 1958) pt 3, 99

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

¹⁷ ‘Inward Cablegram from Australian from Embassy Washington’, *National Archives of Australia* (Web Page, 22 July 1958) pt 3, 73

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

¹⁸ *The Question of West Irian (West New Guinea)*, UN GAOR, 509th plen mtg, Agenda Item 61, UN Doc A/2831 (10 December 1954) para 102.

¹⁹ *Charter of the United Nations* ch XIV art 92.

²⁰ ‘Situation Report No 47’, *National Archives of Australia* (Web Page, 7 August 1958) pt 3, 16

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

²¹ ‘The Likelihood of Indonesia Gaining Control of West New Guinea’, *National Archives of Australia* (Web Page, 7 March 1957) pt 3, 296

<<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>>.

²² ‘Situation Report No 47’ (n 20) pt 3, 16.

²³ ‘Indonesian Troops Infiltrate into New Guinea Area’, *The Palladium-Item* (Richmond, Indiana, 20 September 1961).

Soviet Union, however, was used by America to coerce the Netherlands to relinquish the Territory.²⁴ This only occurred, however, after the Netherlands attempted to have the United Nations take over the Territory in 1961 via a United Nations Trusteeship in order to ‘relinquish sovereignty to the people of Netherlands New Guinea’.²⁵ This proposal, however, failed to gain the required two-thirds majority in the General Assembly due to the Cold War and religious affiliations taking precedence over the legal rights of the West Papuan people. While the United Nations Secretariat was responsible for numerous breaches in relation to the *Agreement*,²⁶ as will be touched on below, this paper is concerned principally with the Territory’s *legal status* under the *Charter* following the transfer of administration from the Netherlands to the United Nations in 1962.

We will now examine West Papua’s legal status under the *Charter* — initially under the sovereignty of the Netherlands as a registered Non-Self-Governing Territory, then under the administration of the United Nations (and subsequently Indonesia) — and how the international law of the *Charter* and associated General Assembly Resolutions may apply.

II THE LEGAL STATUS OF WEST PAPUA UNDER INTERNATIONAL LAW

A West Papua as a Non-Self-Governing Territory

Chapter XI of the *Charter* governs Non-Self-Governing Territories ‘whose peoples have not yet attained a full measure of self-government’.²⁷ As confirmed in the United Nations list of Non-Self-Governing Territories,²⁸ this was the legal status of West Papua under the *Charter* prior to the transfer of the Territory to the United Nations. Article 73e of Chapter XI requires Members of the United Nations who assume responsibility for Non-Self-Governing Territories

²⁴ Letter from United States President JF Kennedy to Netherlands Prime Minister Dr J E de Quay, 2 April 1962, reproduced in *Free West Papua Campaign* (Web Page) <<https://www.freewestpapua.org/documents/secret-letter-from-john-f-kennedy-to-the-prime-minister-of-the-netherlands-2nd-april-1962/>>.

²⁵ *General Debate*, UN GAOR, 1016th plen mtg, Agenda Item 9, UN Doc A/PV.1016 (26 September 1961) 90 para 16.

²⁶ See, eg, John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969: The Anatomy of Betrayal* (Taylor & Francis, 2004).

²⁷ *Charter of the United Nations* ch XI art 73.

²⁸ See, eg, *Non-Self-Governing Territories: Summaries of Information Transmitted to the Secretary-General for the Year 1960*, UN Doc ST/TRI/SER.A/19 (1963).

to transmit regularly to the Secretary-General for information purposes ... statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.²⁹

The Netherlands fulfilled this legal requirement and reported yearly on its progress towards delivering 'a full measurement of self-government' up until the Territory's administration was transferred to the United Nations in 1962.³⁰

By way of example, the Netherlands 1961 report to the Secretary-General in accordance with Article 73e highlights the progress being made towards delivering a 'full measure of self-government' to the people of West Papua and planned independence. It describes how

the institution of the New Guinea Council has had a catalytic effect on the political awakening of the population of the Territory ... evident from the fact that ... the population resolved: 1. to call themselves Papuans and to refer to their country as West Papua; 2. to design a flag of their own (the design of which was laid down by ordinance) and 3. to adopt a national anthem to be played on official occasions after the Netherlands national anthem.

At the same time the need was felt to give expression abroad, too, to the newly gained awareness of national identity. The Netherlands Government met this expression of awakening national consciousness by including Papuans in the Netherlands delegations to sessions of the General Assembly of the United Nations, of the South Pacific Commission and of the International Labour Conference, and in other ways.³¹

The report also details the decentralised system of governance being implemented across the Territory, reflecting the hundreds of autonomous Melanesian tribes with their vast array of language groups, tribal grounds, local laws, and customs. Apart from the national body of the New Guinea Council, Regional Councils were established and, within these, any number of Village Councils with representation determined by direct local election.³²

²⁹ *Charter of the United Nations* ch XI art 73e.

³⁰ *Information from Non-Self-Governing Territories: Summaries of Information Transmitted under Article 73e of the Charter of the United Nations*, UN Doc A/5081 (15 March 1962).

³¹ Ministry of Home Affairs and Ministry of Foreign Affairs, Kingdom of the Netherlands, *Report on Netherlands New Guinea for the Year 1961: Presented to the Secretary General of the United Nations pursuant to Article 73(e) of the Charter* (Report, 1961) a ('*Report on Netherlands New Guinea for the Year 1961*').

³² *Ibid* 12.

Prior to the transfer of the Territory to the United Nations, the West Papuan people, with the assistance of the Netherlands, were creating their own unique form of indigenous 'self-government' and were firmly on the path to independence.³³

As detailed above, Article 73e of Chapter XI governing Non-Self-Governing Territories states that the obligation to report to the United Nations applies to territories 'other than those territories to which Chapters XII and XIII apply'.³⁴ These specific chapters apply to the International Trusteeship System and the Trusteeship Council respectively. The International Trusteeship System governs 'the administration and supervision of such territories as may be placed thereunder by subsequent agreements. These territories are hereinafter referred to as trust territories.'³⁵ Thus, the cessation of reporting under Article 73e by the Netherlands in 1962 was permissible only when Chapters XII and XIII applied: when the Non-Self-Governing Territory became subject to the International Trusteeship System. The Netherlands ceased its legal obligation to transmit regularly to the Secretary-General in accordance with Article 73e upon the transfer of the Territory to the United Nations in 1962 and as directed by the aide memoir from the Acting Secretary-General contained in Part IV of the *Agreement* between the United Nations, Indonesia, and the Netherlands.³⁶

The *Agreement* — where 'the Netherlands ... transfer[red] administration of the territory to a United Nations Temporary Executive Authority (UNTEA)'³⁷ — and the accompanying *ex officio* agreement between the United Nations, Indonesia, and the Netherlands ended the Netherlands' legal obligation to report to the Secretary General under Article 73e.³⁸ The *Agreement* thus shifted West Papua's *legal status* from a Non-Self-Governing Territory of the Netherlands to a Trust Territory of the United Nations. Under international law governed by the *Charter*, no alternative is available.

