West Papua: Decolonization, Boundaries and Self Determination

Annette Culley

A summary of modern West Papua's legal history and future prospects

WEST PAPUA

DECOLONIZATION, BOUNDARIES AND SELF DETERMINATION

ANNETTE CULLEY

WEST PAPUA WOMEN'S OFFICE
FEDERAL REPUBLIC OF WEST PAPUA

FIRST PUBLISHED, AUGUST 2016
REPRINTED, WITH CORRECTIONS, DECEMBER 2016

COVER PHOTO

West Papua flag mural in Darwin remains intact despite criticism from Indonesian Consul ABC News, 8 June 2016, Stephanie Zillman, Felicity James. The West Papua-Aboriginal mural was painted twelve months earlier during a commemoration of the Biak Island Massacre in 1998.

COVER DESIGN: HEIDI CULLEY

PRINTING: PRINT EXPRESS
CHAPEL ST, PRAHRAN, VICTORIA

‘It seems hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes ... it is for the people to determine the destiny of the territory and not the territory the destiny of the people’

Judge Dillard, Western Sahara Case, ICJ Reports 1975

PROLOGUE

I had never heard of a place called West Papua until I picked up a book called People of the Valley at my municipal library in the mid-1970's. The book was written by an American photojournalist, Wyn Sargent, who with her interpreter, Sjamsuarni Sjam, lived for a time with different clans in the Baliem Valley in the highlands of West Papua. She had lived with and written about the Dyaks of Kalimantan, but still her red hair and imposing stature in (then) masculine dress puzzled the Papuans. The brutality of the Indonesian police horrified her, and she worked to break down long-standing animosities between the clans to try and strengthen their ability to cope with the racist administration. One endeavour involved a symbolic marriage with a highly respected chief, *Kain* Obaharok. (Her marriage dress, made by the women, was a full-length spectacular of finely plaited bamboo thread that reduced her normally long stride to a shuffle). Wyn's complaints and advocacy, including many letters to the Indonesian police and government, resulted in her being expelled from Indonesia. However, because she was a witness to the atrocities, TEMPO eventually published her story, including a photograph of a Wamena native beaten by the Indonesian police. Sjam, who was hounded by Indonesian intelligence after Wyn returned to America, told her that her situation improved after the publication of the article.

I have never forgotten this book and always hoped that one day I could play a part in the West Papuans struggle for independence. In the meantime I opened many of my conversations with 'Do you know where West Papua is?' to which the reply was usually a blank or indifferent stare. Then one rainy day in March 2009, I met two West Papuan men, Ricky and Adolph, at Flinders St Train Station and offered to hand out leaflets for them. They introduced me to other Papuans, and I soon joined their rallies and demonstration outside the Indonesian Embassy. In 2014, when the Federal Republic of West Papua opened an office in Docklands, I joined the Women's Office.

I became intrigued by the legal underpinnings of Indonesia's occupation of West Papua, and concerned about how little we, as activists, knew about them. The fact that I am not a lawyer meant that my journey of discovery was a bit haphazard, each hard-wrought bit of information simply leading to more questions. Indonesia had used the principle of *uti possidetis* [as you possess] to press its claim for sovereignty, so my first hurdle was to understand that elusive legal principle and work out how it had been extended to mean 'sovereignty' over West Papua. Suzanne Lalonde's *Determining boundaries in a conflicted world: the role of uti possidetis* proved a useful text containing much evidence regarding the normative status or otherwise of the principle of *uti possidetis*. Suzanne Lalonde is a lecturer in the Law Faculty at Montreal University. She has a great interest in interstate relations, namely sovereignty, territory and boundaries. Her specialty now is in the domain of maritime law.

The formation of the United Nations after World War Two opened a period of rapid development in international law. Jurist Christian Tomuschat believes UN Resolution 1514 (XV) 1960 *On the granting of independence to colonial countries and peoples* as 'an almost revolutionary act' because it transformed the principle of self-determination into a legal right for non-self-governing people. Antonio Cassese referred to West Papua as a 'case where the principle of self-determination was blatantly set aside' and 'a gross disregard for the principle of self-determination'. I have attempted to bring together all the UN resolutions, and principles, and rules that have been applied, or ignored, in the case of West Papua's occupation.

There is a great depth to international law and I myself have only skimmed the surface in this booklet. I wish here to acknowledge the contribution made by Andrew Johnson. Andrew uncovered many primary source documents and also contributed much thoughtful insight into the history of West Papua's struggle for independence.

Many questions remain unanswered about the treatment of the West Papuan people. There is much evidence of a total disregard of their rights and a manipulative practice that saw their right to self-determination totally ignored. That powerful nations were involved in this is beyond doubt.

This little book then is my analysis of the relationship between occupied West Papua and international law, but it is also a commentary on how international law offers hope to the beleagured people of West Papua. It traces how the focus of international law has shifted during the twentieth century from states' rights to people's rights, and how the norms of *jus cogens* (rules that cannot be derogated from) have broadened to include self-determination, genocide, slavery, torture, murder and the disappearance of individuals.

Annette Culley, October 2016

CONTENTS

General Assembly and The Agreement between the Republic of Indonesia and the Kingdom of the Netherlands ✰ Status of Non-Self-Governing Territories ✰ The development of the right of self-determination ✰ Self-determination post decolonization ✰

CHAPTER 1: NEW GUINEA IN ITS BIOGEOGRAPHICAL CONTEXT

This chapter looks at the island of New Guinea in its biogeographical situation as part of the Australian ecozone, and the people who live there, their history, and their racial and genetic characteristics.

That the Earth's continents were not always in the positions that they now occupy has been a fairly recent discovery. The movements of the continents have been described as a conveyor belt system in which the outer parts of the Earth's crust, the lithosphere, move over the inner part of the earth.[1] F.B. Taylor called this a 'mighty creeping movement of the Earth's crust'. German meteorologist Alfred Wegener believed the continental blocks moved vertically as well as horizontally and that geological features continued from one continent to another.[2]

Fifty-five million years ago, the Australian tectonic plate broke away from the Antarctic area of Gondwanaland and began a slow migration towards the equator.[3] New Guinea was always part of the Australian Plate, its mountains considered to be the result of a collision between the Australian and Pacific Plates. Sahul is the geological name for the Australian continent, which includes Australia, New Guinea and Tasmania; Sunda is the name for the continental shelf area of the Eurasian Plate occupied by South East Asia. South East Asia is an archipelago of thousands of islands situated in shallow seas. Those pertinent to this discussion include Sumatra, Java, Borneo, Bali,

[1] During the latter half of World War II scientist and ship commander Professor Harry Hess used the echo sounder of his ship continuously and obtained many profiles of the ocean floor. In 1960 he wrote a paper outlining his findings. Clark, I.F., Cook, B.J. eds. *Perspectives of the Earth* Canberra, Australian Academy of Science, 1983, p. 457.

[2] CLARK IF, COOK BJ (eds) *Perspectives of the Earth* Canberra, Australian Academy of Science, 1983, pp. 449-50.

[3] WIKIPEDIA *Continental Shelf* at http://www.snipview.com/q/Continental_shelf. The information and graphics in Wikipedia articles I cite in this chapter are the most accessible general information about this fascinating area of science.

Palawan (north of Borneo). The deep sea between Bali and Lombok separates the South East Asian Sunda from the Australian Sahul. Seram is a microplate, one of several tectonic plate fragments formed by interactions between four large tectonic plates.[4] The Aru Islands are continental islands that are part of the same tectonic plate as Australia and New Guinea but they are politically part of the Republic of Indonesia, as is Papua and West Papua, two provinces that occupy the island of New Guinea up to the 141st meridian.

Alfred Russel Wallace drew a line between Bali and Lombok, through the Makassar Strait west of Sulewesi, and up to the Philippines, which marks two distinct ecological zones, the Asian (Sunda) and the Australian (Sahul). Today this line-boundary between the Indomalaya and Australasian ecozones is considered more a zone of transition than a line.[5] Wallace noted that the line separates 'the Malayan and all the Asiatic races from the Papuans and all that inhabit the Pacific'. He believed that the Malayan race resembles the East Asian; the natives of Java resembled Chinese, and 'a race identical in all its chief features to the Papuan is found in all the islands as far East as the Fijis; beyond this the brown Polynesian race, or some intermediate type is spread everywhere over the Pacific'. He also believed the Polynesian races resemble each other so that a New Zealander or a Tahitian will very much resemble a Papuan or a Timorese. 'They are energetic, demonstrative, joyous and laughter-loving and in all these particulars' which included artistic productions 'they differed widely from the Malay'. Wallace noted that the Polynesians resembled the indigenous people of the Maluku Islands, and were linked more directly to Papuan than Malay populations.[6] He also noticed that Aru, Kei and New Guinea were inhabited by Papuans. Recent studies indicate that the

[4] COOPER, I *Seram Geology* [n.d] [http://web.archive.org/web/20020106064535/http://www.ee.usyd.edu.au/suss/Bulls/37(2)/seramgeology.html].

[5] PETOCZ, RJ *Conservation and development in Irian Jaya* Netherlands, EJ Brill, 1989, p. 26-27; MULLER, K *East of Bali: from Lombok to Timor*, Tuttle Publishing, 1997, p. 24.

[6] WALLACE, AR *The Malay Archipelago: the Land of the Orang-Utan and the Bird of Paradise*: *a narrative of travel with studies of man and nature*. London, MacMillan, 1869; WALLACE, AR *Project Gutenberg's The Malay Archipelago*, vol. II, Ch. XL, 2008, 2013 [http://www.gutenberg.org/files].

present population of Aru are descended from Pleistocene settlers,[7] and that the presence of Austronesian languages was the result not of in-migration but of a language shift.[8]

Eighteen thousand years ago and during the last Ice Age the Sahul Shelf was dry land. The Arafura Shelf, part of the Sahul Shelf now running under the Arafura Sea from Australia to New Guinea, was also dry land. Rising water levels some 10,000 years ago at the end of the last Ice Age caused parts of this continental shelf to appear as separate islands, e.g. Tasmania, and Kangaroo Island off the coast of South Australia, and the island of New Guinea. Geologically the island that encompasses Papua New Guinea, and the Indonesian provinces of Papua and West Papua is a continental island of the Australian mainland.[9] The southern part of New Guinea has been part of the Australian craton from 230-160 million years before the present, and the northern part is the result of collisions with ocean plateaus, micro-continents and island arcs and is therefore more geologically complex.[10]