The details of Chapters XII and XIII governing the International Trusteeship System will now be examined in relation to the transfer of the Territory to the United Nations via the *Agreement*.

³³ *Charter of the United Nations* ch XI art 73.

³⁴ *Charter of the United Nations* ch XI art 73e.

³⁵ *Ibid* art 75.

³⁶ *Understandings relating to the Agreement* (n 1).

³⁷ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) art II.

³⁸ *Understandings relating to the Agreement* (n 1) pt IV.

B *West Papua as a Trust Territory*

Article 76 of Chapter XII details the basic objectives of the International Trusteeship System which include

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.³⁹

Chapter XII of the *Charter* thus reinforces the principles of decolonisation requiring trustees of Trust Territories to deliver ‘self-government or independence’. The option provided to the West Papuan people in the *Agreement*, ‘to decide (a) whether they wish to remain with Indonesia; or (b) whether they wish to sever their ties with Indonesia’,⁴⁰ thus fails to satisfy the legal obligation under the *Charter* to deliver ‘self-government or independence’.

The International Trusteeship System applies to ‘territories voluntarily placed under the system by states responsible for their administration’.⁴¹ The Kingdom of the Netherlands, in this instance, ‘voluntarily placed’ the inhabitants under the care of the United Nations.

The International Trusteeship System requires that the ‘terms of trusteeship for each territory to be placed under the trusteeship system ... shall be agreed upon by the states directly concerned’.⁴² The terms of the *Agreement* were agreed upon by ‘the states directly concerned’ — the United Nations, the Netherlands, and Indonesia — and was thus in compliance with the International Trusteeship System.

Under the terms of the *Agreement*,⁴³ the United Nations took over administration of West Papua as is only available under Article 81 of the International Trusteeship System which states:

³⁹ *Charter of the United Nations* ch XI art 76b.

⁴⁰ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) art XVIII.

⁴¹ *Charter of the United Nations* ch XI art 77c.

⁴² *Charter of the United Nations* ch XI art 79.

⁴³ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) art II.

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the 'Organisation itself'.

The United Nations, the 'Organisation itself', thus became the 'administering authority' of West Papua with the legal obligation under Article 76 of the *Charter* to deliver 'self-government or independence'. The transfer of sovereignty over a Non-Self-Governing Territory or Trust Territory to another UN Member is not available under Chapters XI, XII, and XIII governing decolonisation nor elsewhere in the *Charter*.

Finally, Article 85 of Chapter XII governing the International Trusteeship System requires that:

- 1 The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
- 2 The Trusteeship Council, operating under the authority of the General Assembly shall assist the General Assembly in carrying out these functions.⁴⁴

As required under Article 85, the terms of the *Agreement* were put before the General Assembly for adoption on 21 September 1962 via draft resolution;⁴⁵ however, the accompanying agreement between the United Nations, Indonesia, and Netherlands was interestingly omitted.⁴⁶ Without opportunity for discussion or debate,⁴⁷ the draft was voted on and adopted as General Assembly Resolution 1752(XVII), which (1) 'takes note of the Agreement'; (2) 'acknowledges the role conferred upon the Secretary-General in the Agreement'; and (3) 'authorizes the Secretary-General to carry out the tasks entrusted to him in the Agreement'.⁴⁸

⁴⁴ *Charter of the United Nations* art 85.

⁴⁵ *Draft Resolution — Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, UN Doc A/L.393 (21 September 1962).

⁴⁶ *Understandings relating to the Agreement* (n 1).

⁴⁷ *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, GA Res 1752(XVII), UN Doc A/RES/1752 (21 September 1962) para 171.

⁴⁸ *Ibid* art 1.

According to the UN, 'takes note' is a 'neutral term and does not indicate approval or disapproval'.⁴⁹ However, the third component of Resolution 1752(XVII) 'authorizes the Secretary-General to carry out the tasks entrusted to him' and thus approves *only* those tasks to be undertaken by the Secretary-General within the terms of the *Agreement*.

Following criticism of the terms and implementation of the *Agreement* in the General Assembly in 1969, Indonesia argued that the *Agreement* — affecting the future of a Non-Self-Governing Territory — did not require the 'approval' of the United Nations:

And let us be clear, no approval of any kind is required or requested either of the Agreement itself or of the Secretary-General's report ... Members of the Assembly may, of course, like or dislike the Indonesia-Netherlands Agreement of 1962 ... They are of course free to do so although it is, a matter of fact, not their Agreement.⁵⁰

Clearly under Article 85 of the *Charter*, approval *is* required for an agreement that makes the United Nations, 'the Organisation itself', trustee of a Non-Self-Governing Territory. While the terms of the *Agreement* were questioned by many UN Members at the time,⁵¹ and further critiqued by legal and other scholars,⁵² the transfer of administration over a Non-Self-Governing Territory that has not yet gained 'a full measure of self-government' is only available to 'territories to which Chapters XII and XIII apply' and thus only via a Trusteeship Agreement.⁵³

Consulting the Yearbook of the United Nations for 1963, 'Netherlands New Guinea' no longer appears in the list of Non-Self-Governing Territories subject to Article 73e reporting requirements, therefore confirming *a shift in legal status* for the Territory.⁵⁴ Resolution 1752 (XVII) thus created a Trust Territory of the United Nations.

The alternative legal position is to suggest the terms of the *Agreement* were never 'approved' by the General Assembly, and it is therefore illegal. As such, West Papua

⁴⁹ Nicole Ruder, Kenju Nakano and Johann Aeschlimann, Permanent Mission of Switzerland to the UN, *The PGA Handbook: A Practical Guide to the United Nations General Assembly* (2011) 46.

⁵⁰ UN GAOR, 1813th plen mtg, Agenda Item 98, UN Doc A/PV.1813 (19 November 1969) paras 96–7.

⁵¹ See, eg, arguments made in the 1127th and 1810th General Assembly plenary meetings.

⁵² See, eg, Melinda Janki, 'West Papua and the Right to Self-Determination under International Law' (2010) 34(1) *West Indian Law Journal* 1; Saltford (n 26); See also Pieter Drooglever, *An Act of Free Choice: Decolonisation and the Right to Self-Determination in West Papua* (One World Publications, 2010).

⁵³ *Charter of the United Nations* arts 73, 73(3).