Migration of Homo sapiens

Sixty thousand years ago, in the era of 'Greater Australia', which included parts of Papua New Guinea and West Papua, immigrants journeyed from Southeast Asia, across the Aru archipelago at the edge of the Sahul Shelf (then a dry land bridge) to New Guinea and Australia. These ancestors were part of the earliest waves of migrations from Africa. Artefacts found in the Ivane Valley in Papua New Guinea, were between 49,000 and 44,000 years old, and

[7] The Pleistocene epoch ran from 2,6 million years ago until 12,000 years ago.

[8] SPRIGGS M, O'CONNOR S, VETH P 'The Aru Islands in perspective: a general introduction' In O'Connor S, Spriggs M, Veth S eds *The Archaeology of the Aru Islands: Eastern Indonesia* Canberra, Pandanus Books, 2005, p. 15 [http://press.anu.edu.au/wp-content/uploads/2011/08/ta22-whole.pdf].

[9] SAHUL SHELF, Wikipedia, par 1-4, Accessed 26 May 2015; COLLER, M *Sahul time* Monash University, 2007 [http://sahultime.monash.edu.au/].

[10] PANDOLFI, JM *A review of the tectonic history of New Guinea and its significance for marine biogeography* Proceedings of the 7th International Coral Reef Symposium, Guam, 1992, vol. 2, p. 718 [http://marinepalaeoecology.org/wp-content/uploads/2011/09/Pandolfi-1993-Proc-7-ICRS.pdf].

are evidence of the earliest human habitation in this part of the world.[11] In New Guinea languages ancestral to the Papuan languages were spoken 38,000—48,000 years ago.[12] Austronesian language speakers left Taiwan about 5,500 years ago and colonised South East Asia, reaching Timor 4,100 years ago and the Bismark Archipelago 3,500 years ago. About 2,000 years ago the island cultures of the Pacific and of South East Asia diverged rapidly such that Indonesian cultures scarcely resemble any in the Pacific.

Austronesian languages spread along the north and south coasts of New Guinea and inland along the Markham Valley.[13] Linguistic studies of Austronesian languages spoken in areas east of New Guinea suggest that Austronesian speakers encountered Papuan language speakers in their journey into Oceania. Papuan languages occur in Austronesian-speaking areas as far east as Santa Cruz in the Solomon Islands.[14] Timor Leste contains several large groups of peoples who speak Papuan languages,[15] principally the Fataluku in the east and the Bunaq in the south west.[16]

The science of genetics throws some light on migratory events that happened up to 70,000 years ago and suggests that New Guinea and Australia were colonized about the same time. Data from one study suggests that some lineages from the Australian and New Guinea population have shared history

---

[11] SWALLOW, J *PNG find prompts human migration rethink*, Australian Geographic, 30 September 2010.

[12] INGMAN M, GYLLENSTEN U *Mitochondrial genome variation and evolutionary history of Australian and New Guinea Aborigines*, Genome Research, vol 13, no. 7, 2003, pp. 1600-1608. [http://genome.cshlp.org/content/13/7/1600.full.pdf+html].

[13] SPRIGGS, M *From Taiwan to the Tuamotus.* In Blench, R, Spriggs, M *Archaeology and language: correlating archaeological and linguistic hypotheses* 1998, p. 122.

[14] ROSS, M 'Pronouns as a preliminary diagnostic for grouping Papuan languages' In Pawley, A, Attenborough, R, Golson, J, Hyde, R eds *Papuan pasts-cultural, linguistic and biological histories of Papuan speaking peoples* Canberra, Pacific Linguistics, 2005 pp. 15-65.

[15] MCWILLIAM A, TRAUBE EG 'Land and life in Timor Leste: introduction' In McWilliam, A Traube, EG eds *Land and life in Timor Leste: ethnographic essays* Canberra, ANU E Press, 2011, pp. 5-6.

[16] SCHAPPER, A 'Finding Bunaq: the homeland and expansion of the Bunaq in central Timor' In McWilliam A, Traube EG, eds *Land and life in Timor Leste: ethnographic essays* Canberra, ANU E Press, 2011, pp. 182-185.

since their arrival in Sahul.[17] There is much interest in these connections, which include striking similarities in the content of dreamtime stories. For example, links between the people on one side of the Fly River and the Marind on the other side are less strong than the links between the Marind and nearby areas of Australia even though a body of water separates the two. Historical records and oral history attest to links between Kiriwina Island Papuans, Torres Strait islanders and Cape York aborigines. Language studies reveal that these links must have existed for a very long time because the land bridge between New Guinea and Australia has been under water for approximately 7000 years.