⁵⁴ 'The Trusteeship System and Non-Self-Governing Territories' [1963] *The Yearbook of the United Nations* 435.

remains a Non-Self-Governing Territory abandoned by the Netherlands and invaded by the United Nations Security Force (and subsequently the Indonesian armed forces). Only the ICJ is authorised to provide clarification, as will be detailed later in this paper.

C The Role of the Trusteeship Council

The Trusteeship Council is one of the six principal organs of the United Nations and is governed by Chapter XIII of the *Charter*.⁵⁵ The Trusteeship Council, under the authority of the General Assembly,⁵⁶ may assist in the formulation of Trusteeship Agreements and must provide questionnaires to the Administering Authority of Trust Territories,⁵⁷ in order that the General Assembly is informed on a yearly basis of the ongoing progress towards 'self-government or independence' as required under the International Trusteeship System.⁵⁸

Since the General Assembly was not made aware of the legal status of the *Agreement* — a draft Trusteeship Agreement where the United Nations was to become the Administering Authority — the Trusteeship Council was not engaged by the Secretary-General to assist in the formulation of the terms of the *Agreement* and prepare a questionnaire for the 'Organisation itself' to report on 'the political, economic, social, and educational advancement of the inhabitants' as required under Article 88 of Chapter XIII.⁵⁹

The Netherlands' report to the Secretary-General in 1961, in compliance with Article 73e detailing the 'awakening national consciousness' and unique decentralised system of indigenous representation,⁶⁰ was therefore the last official report on the progress of decolonisation in West Papua to this day. The United Nations as the new Administering Authority (and subsequently Indonesia) failed to provide an annual report to the United Nations detailing ongoing progress towards 'self-government or independence' as required for all Non-Self-Governing Territories and Trust Territories alike.⁶¹

⁵⁵ *Charter of the United Nations* ch III art 7.

⁵⁶ *Charter of the United Nations* ch XIII art 85.

⁵⁷ *Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/1/Rev.7 (1995) r 101.

⁵⁸ *Charter of the United Nations* ch XIII art 88.

⁵⁹ Under Article 98 of Chapter XV of the *Charter* governing the role of the UN Secretariat, the Secretary-General is responsible for the administration 'of the General Assembly, of the Security Council, of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs'.

⁶⁰ *Report on Netherlands New Guinea for the Year 1961* (n 31) a.

⁶¹ *Charter of the United Nations* ch XIII art 88.

The only available options are ‘a full measure of self-government’ under Chapter XI governing Non-Self-Governing Territories (unless subjected to Chapters XII and XIII) or ‘self-government or independence’ under Chapter XII governing Trust Territories.⁶² Neither occurred.

D General Assembly Resolution 1514(XV)

General Assembly Resolution 1514(XV), titled *Declaration on the Granting of Independence to Countries and Peoples*, was declared on 14 December 1960 when it was deemed necessary by Members of the United Nations to strengthen and accelerate the decolonisation of Non-Self-Governing and Trust Territories.⁶³ Part 5 of General Assembly Resolution 1514(XV) states:

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 discretion as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.⁶⁴

Therefore, regardless of whether West Papua is a Non-Self-Governing Territory under Chapter XI of the *Charter*, a Trust Territory under Chapter XII of the *Charter*, or any other form of territory, Resolution 1514(XV) requires ‘immediate steps’ be taken to ‘transfer all powers’ to the people so they can enjoy ‘complete independence and freedom’.

E General Assembly Resolution 1541(XV)

Given the General Assembly was not made aware of West Papua’s shift in legal status via the *Agreement*, West Papua should have remained a Non-Self-Governing Territory in the eyes of the United Nations Secretariat and the General Assembly. By taking over administration of the Territory, the United Nations therefore became responsible to ‘transmit information’ to the Secretary-General under Article 73e even if a shift in legal status was unrecognised at the time.

⁶² *Charter of the United Nations* ch XIII arts 73, 88.

⁶³ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), UN Doc A/RES/1514 (20 December 1960).

⁶⁴ *Ibid* para 15.

The shift in West Papua's legal status — from a Non-Self-Governing Territory to a Trust Territory — was not raised by the Netherlands or any other Member prior to its introduction to the General Assembly and adoption via Resolution 1752(XV).⁶⁵ It was, however, raised by Sir Garfield Barwick, representing Australia, immediately after its adoption in 1962. He stated:

Australia looks to the United Nations to perform its proper functions under the Agreement, and to Indonesia to place the welfare of the Papuans above all other considerations in its administration of the Territory — whatever the proper status of the Territory in relation to the Charter might be — a matter into which there is no present need to enter.⁶⁶

Clearly Australia was aware that the *Agreement* altered West Papua's legal 'status ... in relation to the *Charter*' but given the United Nations was entrusted to 'perform its proper functions' — the delivery of 'self-governance or independence' — Australia did not see any reason to raise the issue *at that time*.

General Assembly Resolution 1541(XV) provides clarification on the reporting requirements under Article 73e for administrators of Non-Self-Governing Territories, with Principle II stating:

Chapter XI of the *Charter* embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government'. As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.⁶⁷

Since the people of West Papua had not yet reached a 'full measure of self-government', the United Nations (and subsequently Indonesia) was required to transmit information under Article 73e. Neither administration did so. Principle III of Resolution 1541(XV) states that failing to satisfy the obligation to transmit information under Article 73e is a

⁶⁵ *Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter*, UN Doc A/Res/1541 (15 December 1960) ('*Principles*').

⁶⁶ UN GAOR, 1127th plen mtg, Agenda Item 89, UN Doc A/PV.1127 (21 September 1962) para 223.

⁶⁷ *Principles* (n 65).

breach 'of international law'.⁶⁸ The United Nations and Indonesia are thus in breach of international law.

Principle IV states:

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and distinct ethnically and/or culturally from the country administering it.⁶⁹

The animist Melanesian people of West Papua are both ethnically and culturally distinct from the 'Organisation itself' and the predominantly Javanese Muslim military who control Indonesia. Therefore, Principle IV demands that the obligation to transmit information continues under the new administration.

Principle V states that while other elements may be brought into consideration, including those that are 'administrative, political, juridical, economic, or historical' in nature,

[i]f they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the *Charter*.⁷⁰

While Indonesia's claim to West Papua was based upon it being a colonial territory of the Netherlands and that the dispute was of 'national unity' and therefore 'political' in nature,⁷¹ the relationship between the metropolitan State and the Territory put the latter in a clear position of 'subordination'. The legal obligation to report yearly to the Secretary-General therefore continued under Principle V.

Principle VI provides a definition for when the West Papuan people have 'reached a full measure of self-government'. Three options are available:

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

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ UN GAOR, 1127th plen mtg, Agenda Item 89, UN Doc A/PV.1127 (21 September 1962) para 117.