Indonesian archipelago

The archipelago that comprises the Republic of Indonesia extends from 94^0 to 141^0 longitude. Legally, the republic is an archipelagic state, although in fact it is made up of a number of archipelagos of oceanic islands or continental fragments or continental islands.[18] It occupies two distinct tectonic plates, the Indo-Australian plate and the Eurasian plate, and two geological and ecological zones separated by deep water. The republic contains within its borders a large number of ethnic groups and an even larger number of diverse languages. Two quite different groups make up its ethnic identity, the Malay in the west and the Papuan in the east.

[17] INGMAN M, GYLLENSTEN U *Mitochondrial genome variation and evolutionary history of Australian and New Guinea Aborigines* Genome Research, vol. 13, no. 7, 2003 pp. 1600-1608. [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC403733/].

[18] United Nations, Convention on the Law of the Sea, UNCLOS, Part IV, article 46. [http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf].

CHAPTER 2: BOUNDARIES IN THE MODERN WORLD

The rise of Nationalism and the Westphalian State with its centre in State sovereignty, the emergence of liberalism and the rights of citizens, other principles related to boundaries, frontiers, sovereignty, nations, territorial integrity, decolonization and self-determination.

The function of a boundary depends upon whether it defines different States like Canada and the United States of America, or administrative regions within a State, as between Victoria and South Australia. International boundaries have been described as negative in being drawn to control the movement of people and goods and to delimit the area of land over which the State has jurisdiction.[1] Internal boundaries are concerned with the binding together and administration of a State, drawn and often redrawn as part of nation building. Most modern boundaries are straight lines, with little or no relationship to the boundaries of indigenous peoples.[2] For instance, there is little relationship between the boundaries of modern Australia and nature-inspired boundaries of the first inhabitants of the country. Only three provinces in Papua New Guinea, West Papua's other neighbour, have natural boundaries, the rest being straight lines that even divide some of the clans. Most were drawn during the nation's colonial period by the centralised Australian administration. After independence in 1975, the government's Constitutional Planning Committee created nineteen administrations, with boundaries that also bore little relationship to tribal lands or social customs. As such, the people of the new state were largely deprived of their autonomy and political power.[3]

---

[1] RATNER, S *Drawing a better line: uti possidetis and the borders of new states* The American Journal of International Law, vol. 90, no. 4, 1996, pp. 602-3.
[2] RATNER, S 1966, pp. 602-3.
[3] DORNEY, S *Papua New Guinea: people, politics and history since 1975* Random House Australia, 1990, pp. 152-3.

Nationalism

The cultural systems that preceded nationalism were religious communities and the dynastic realms. The religious community was held together by the sacred language and the written texts that linked its members to a superterrestrial order of power. For instance, the Holy Roman Empire, covering vast areas of Europe, was made up of a patchwork of individual entities governed by rulers known as princes.[4]

The Treaty of Westphalia in 1648 brought an end to the Thirty Years' War.[5] It was a treaty of friendship that heralded the end of the European empires and the birth of nation States. The unique principles of this treaty, which ended 140 years of religious warfare in Europe enshrined the benefit of 'Advantage of the other'- the common good in the statecraft of sovereign nations. The Treaty emphasised the sovereignty of the State and non-interference in the sovereignty of the State by others. It has been thought to herald the birth of international law and seems to have created an emphasis there regarding the territorial integrity of the State. There was no emphasis on humanity or democracy and the result of the principle of sovereignty that it relied on was an increase in 'rivalry not community of states; exclusion, not integration'.[6]

The opening phrases of the *Declaration of independence* promulgated by the Congress of the United States of America in 1776 are well known: 'We hold these truths to be self evident: that all men are created equal: that they are endowed by their Creator with certain unalienable rights: that among these are life, liberty and the pursuit of happiness'.[7] They are an expression of both

---

[4] Holy Roman Empire *Wikipedia, The Free Encyclopedia* [accessed 11 Feb 2015]. [http://en.wikipedia.org/w/index.php?title=Holy_Roman_Empire&oldid=646621445].

[5] Treaty of Westphalia *Article 1, Peace treaty between the Holy Roman Empire and the King of France and their respective allies*.

[6] SOLANA, J 'Securing peace in Europe', Speech, Symposium on the Political Relevance of the 1648 Peace of Westphalia, Munster, 12 November 1998 [http://www.nato.int/docu/speech/1998/s981112a.htm].

[7] *Declaration of Independence: a transcription* In 'Congress 4 July 1776' [http://www.archives.gov/exhibits/chts Address to US congress 8 January 1918arters/declaration_transcript.html].

liberalism and nationalism, two concepts that emerged in Europe in the 18th century. The Declaration proclaims that 'in order to secure these rights it is necessary that a stable government derives its power from the consent of the governed' and 'It is the right of the governed to alter or abolish the government that does not uphold the rights of the people'. These sentiments echoed in France's *Declaration of the right of man and the citizen* in 1789.[8]

The aim of the liberalists was to secure a national form of government with its own constitution. Liberalism was dominated by the middle classes, which ultimately proved unwilling to share power with the lower classes (without whom it could not exist).[9] Other liberal ideas are familiar to us today, such as non-interference by government in business arrangements, opposition to trade unions, reluctance to share the profit of business with the working classes.