(c) Integration with an independent State.⁷²

While the inhabitants of the Territory had already declared to the world their decision to embrace option (a) with a name, national flag, and national anthem already declared, the Indonesian dictator was obsessed with option (c).

Principle IX regarding integration requires that the Territory's inhabitants act

with full knowledge of the change of their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.⁷³

While most of the West Papuan people — estimates of 85% to 90% — were opposed to being integrated with Indonesia,⁷⁴ the *Agreement* did not provide 'universal adult suffrage', thus in clear violation of Principle IX of General Assembly Resolution 1541(XV).

Though not the principle subject of this paper, far greater analysis of how the *Act of Free Choice* and the *Agreement* fails international law is provided by Pieter Drooglever and John Saltford.⁷⁵

III DECLASSIFIED DOCUMENTS CONFIRM A PROPOSED TRUSTEESHIP

Over the years, the United Nations Secretariat and the governments involved have released secret documents from the period, which describe the transfer of West Papua to the United Nations (and subsequently Indonesia) as having occurred via a proposed trusteeship. Examples from the archives of the United States of America, Australia, and the United Nations are provided below.

⁷² *Principles* (n 64).

⁷³ *Ibid.*

⁷⁴ Airgram from American Embassy Djakarta to Department of State, 'West Irian: The Nature of the Opposition', 9 July 1969 <<http://nsarchive2.gwu.edu//NSAEPP/NSAEPP128/29.%20Airgram%20A-278%20from%20Jakarta%20to%20State%20Department,%20July%209,%201969.pdf>>.

⁷⁵ Drooglever (n 52); Saltford (n 26).

A Declassified American Government Records

A now-declassified secret despatch from the American Embassy in Indonesia to the Department of State, titled 'A Proposal for Settlement of the West New Guinea Dispute', reveals America's role in the transfer of West Papua to Indonesia. It reads:

[T]he Embassy submits a specific proposal for settlement of the West New Guinea dispute ... [envisaging] a special United Nations trusteeship over the territory for a limited number of years, at the end of which time sovereignty would be turned over to Indonesia.⁷⁶

A now-declassified telegram from America's embassy in Indonesia to the Department of State describes discussions with Indonesian officials and how Indonesia

once contended that UN trusteeship would be anathema under any circumstances ... [and], although they have not gone so far as to be willing to call a trusteeship a trusteeship, they talk in terms of "one or two years" of some kind of interregnum as being acceptable.⁷⁷

Revealed is America's covert negotiations with Indonesia who — already aware that any proposed Trusteeship would invoke the Trusteeship Council and the relevant articles of Chapters XII and XIII of the *Charter* — simply refused 'to call a trusteeship a trusteeship'.⁷⁸

Recently declassified files from the John F Kennedy Library reveal the plan was approved at the highest level. A proposed option put to the American president in April 1961 states:

The US might support a direct UN-administered trusteeship for New Guinea. As advanced in a State paper of February 15, this proposal contained no suggestion of a terminal date for the trusteeship. Though such a solution would be perhaps acceptable to the Dutch, it is highly unlikely that it would be acceptable to the Indonesians who have indicated that they would agree to a trusteeship only for a maximum of one year and then only with an a priori determination that at the end of the year the territory would become part of Indonesia ... A trusteeship which was terminated at a definite and early date by a self-determination plebiscite would be a somewhat more feasible alternative. It would provide

⁷⁶ Despatch from the Embassy in Indonesia to the Department of State, 'A Proposal for Settlement of the West New Guinea Dispute', 26 May 1959, reproduced in *Office of the Historian* (Web Page) <<https://history.state.gov/historicaldocuments/frus1958-60v17/d203>>.

⁷⁷ Telegram from the Embassy in Indonesia to the Department of State, 3 March 1961, reproduced in *Office of the Historian* (Web Page) <<https://history.state.gov/historicaldocuments/frus1961-63v23/d150>>.

⁷⁸ *Ibid.*

a face-saving approach for the Dutch and satisfy their demand for self-determination by the Papuans. At the same time, if the Indonesians were given full access to the Papuans during the period of the trusteeship, it would offer them the hope of early acquisition of the territory ... [S]ome version of such an approach may offer the best façade behind which a turnover to the Indonesians could be effected.⁷⁹

The 'façade' described above, in order to deliver West Papua to Indonesia, became reality the following year via the United Nations sponsored Bunker agreement.⁸⁰ The former secret documents cited above evidence America's shift in foreign policy to support Indonesia's (illegal) claim to West Papua, the covert negotiations with Indonesia, and the disclosure that the transfer of this Non-Self-Governing Territory to the United Nations came about via a trusteeship. America accommodated Indonesia's demands not to 'call a trusteeship a trusteeship'.⁸¹

B Declassified Australian Government Records

A declassified cable from the Australian Embassy in Washington to the Prime Minister of Australia in 1958, titled *Future Policy on New Guinea*, reads:

Most satisfactory arrangement from our point of view would be presumably an Australian Trusteeship over West New Guinea. But as a question of practical politics this seems clearly enough ruled out. Even if it could be got through the United Nations it would probably be at the cost of drawing down on Australia the full force of Indonesian hostility (which is now directed mainly at the Dutch). Only type of trusteeship which Indonesians in their present mood might be prepared to consider would be one in which they played a part, perhaps the predominant part. If this happened, it would be realistic to envisage that sooner or later West New Guinea would be virtually incorporated into Indonesian territory.⁸²

⁷⁹ 'The Dutch-Indonesian Dispute over West New Guinea (West Irian): A Discussion', in 'Netherlands: JFK-Luns Meeting', *John F Kennedy Presidential Library and Museum* (Web Page, 7 April 1961) 27 <<https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-122a-003.aspx>>.

⁸⁰ The American Ambassador to the United Nations Ellsworth Bunker was engaged by the Acting Secretary-General to liaise between Indonesia and the Netherlands and formulate the final *Agreement*.

⁸¹ Telegram from the Embassy in Indonesia to the Department of State (n 77).

⁸² 'Inward Cablegram from Australian Embassy, Washington, to Department of External Affairs, Canberra: Future Policy on New Guinea', *National Archives of Australia* (Web Page, 25 January 1958) pt 3, 188 <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=842558&isAv=N>>.

Apart from a preferred ‘Australian Trusteeship over West New Guinea’ — thereby reuniting the inhabitants of east and west Papua as proposed in the *Joint Netherlands/Australian Statement* detailed earlier — this document reveals that the Australian government also recognised that any transfer of administration over a Non-Self-Governing Territory created a ‘trusteeship’.⁸³ Furthermore, ‘the only type of trusteeship which Indonesians ... might be prepared to consider’ — where ‘they played ... the predominant part’ — played out four years later.⁸⁴

A declassified Australian memo, titled *Netherlands New Guinea*, written in January 1962, provides further insight. It details the request from the Netherlands’ Foreign Minister, Mr Luns, to the Australian Minister for External Affairs and Attorney General, Sir Garfield Barwick, to intervene. In part, it reads:

The [Netherlands] Ambassador approached me as I was about to sit down at an official luncheon to ask whether we had taken steps to express to the Americans our disapproval of a trusteeship proposal attributed to them — a step which the Ambassador had asked Sir Garfield Barwick to take at Mr Luns’ request.⁸⁵

This document again confirms America as the architect of the ‘trusteeship proposal’ and further reveals how the Netherlands, faced with ongoing Indonesian military incursions, was desperately seeking Australia’s intervention.⁸⁶

C United Nations Archives

The United Nations Archives and Records Management Section holds the United Nations archival material for the period of United Nations’ administration of West Papua. A 15-page online document, *Summary of AG-059 United Nations Temporary Executive Authority*

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ For the Record of Conversation with Netherlands Ambassador, Dr JG de Beus: ‘Dutch New Guinea — Policy of the USA’, *National Archives of Australia* (Web Page, 24 January 1962) 33 <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/ViewImage.aspx?B=1509606>>.

⁸⁶ While the Netherlands was desperately trying to protect the West Papuan people’s right to independence, any protracted war with Indonesia would be difficult to maintain without American and Australian military support.

in *West Irian (UNTEA) (1962–1963)*, provides further insight into the current legal status of West Papua according to the Secretariat of the United Nations.⁸⁷

Under the heading *Administrative History*, it states:

The United Nations Temporary Authority in West Irian (UNTEA) was formed to administer West Irian, which is located on the island of New Guinea. In 1963 Dutch New Guinea became Irian Barat, which in 1973 changed its name to Irian Jaya and is currently administered by Indonesia.⁸⁸

This UN summary document — written post-1973 — indicates that the United Nations Secretariat is aware that West Papua remains ‘administered by Indonesia’ rather than being a sovereign part of Indonesia.

Furthermore, now-declassified legal advice provided to then Secretary-General U Thant in April 1962 confirms that the proposed role of the United Nations was ‘analogous’ to Article 81 of Chapter XII governing the International Trusteeship System. In part, it states:

There would seem to be no doubt that with the agreement of the two parties the functions envisaged would come within the competence of the United Nations. The Charter specifically recognizes that the Organisation itself may be an ‘administering authority’ with respect to trust territories (Article 81). While the present case is not one relating to trusteeship it may be considered analogous.⁸⁹

There is, however, no other article within international law governed by the *Charter* that allows the ‘Organisation itself’ to take over a Non-Self-Governing Territory. Thus, Chapter XII governing the International Trusteeship System must apply.

⁸⁷ ‘Summary of AG-059 United Nations Temporary Executive Authority in West Irian (UNTEA) (1962–1963)’, *United Nations Archives* (Web Page) <<https://search.archives.un.org/united-nations-temporary-executive-authority-in-west-irian-untea-1962-1963>>.

⁸⁸ *Ibid.*

⁸⁹ Interoffice Memorandum from CA Stavropoulos to U Thant, ‘Agreement between the Governments of Indonesia and the Netherlands’, 12 April 1962, reproduced in ‘West Irian (West New Guinea) — Bunker Proposals’, *United Nations Archives* (Web Page) <<https://search.archives.un.org/uploads/r/united-nations-archives/c/d/d/cdde2ac79908f9b00742b88e83d6c9d3e363eb978460268e7b2faa12bae6014c/S-0884-0022-05-00001.pdf>>.

IV LEGAL RECOURSE VIA THE TRUSTEESHIP COUNCIL

The failure to provide West Papua 'self-government or independence' under Article 76b, and the ongoing human rights violations defined as 'slow-motion genocide' by several scholars,⁹⁰ is a matter for redress by the United Nations as well as the international community at large. Each Member of the United Nations has a legal obligation to uphold 'international law governing equal rights and self-determination of peoples' under the *Charter*.⁹¹

While a growing number of Members have raised the plight of the West Papuan people in the General Assembly,⁹² a method of legal redress via the *Charter* has yet to be advanced. A simple path to engage the ICJ to review West Papua's legal status is available via the United Nations Trusteeship Council. Rule 7(e) of the Rules of Procedure of the Trusteeship Council allows 'all items proposed by any Member of the United Nations' to be added to the provisional agenda via the Secretary-General.⁹³ Therefore, any Member can add an agenda item drawing attention to the failure of the International Trusteeship System regarding West Papua.

Following the presentation of this proposal in 2016 at the University of Western Sydney,⁹⁴ the Honourable Ralph Regenvanu, now Minister for Foreign Affairs for the Republic of Vanuatu, agreed to pursue this course of action. Consequently, a draft agenda item for the Trusteeship Council was prepared for the government of Vanuatu to lodge via the United Nations Secretary-General.⁹⁵

Rule 74 of the Rules of Procedure of the Trusteeship Council allows for petitions to be accepted by the Council 'if they concern the affairs of one or more Trust Territories or the operation of the International Trusteeship System as laid down in the *Charter*'.⁹⁶ Further,

⁹⁰ Jim Elmslie and Camellia Webb-Gannon, 'A Slow-Motion Genocide: Indonesian Rule in West Papua' (2013) 1(2) *Griffith Journal of Law & Human Dignity* 142.

⁹¹ *Charter of the United Nations* ch IX arts 55–56.

⁹² Liam Fox, 'Pacific Nations Call for UN Investigations into Alleged Indonesian Rights Abuses in West Papua', *ABC News* (online, 2 March 2017) <<http://www.abc.net.au/news/2017-03-02/pacific-nations-call-for-un-investigations-into-west-papua/8320194>>.

⁹³ *Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/1/Rev.7 (1995) r 7.

⁹⁴ Presented by Julian McKinlay King and Andrew Johnson at the West Papua Project Conference, 'At the Intersection: Pacific Climate Change and West Papua' (University of Western Sydney, 4 November 2016).

⁹⁵ Julian McKinlay King, 'West Papua: Failure by the United Nations to Deliver Self-Government or Independence, and a Path to Legal Recourse' (DPACS Working Paper, West Papua Project, University of Sydney, 17 October 2017) app.

⁹⁶ *Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/1/Rev.7 (1995) r 74.

Rule 75 states that '[p]etitioners may be the inhabitants of Trust Territories, or other parties'.⁹⁷ Thus, the people of West Papua and 'other parties' can forward petitions to the Trusteeship Council drawing attention to this breach of the International Trusteeship System.