The French Revolution of 1789 sparked the rise of nationalism in Europe, destroying the concept of a French kingdom and sparking the birth of a French State. *The declaration of the right of man and the citizen* states 'the principle of all sovereignty resides in the nation'. Not withstanding Napoleon's 'wars of emancipation' (that over-rode other nations' sovereignty) the revolution stimulated the growth of nationalism in Europe.[10] Political nationalism gave rise to an increase in parliamentary forms of government. Cultural nationalism gave rise to efforts to revive national language, customs, music and literature.

Benedict Anderson in *Imagined communities* speaks of nations as being 'imagined' because the political community consists of people who perceive themselves as part of a group. Even though most have never met, they are prepared to work and die together in defence of their nation. Anderson uses

---

[8] *Declaration of the right of man and the citizen,* 26 August 1789. [http://www.refworld.org/docid/3ae6b52410.html].
[9] COWIE LW, WOLFSON R *Years of nationalism: European history 1815-1890* Hodder & Stoughton, 1985, pp. 380-381.
[10] COWIE LW, WOLFSON R 1985, p. 380-381.

the example of West New Guinea as being imagined firstly by the Dutch whose logo-map 'sped across in the colony showing West New Guinea *with nothing to its east*' and then by Indonesian nationalists.[11] Some Indonesian nationalists were incarcerated in West New Guinea, but few had actually seen or been to West New Guinea before the 1960s. Nevertheless, in their imagination it was 'sacred ground', and features in the island-filled logo-map in Jakarta that is a miniature reconstruction of the Indonesian Republic.

The stability of boundaries

The doctrine of the stability of boundaries is a legal principle, not a legal rule, and one of a number of principles that needs to be weighed up according to the circumstances of a case. In the determination of boundaries there may be many principles to be taken into consideration.[12] Nevertheless, after States have established a boundary between them the primary object is to achieve stability. The Temple of Preah Vihear is an example of a boundary conflict that has cost thousands of lives and engaged the legal profession for more than a century.[13]

Rebus Sic Stantibus rule

The Rebus Sic Stantibus rule is part of treaty law that culminated in the *Vienna Convention on the Law of Treaties.* According to this rule a party may

---

[11] ANDERSON, B *Imagined communities: reflections on the origin and spread of nationalism*, rev.ed., Verso, 1991, pp. 176-77.

[12] LALONDE, S *Determining boundaries in a conflicted world: the role of Uti Possidetis* Montreal, McGill-Queens University Press, 2002, p. 141.

[13] A treaty in 1909 placed this temple in Thailand. Later maps showed it to be in Cambodia, and in 1959 Cambodia took what had become a dispute to the International Court of Justice requesting sovereignty over the temple and surrounding area. The Court ruled in favour of Cambodia, stating that Thailand had neglected its duty to inspect the map. The report of a dissenting (Australian) Judge, Sir Percy Spender, is almost 50 pages long (Case concerning the Temple of Preah Vihear, *Cambodia v. Thailand*, Judgement of 15 June 1962, ICJ Reports 1962, 4; ICJ judgement 15 vi 62 Diss. Op. Sir Percy Spender). In June 1979 the temple was the site of an atrocity when Thai soldiers pushed thousands of Cambodian refugees over a 2000-foot cliff. In 2008 the temple was designated a UNESCO World Heritage site, even though it is still under dispute (Preah Vihear Temple, *Wikipedia, The Free Encyclopedia*, accessed 9 Feb 2015 [http://en.wikipedia.org/w/index.php?title=Preah_Vihear_Temple&oldid=634337394].

unilaterally invoke as grounds for terminating or withdrawing from a treaty the fact that circumstances have changed fundamentally since the conclusion of the treaty. Article 62 of the *Vienna convention on the law of treaties* states:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty **unless:**

   a) the existence of those circumstances constituted an essential basis for the consent of the parties to be bound by the treaty; and

   b) the effect of the change is to radically transform the extent of obligations still to be performed under the treaty;

2. A fundamental change of circumstances may not be invoked as grounds for terminating or withdrawing from a treaty if the treaty establishes a boundary.[14]

Inviolability of frontiers

Inviolability of frontiers is a principle of international law, which states that one sovereign nation cannot cross the frontier of another state to violate, without its consent, the sovereignty of that State. The inviolability of frontiers protects States against incursions by other sovereign States.[15]

Intangibility of Frontiers

Intangibility of frontiers principle means that boundaries cannot be called into question by the use of force even if the title appears questionable.

[14] Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, United Nations, Treaty Series, vol. 1946, p. 3. Entered into force on 6 November 1996.

[15] LALONDE, S *Determining boundaries in a conflicted world: the role of Uti Possidetis* Montreal, McGill-Queens University Press, 2002, p. 151.