The Trusteeship Council suspended regular operations on 1 November 1994 — no longer having *registered* Trust Territories to oversee — but continues to meet every two years in order to elect new office-bearers.⁹⁸ The last meeting was held on Friday, 15 December 2017.⁹⁹

UN Members or Petitioners — drawing attention to the breaches of the International Trusteeship System in relation to West Papua — can therefore request the Trusteeship Council to seek an advisory opinion from the ICJ as encouraged under Article 96 Part 2 of the *Charter* and subsequently authorised by General Assembly Resolution 171(II) Part B.¹⁰⁰ This resolution states:

The General Assembly ... [a]uthorizes the Trusteeship Council to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council.¹⁰¹

A legal opinion from the ICJ will confirm whether the *Agreement* is a Trusteeship Agreement creating a Trust Territory of the United Nations or whether West Papua remains a Non-Self-Governing Territory of the Netherlands. Either outcome will compel the United Nations General Assembly to take 'immediate steps' to fulfil its legal obligation to deliver complete independence and freedom to the West Papuan people.¹⁰²

V INTERVENTION VIA RESOLUTION 2621(XXV)

In 1970, the United Nations General Assembly held a special session to commemorate the 10th anniversary of Resolution 1514(XV), *Declaration on the Granting of Independence to*

⁹⁷ *Ibid* r 75.

⁹⁸ *Amendment of the Rules of Procedure of the Trusteeship Council*, UN TCOR, UN Doc T/RES/2200(LXI) (25 May 1994) annex para 3.

⁹⁹ UN TCOR, UN Doc T/PV.1716 (15 December 2017).

¹⁰⁰ *Need for Greater Use by the United Nations and Its Organs of the International Court of Justice*, GA Res 171, UN Doc A/RES/171 (14 November 1947) pt B.

¹⁰¹ *Ibid*.

¹⁰² *Declaration on the Granting of Independence to Colonial Countries and Peoples* (n 63).

Countries and Peoples, in order to promote ‘practical action for the speedy liquidation of colonialism in all its forms and manifestations’.¹⁰³

The special session resulted in General Assembly Resolution 2621(XXV), *Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, which under Part 2

[r]eaffirms the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppress their aspiration for freedom and independence.

As recognised by former OPM freedom fighter and scholar, Otto Ondawame,¹⁰⁴ the use of arms and any other available means by the West Papuan people is here stated an ‘inherent right’.¹⁰⁵ The guerrilla warfare, waged by the West Papuan people since 1965,¹⁰⁶ may therefore be considered legitimate under General Assembly Resolution 2621(XXV).

Part 3(2) of Resolution 2621(XXV) states that ‘Member States shall render all necessary moral and material assistance to the peoples of colonial Territories in their struggle to attain freedom and independence’. Part 3 thus advocates for Members of the United Nations to provide ‘material assistance’ to the people of West Papua — which may include military hardware and intervention — to yet again remove the Indonesian armed forces from an illegally occupied Non-Self-Governing Territory.

VI DISCUSSION

In 1962, the Netherlands ceased the transmission of information to the Secretary-General, permitted only when either a full measure of self-government has been achieved or when Chapters XII and XIII apply. Yet to attain a full measure of self-government, West Papua should therefore have become subject to Chapters XII and XIII on 21 September 1962 and logically became a Trust Territory of the United Nations.

¹⁰³ *Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2621(XXV), UN GAOR, UN Doc A/8086 (12 October 1970) para 25.

¹⁰⁴ ‘OPM’ refers to the ‘Organisasi Papua Merdeka’ or ‘Free Papua Movement’.

¹⁰⁵ Otto Ondawame, *One People, One Soul: West Papuan Nationalism and the Organisasi Papua Merdeka* (Crawford House, 2010) 31.

¹⁰⁶ *Ibid* 64.

Following the take-over of the Territory, the United Nations failed to provide an annual report to either the United Nations Trusteeship Council or Secretary General — as a Trust Territory or Non-Self-Governing Territory — in breach of Chapters XI and XII governing decolonisation. Indonesia, since 1963, has similarly been in breach of legal reporting requirements on the decolonisation of the Territory until this day.

Indonesia's fraudulent act of self-determination orchestrated in 1969 was a breach of General Assembly Resolution 1541 governing Non-Self-Governing Territories by failing to allow all adults the opportunity to vote as well as failing to provide the options of independence, free association, or integration and a breach of Chapter XII governing Trust Territories by failing to provide the option of 'self-government or independence'. Furthermore, since the Netherlands was the colonial power of this Non-Self-Governing Territory, under General Assembly Resolution 1541, the option should have been to remain with the Netherlands rather than Indonesia who was only providing administration. Regardless, however, as announced to the world in 1961, the people of West Papua had already declared their desire to become a new nation called West Papua.

As presented by John Saltford in 2011,¹⁰⁷ Indonesia recognised the West Papuan people's right to self-determination following the signing of the *Agreement* which, from the outset, had 'in mind the interests and welfare of the people of the territory' and guaranteed 'the eligibility of all adults, male and female, not foreign nationals to participate in the act of self-determination to be carried out in accordance with international practice'.¹⁰⁸

Thus, Indonesia's original claim that West Papua was an integral part of the United States of Indonesia — let alone the Republic of Indonesia — instantly became null and void upon the signing of the *Agreement*. Furthermore, Indonesia's recognition of the West Papuan people's right to self-determination provides de jure recognition that West Papua's legal status was that of a Non-Self-Governing or Trust Territory.

As argued earlier, the *Agreement* was only 'noted' by the General Assembly in direct contrast to the required 'approval' for trusteeship agreements. Furthermore, the accompanying *ex officio* agreement between the United Nations, Indonesia, and the

¹⁰⁷ John Saltford, 'Reflections on the New York Agreement, the Act of Free Choice and Developments Since' (Speech, Comprehending West Papua Conference, West Papua Project, Centre for Peace and Conflict Studies, University of Sydney, 23–4 February 2011).

¹⁰⁸ *Agreement (with annex) concerning West New Guinea (West Irian)* (n 1) Preamble, art XVII(d).

Netherlands — which directed the Netherlands to cease its responsibilities — was never provided to the General Assembly for consideration and debate, let alone ‘approved’. While West Papua may have been transformed into a Trust Territory,¹⁰⁹ such breaches of the UN Secretariat and the International Trusteeship System may well leave the Netherlands in the legal position of having abandoned its Non-Self-Governing Territory.

The failure to ensure that the *Act of Free Choice* complied with international standards, that the UN maintained a presence throughout the period of Indonesian administration, and that the people’s human rights were being upheld was a further failure of the UN Secretariat and International Trusteeship System. Given Indonesia’s military incursions prior to the *Agreement* and behaviour during the first phase,¹¹⁰ the United Nations’ decision to use its discretion and transfer *any* of the administration to Indonesia under Article 7 of the *Agreement* yet again highlights the complicity of the ‘Organisation itself’. But again, this paper is concerned principally with West Papua’s legal status following the *Agreement*.