Sovereignty

Sovereignty has a variety of meanings, one being the 'totality of international rights and duties recognized by international law' as residing in an independent territorial unit—the State.[16] Sovereignty is not a right or a necessary attribute for statehood.[17] While the term suggests total independence and autonomy, that is, that a State has total authority over all aspects of its internal affairs including the right to do whatever it likes with the peoples who reside within its boundaries, contemporary States are constrained by customary general international law, by United Nations Conventions, and by regional human rights instruments such as the *European convention on human rights*. Sovereignty also means that a sovereign State has a territory, a population, a government and formal juridical autonomy, that is it is accepted as an equal by other States, can enter into agreements with other States and be a member of international organizations.[18]

The Nation

A nation needs to be distinguished from a population such as an ethnic or national minority. The nation is a self-defined group; a 'collective agent characterized by a political culture of self-determination with which its members self-identify'.[19] As Alan Buchanan suggests, a claim to separate statehood can be tied to human rights violations, but not all claims to separation are the result of human rights abuses. The definition should not include group rights to entitlement, because many groups share personal group identity and language, culture, history, and political preferences but are *not* seeking independence. This narrows the definition down to the following:

---

[16] Advisory opinion on reparations for injuries suffered in the service of the United Nations organization, I.C.J. Reports, 1949, pp.174, 180, 10.
[17] Crawford, J *The concept of Statehood in international law* 2nd ed., Oxford University Press, 2006, p. 32.
[18] SCHARF, MP *Earned sovereignty: juridical underpinnings* Denver Journal of International Law and Policy vol, 31, no. 3, 2004, p. 375.
[19] MOLTCHANOVA, A *National self-determination and justice in multinational states* Springer, 2009, p. 71.

'[n]ations are groups whose members share and identify with a particular kind of political culture or a set of beliefs and attitudes concerning politics'.[20]

Territorial integrity

Territorial integrity means that a State is free from control or interference by the government of another State. Many instruments emphasize the principle of territorial integrity and existing political independence of States.[21] Article 2, par. 4 of the United Nations Charter states '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political integrity of any State or in any manner inconsistent with the Purposes of the United Nations.'

Non dismemberment of Non-Self-Governing Territories

Various United Nations instruments emphasise the territorial integrity principle in international relations, the *Colonial declaration* UNGA Res. 1514, paragraph 6 being an example:

> [a]ny 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.[22]

Paragraph 6 prohibits the dismemberment of non-self-governing units prior to independence, with the Administering Authority under an obligation to maintain unity so the inhabitants exercise their right to self-determination as a

[20] MOLTCHANOVA, A 2009, p. 80.

[21] Covenant, League of Nations, Article 10; Montevideo Convention on Rights and Duties of States, Article 11; United Nations Charter, Article 2 (4*)*; Declaration on the granting of independence to colonial countries and peoples—UNGA Res. 1514 (XV); Declaration on principles of international law concerning friendly relations and co-operation among States—UNGA Res. 2625 (XXV); The Charter of the Organisation of African Unity.

[22] Declaration on the granting of independence to colonial countries and peoples (the Colonial Declaration), UNGA Res. 1514 (XV) 14 December 1960.

single indivisible unit.[23] The Administering Authority has, however, the right to alter these boundaries, for example dividing them into more than one unit as long as all units have each the right to self-determination.[24]

Decolonization and Self-Determination

UNGA Res. 1541 (XV) Annex, Principle V, provides the following:

> Once it has been established that a *prima facie* case of geographical or ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia* [among others], of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner that arbitrarily places the territory in a position or status of subordination, there is an obligation to transmit the information under Article 73e of the Charter.

In other words these territories come under the definition of Non-Self-Governing Territories. This resolution applies equally to mandated territories as was stated in the *Namibia Case* which emphasised that the sacred trust[25] was owed to both Non-Self-Governing Territories and Trust Territories alike.

> 'Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier' and that following the dissolution of the League of Nations '[a]ll those that did not acquire independence ... were placed under trusteeship'.[26]

The Declaration on friendly relations, UNGA Res. 2625 (XXV), refers to every State's obligation to 'refrain from any action aimed at the partial or total disruption of the national unity and the territorial integrity of any other state or

[23] LALONDE, S 2002, p.155.
[24] RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Sijthoff, 1973, pp. 145-146.
[25] Article 73, Chapter XI, *Declaration regarding Non-Self-Governing Territories* requires members who administer these territories to maintain as a sacred trust the preparation of these peoples for an act of self-determination that includes the choice of independence.
[26] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion, I.C.J. Reports, 1971, p.16, par. 52 (June 21).

country'. This resolution, however, refers to the territorial integrity of States being dependent upon the State's **'compliance with the principle of equal rights and self-determination of peoples** ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

It is important to note that these references to the territorial integrity of countries and States have been interpreted as conferring the right to territorial integrity upon Non-Self-Governing Territories as well as to Trust and Mandated territories.[27]

[27] LALONDE, S *Determining boundaries in a conflicted world: the role of Uti Possidetis* Montreal, McGill-Queen's University Press, 2002, p. 154.

CHAPTER 3: TREATY LAW AND THE ROLE OF *UTI POSSIDETIS*

Customary international law, treaty law, general international law, self-determination, and the role of uti possidetis in determining boundaries in the break up of colonial empires.

Ye ministers of Britain's State,
Form'd of *all talent,* good and great,
Like GROTIUS vers'd in treaties;
What, though *abroad* ye marr'd the scene,
Tell us what 'tis *at home* you mean
By th' uti possidetis?

Uti possidetis and status quo: a political satire
attributed to James Sayers, London, Stockdale, 1807

Treaty law

Treaty law is connected with treaties and is referred to as conventional law. Following World War II and the foundation of the United Nations, there was a need for international law to be codified and some important treaties were finalized. One of these was a treaty about treaties, the *Vienna convention on the law of treaties* 3 May 1969; others included the United Nations *Convention on the law of the sea* 10 December 1982. Treaties are known by different names, e.g.: Conventions, International Agreements, Pacts, General Acts, Charters, Statutes, Declarations, Covenants. They are written agreements where the participants bind themselves legally to act in a certain way and these obligations are set out in the treaty; these are obligatory upon the participants. International law states that these agreements are binding, *pacta sunt servanda (*agreements must be kept). A treaty between two States is a bilateral treaty

and between more than two entities it is a multilateral treaty.[1] Treaties between States are not codified into law but both parties to the agreement must abide by the terms of the agreement.[2] (This does not always happen as can be seen in the abrogation by Indonesia of many of the articles of the Indonesia and Netherlands Agreement of 1962).[3]

Customary law and General International law

Conventional (treaty) law and customary law together make up general international law. Customary law, as opposed to common law ('the law of the land'), is a norm of international law, composed of legal principles that have been elevated to the status of law as a result of consistency of use (*usus)*. *Opinio juris* (a sense that a state is bound to the law in question) follows *usus* (State practice), and is a sense of obligation that establishes the law as a legally binding custom.[4] The consistent use of a legal practice by States *(usus)* and its consequent status as a rule and a norm of customary international law means that States are expected to follow and respect the practice.

There are two types of norms: norms that can be derogated from under certain conditions, and norms that cannot be derogated (deviated) from under any circumstances. The latter are called peremptory norms and are connected with morality and the collective belief that violation of them is abhorrent. For example, 'Intangibility of borders' is a norm that can be deviated from; meaning that a State border cannot usually be questioned by another State but can be questioned under certain conditions, for instance by the International Court of Justice. Genocide is an example of a peremptory norm that cannot be derogated from under any circumstances.

---

[1] Treaty Handbook prepared by the Treaty Section of Office of Legal Affairs, rev. ed., United Nations, 2012, pp. 71-72.
[2] SHAW, MN *International law* 6th ed., Cambridge University Press, 2008, p. 93.
[3] Indonesia and Netherlands Agreement concerning West New Guinea (West Irian) signed at United Nations headquarters, New York, 15 August 1962, United Nations Treaty Series 1962, 1-6311.
[4] LEGAL INFORMATION INSTITUTE *Opinio juris* (international law) [n.d].

Treaties are a 'further elaboration of general international law by codification' and can 'consolidate, develop and change general international law'.[5] Examples of multilateral treaties are the Briand-Kellog Pact of 1928 that prohibited recourse to war, and the Charter of the United Nations—which has become a norm of general international law—that 'went much further than the Briand-Kellog Pact and prohibited the **threat** and use of force in relations among States'.[6] Another example is the *Genocide Convention* signed by many states in 1950, which was simultaneously both treaty law and customary law, and which has become part of general international law.[7]

General international law is an umbrella term for both treaty law and customary law. When a treaty becomes a part of customary international law, then non-parties (states that are not members of the United Nations) are bound to it. An example here is self-determination, which by the *East Timor* Case at The Hague (*Portugal v. Australia*) in 1995 was elevated to the status of a peremptory norm of *jus cogens* (compelling law) and *erga omnes* (applicable to all).[8] Peremptory norms are based on principles of morality, and concern human rights and humanitarian rights that regulate the conduct of States and individuals in times of peace (human rights) or war (humanitarian rights).

The International Court of Justice Statute uses international conventions; international customs as evidence of general practice; general principles of law recognised by civilised countries; judgements already made in past cases; and teachings of the most highly qualified writers on international law.[9] Article 59 of the International Court of Justice states that the decision of the Court is only

[5] TUNKIN G *Is general international law customary law only?* European Journal of International Law, vol 4, 1993, p. 537.
[6] TUNKIN, G 1993, p. 538.
[7] UN General Assembly, Convention on the Crime of Genocide, 9 December 1948. A/Res/260.
[8] East Timor (*Portugal v. Australia*), Judgment, I.C.J. Reports, 1995, p. 90, (par. 31); CASSESE, N *Self-determination of peoples: a legal reappraisal* Cambridge University Press, 1995, pp. 319-320.
[9] Statute of the International Court of Justice, Article 38.

binding between the parties to a treaty and in respect of that particular case.[10] Judgements made by the Court can and do influence international law.

There is a distinction between principles and rules. A principle is not usually a norm of international law (a rule binding on all), but in certain cases a principle can be broken down into rules, which themselves become rules of *jus cogens* (compelling law). A good example is the principle of self-determination that has led to the formulation of customary rules such as a) Self determination is the right of colonial peoples; b) Self-determination is the right of peoples living under a foreign military domination. Whilst the *International covenant on civil and political rights* states in Article 1 that 'all peoples have the right of self-determination' and that 'by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' nevertheless the right of racial groups within a sovereign state is more problematic simply because many States have numerous racial groups living in their territory. The basic right of self-determination is called "internal" self-determination. "External" self determination is the right of all self-determination units that have resulted from the era of colonization. This right has been extended to peoples under alien domination and subjugation or exploitation. More recent thinking has proposed that external self-determination is applicable to situations where a State causes serious harm to elements of its own peoples. This is called the Remedial Right of secession and will be addressed here in Chapters 13 and 14.