As detailed earlier, a simple remedy is available by drawing this to the attention of the ICJ via the Trusteeship Council. This is most readily achieved through a petition from the West Papuan people (or other parties) or the addition of an agenda item to the Trusteeship Council by Vanuatu, Solomon Islands, or another UN Member. A legal opinion from the ICJ should logically confirm that West Papua became a Trust Territory of the United Nations or remains a Non-Self-Governing Territory. Either way, it will provide the catalyst for the General Assembly and the United Nations Secretariat to resume their responsibilities and finally deliver the West Papuan people’s long-awaited freedom.

A petition signed by a reported 1.8 million inhabitants of West Papua presented to the chairman of the United Nations Decolonisation Committee in September 2017 by the United Liberation Movement for West Papua (‘ULMWP’) was rejected on the grounds that West Papua is not on the UN’s list of Non-Self-Governing Territories.¹¹¹ However, as detailed above, the Trusteeship Council can receive petitions provided they draw

¹⁰⁹ As originally advanced by Andrew Johnson (n 3).

¹¹⁰ For a detailed analysis: See Saltford (n 26).

¹¹¹ ‘UN Committee Rejects West Papua Independence Petition’, *Radio New Zealand* (30 September 2017) <<https://www.radionz.co.nz/international/pacific-news/340570/un-committee-rejects-west-papua-independence-petition>>.

attention to a breach of the International Trusteeship System.¹¹² ULMWP can therefore put the West Papuan people's petition to this Council at any time and thus recommence the process of decolonisation.

In a publication presented in early 2018, Leon Kaulahao Siu and Mehmet Sukru Guzel support the notion that West Papua became a Trust Territory of the United Nations via Resolution 1752(XVII). They write:

West Papua became a UN trust territory when the General Assembly adopted Resolution 1752 approving the UN occupation and administration of West New Guinea (West Papua), as Article 85 of the UN Charter allows the General Assembly to do so. West Papua became a UN trust territory because that is the only way that General Assembly Resolution 1752 was able to authorize the deployment of UN troops to occupy the colony of West Papua.¹¹³

While these scholars cite the 'Colony of West Papua' website,¹¹⁴ which advances West Papua's legal status of Trust Territory,¹¹⁵ first published in 2012 and expanded upon in numerous academic conferences, public presentations, and online,¹¹⁶ they have failed to attribute recognition of this argument and claim precedence.

These scholars further suggest that the adoption of General Assembly Resolution 2504(XXIV) in 1969 — regarding the Secretary-General's report on the implementation of the *Agreement* — created a *modus vivendi* or 'provisional agreement' between the Netherlands and Indonesia.¹¹⁷ Resolution 2504(XXIV) however only '*takes note*' of the

¹¹² Julian McKinlay King presented this argument at the Port Vila ULMWP Summit meeting in November 2017.

¹¹³ Leon Kaulahao Siu and Mehmet Sukru Guzel, *Modus Vivendi Situation of West Papua* (Lulu Publishing Services, 24 January 2018) 140.

¹¹⁴ *Colony of West Papua* (Web Page) <<https://web.archive.org/web/20120825161613/http://colonyWestPapua.info>>.

¹¹⁵ Siu and Guzel (n 113) 114.

¹¹⁶ See, eg, Andrew Johnson and Julian McKinlay King (Speech, At the Intersection: Pacific Climate Change and West Papua Conference, West Papua Project, University of Western Sydney, 4 November 2016); See, eg, Julian McKinlay King (Speech, The Patriots vs The Elites, Round Table Forum, New South Wales Parliament House, 9 May 2017); See, eg, Julian McKinlay King, 'West Papua: On the Periphery of Globalisation' (Speech, Solidarity for West Papua, Bellingen Memorial Hall, 20 August 2017); See, eg, Julian McKinlay King, 'West Papua: The Geopolitical Context and Legal Recourse' (Speech, Beyond the Pacific: West Papua on the World Stage, West Papua Project, Department of Peace and Conflict Studies, University of Sydney, 1 September 2017) <<https://youtu.be/gYzspIFZJnY>>; See, eg, Julian McKinlay King and Stephen Hill, 'The Case of Papua: A Soul Divided' (Speech, Decolonisation, Sovereignty, and Human Security in the Pacific, University of Wollongong, 26–27 June 2018) <<https://youtu.be/QCmIVLJnR7s>>.

¹¹⁷ *Ibid* 135.

Secretary-General's report.¹¹⁸ As detailed above, 'takes note' is a 'neutral term' and therefore neither approves nor disapproves the content of the Secretary-General's report.¹¹⁹ This Resolution does not mention, let alone approve, any transfer of sovereignty to Indonesia, and neither is there any implication of a new 'provisional agreement' as suggested by these scholars.

Siu and Guzel also suggest that the International Trusteeship System was abolished in 1993,¹²⁰ argue that the Fourth Committee (of the General Assembly) governing Non-Self-Governing Territories is one of the six main organs of the United Nations,¹²¹ and have sent the Committee a petition seeking that the General Assembly request an advisory opinion from the ICJ regarding the legal status of Resolution 2504(XXIV).¹²² However, as detailed above: the Trusteeship Council has not been abolished and continues to meet as necessary; the Chairman of the Fourth Committee will not receive petitions from peoples who are not from Non-Self-Governing Territories listed with the Committee; and the General Assembly previously was unable to raise the required two-third majority support to revisit the matter. Additionally, as detailed above, a legal opinion from the ICJ regarding the shift in West Papua's legal status via General Assembly Resolution 1752(XVII) — and not Resolution 2504(XXIV) — should bring about a swift conclusion to the ongoing oppression of the West Papuan people.

Similarly, the co-founder of International Lawyers for West Papua, Melinda Janki, wrote in 2017:

[A]ll the General Assembly said is we take note of this report. There is nowhere anywhere in the United Nations General Assembly a resolution which says the General Assembly *approves* the integration of West Papua into Indonesia.¹²³

The West Papuan people have simply been denied their rightful independence, as Jennifer Robinson observed in 2012:

¹¹⁸ *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)* (n 47) art 1.

¹¹⁹ Ruder, Nakano and Aeschlimann (n 49) 46.

¹²⁰ *Ibid* 93.

¹²¹ *Ibid*.

¹²² *Ibid* 150.

¹²³ Melinda Janki, 'Matter of Time for Papuan Self-Determination, Says Lawyer', *Radio New Zealand* (4 October 2017) (emphasis added) <<https://www.radionz.co.nz/international/pacific-news/340800/matter-of-time-for-papuan-self-determination-says-lawyer>>.

Had the UN properly discharged its mandate back then, West Papuans would have celebrated more than 40 years of independence instead of having endured nearly 50 years of oppression. In that time, it is estimated that as many as 500,000 Papuans have been killed at the hands of the Indonesian security forces.¹²⁴

Former secret American and Australian government documents confirm that the *Agreement* was understood to be a *trusteeship*. However, Indonesia refused to ‘call a trusteeship a trusteeship’,¹²⁵ no doubt aware that it would invoke the Trusteeship Council to amend the *Agreement* to be compliant with international law and associated UN resolutions governing decolonisation.

The *Charter* requires all UN Members to pledge themselves to uphold the principle of equal rights and self-determination.¹²⁶ Since the General Assembly was responsible for this breach — albeit with the covert assistance of the UN Secretariat — all UN Members are legally responsible for this gross miscarriage of justice and human suffering that has been allowed to continue since 1962. Furthermore, General Assembly Resolution 2621(XXV) encourages Members of the United Nations to provide all necessary moral and material assistance to the West Papuan people and help end the nearly 60 years of slow-motion genocide.

The unique decentralised system of self-governance created by the West Papuan people reflecting the indigenous make-up of Melanesia — from the family clans to the Village Councils to the Regional Councils and up to the National Council — was instead replaced by a predominantly Javanese Muslim military dictatorship which has inflicted extreme suffering and hardship upon the Melanesian population, described by many as genocide.

Like the people of East Timor, the Non-Self-Governing Territory of West Papua has had its rightful independence postponed due to geopolitical manoeuvrings in breach of the *Charter*. While East Timor was illegally invaded and annexed by Indonesia, yet again with the covert support of America and the complicity of Australia and the United Kingdom,¹²⁷

¹²⁴ Jennifer Robinson, ‘UN’s Chequered Record in West Papua’, *Al Jazeera* (online, 21 March 2012) <<https://www.aljazeera.com/indepth/opinion/2012/03/201232172539145809.html>>.

¹²⁵ Telegram from the Embassy in Indonesia to the Department of State (n 77).

¹²⁶ *Charter of the United Nations* ch IX arts 55–6.

¹²⁷ Dana Milbank, ‘1975 East Timor Invasion Got US Go-Ahead’, *The Washington Post* (online, 7 December 2001) <https://www.washingtonpost.com/archive/politics/2001/12/07/1975-east-timor-invasion-got-us-go-ahead/b59c47dc-3e54-4a3c-bca8-9f9f5120686a/?utm_term=.fe820dd52ed2>; John Pilger, ‘Australia’s Complicity in the East Timor Genocide: Oil, Gas, and the Depravity of Power’, *The Ecologist*

the transfer of West Papua to the United Nations (and subsequently Indonesia) transpired without due recognition of the Territory's legal status.

Due to ongoing campaigns by the families of Australian and UK journalists murdered by the Indonesian military during the invasion of East Timor,¹²⁸ Max Stahl's footage of the brutal Dili massacre,¹²⁹ Indonesia's inability to crush the East Timorese guerrilla fighters, recognition at the UN,¹³⁰ the fall of Suharto in 1998, and global human rights campaigns, Indonesia finally withdrew from this illegally occupied Non-Self-Governing Territory. The Indonesian military, however, acted as ever with mass brutality, no doubt in order to dissuade other territories or indigenous communities seeking a similar exodus from the (illegal) Republic.

However, West Papua — closed to foreign journalists,¹³¹ despite Presidential claims of access,¹³² and, in particular, not being *legally* recognised as either a Trust or Non-Self-Governing Territory — has not received the same attention from the international community despite equivalent (or worse) human rights abuse.

Following East Timor's experience, the international community, the United Nations, and the West Papuan people in particular should prepare for the scorched-earth policy and mass murder perpetrated when last the Indonesian military was forced to vacate a Territory that had been denied its rightful independence.¹³³

(online, 31 March 2016) <<https://theecologist.org/2016/mar/31/australias-complicity-east-timor-genocide-oil-gas-and-depravity-power>>.

¹²⁸ Nick Xenophon and Clinton Fernandes, 'We Can't Forget the Lessons of Balibo: Six Journalists Were Killed and It Shouldn't Have Been Swept under the Carpet', *The Sydney Morning Herald* (online, 15 October 2015) <<https://www.smh.com.au/opinion/comment-nick-xenophon-and-clinton-fernandes-on-balibo-20151014-gk8jb3.html>>.

¹²⁹ Mary Boland, 'Footage of a Massacre that Changed History of Timor-Leste', *The Irish Times* (online, 10 November 2017) <<https://www.irishtimes.com/news/world/asia-pacific/footage-of-a-massacre-that-changed-history-of-timor-leste-1.3286091>>.

¹³⁰ United Nations General Assembly, 'Special Committee on Decolonisation Takes Up Questions of Western Sahara, East Timor, Hears Petitioners' (Press Release GA/COL/2982, 30 June 1998).

¹³¹ 'RSF's Decries Journalist's Expulsion from Indonesia's Papua Region', *Reporters Without Borders*, (online, 8 February 2018) <<https://rsf.org/en/news/rsfs-decries-journalists-expulsion-indonesias-papua-region>>.

¹³² 'Jokowi Opens Papua to Foreign Journalists', *The Economist* (online, 11 May 2015) <http://country.eiu.com/article.aspx?articleid=993153883&Country=Indonesia&topic=Politics&subtopic_5>.

¹³³ 'World: Asia-Pacific Scorched Earth in Timor', *BBC News* (online, 21 September 1999) <<http://news.bbc.co.uk/2/hi/asia-pacific/452802.stm>>.

VII CONCLUSION

The façade is over. A shift in West Papua's legal status should have occurred in 1962 upon the transfer of this Non-Self-Governing Territory to the United Nations creating a Trust Territory of 'the Organisation itself'. Alternatively, West Papua remains a Non-Self-Governing Territory, invaded by the United Nations (and subsequently Indonesia) and abandoned by the Netherlands.

The American, Australian, Dutch, and Indonesian governments are revealed as complicit in the understanding that a trusteeship had been created but failed to bring this to the attention of the General Assembly.

Either as a Non-Self-Governing Territory or a Trust Territory, the legal rights of the people of West Papua have been denied with every UN Member responsible and *legally bound* to uphold the *Charter* in order to correct this *breach of international law*.

Meanwhile, the West Papuan freedom fighters continue their legitimate armed rebellion with the international community duty-bound to provide immediate moral and material support. The Indonesian military's brutality should *this time*, however, be taken into account by all concerned.

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