Uti possidetis

Uti possidetis is a legal principle whereby emerging States that had been colonies inherited colonial borders.[11] However, it was not consistently used in the break-up of (colonial) States, or in treaties, and in fact was just one of a

[10] Statute of the International Court of Justice, Article 59.
[11] RATNER, SR *Drawing a better line: Uti possidetis and the borders of new states* The American Journal of International Law, vol. 90, no. 4, 1990, p. 590.

variety of ways of delimiting a boundary. As we shall see, *uti possidetis* is a pragmatic confused device, which, because of its inconsistent use, has never become part of customary international law. During the decolonization of Latin America, it was actually a pragmatic way of dealing with vast unsurveyed lands that were virtually impenetrable.[12] F.C. Fisher, writing about the arbitration of the Guatemalan-Honduran boundary dispute stated that '...it was rarely that the demarcation of Spanish American administrative units had been clearly defined by the former sovereigns, and the uncertainty resulted a series of fiercely contested boundary disputes'.[13]

Uti possidetis has been associated with the decolonization of the Spanish Empire, European Africa, Southeast Asia, and the break-up of the Federal Republic of Yugoslavia, and was *thought* to be the principle behind boundary decisions at the time of independence.[14] In 1949, when the Netherlands removed West New Guinea from the area claimed by Indonesian nationalists as part of the new State, Indonesia used the legal principle of *uti possidetis* to press its claim, adding that West New Guinea was part of the Netherlands Empire as well as of the Majapahit Empire (that collapsed early in the 15th Century AD).[15] In 1961, President Sukarno told President Kennedy that West New Guinea was part of 'Indonesia' even before the Dutch arrived.[16]

The origin of *Uti possidetis* is to be found in Roman law of the Republican era (approximately 458—30 BC) and was a possessory interdict. Interdicts were issued by the Praetor at the request of the claimant. They were more administrative than judicial, with no witness testimony and no examination of

---

[12] LALONDE, S *Determining boundaries in a conflicted world: the role of uti possidetis* Montreal, McGill-Queen's University Press, 2002, pp. 23, 30-33.
[13] FISHER, FC *The arbitration of the Guatamalan-Honduran boundary dispute* American Journal of International Law, vol. 27, 1933, p. 416.
[14] RATNER, SR 1996, p. 590.
[15] SALTFORD, J *The United Nations and the Indonesian takeover of West Papua 1962-1969* Routledge, 2003, p. 8.
[16] US Department of State, Office of the Historian, Foreign Relations of the United States 1961-63, vol. XXIII, South East Asia, Document 172, 24 April 1961. [https://history.state.gov/historicaldocuments/frus1961-63v23/ch4].

evidence. If the Praetor considered the claim had some merit the *interdictum* was issued.[17] The intent was to prevent force between the claimant and the possessor, and was only used when the possession was 'faultless' (that is, not taken by force or by clandestine means, or without permission). *Uti possidetis* actually decided nothing, but it placed both parties to the dispute into an identical legal position. Each party had to plead possession even if only one party actually inhabited the property. Separate legal proceedings decided the outcome of the dispute.

It has been suggested that *uti possidetis* disappeared with the code authorized by Justinian early in the 6th Century. The interdict, however, re-appeared in 1609 in the work of Hugo Grotius, where it was still attached to possession of private rights in a case about the right to make an enclosure to trap fish (some say that the interdict may have been inserted by the translator).[18]

Cornelius Van Bynkershoek, a Dutch jurist, was the first to connect *uti possidetis* with the phenomenon of *status quo post bellum* (remains the same after war). Writing in 1739 he stated that '[e]ach party should, during the truce continue to hold possession on the principle of *uti possidetis* of the part he had occupied in the war'.[19] This was a transformation of *uti possidetis* from a provisional remedy between individuals to one applied to wars between State territories. Scholars thereafter adopted the vocabulary of *uti possidetis* to describe the *status quo post bellum,* and in this manner *uti possidetis* became a basic tenet of the law of war and peace.

Moore argues that *uti possidetis* was applicable to international law because the use of force was lawful and the right of conquest recognized, and therefore

[17] LALONDE, S *Determining boundaries in a conflicted world: the role of Uti Possidetis* Montreal, McGill-Queen's University Press, 2002, p. 12.
[18] LALONDE, S 2002, p. 20.
[19] BYNKERSHOEK, C van *A treatise on the law of war*. Translated from the original Latin of Cornelius van Bynkershoek, being the First book of his 'Questionas Juris' Publici 1737 with notes by Peter Stephen Du Ponceau, cited in LALONDE, S. 2002, pp. 20-21.

uti possidetis was a rule of peace that 'furnished a date from which rights were to be reckoned'.[20] Its provisions, as outlined in the 1866 edition of Henry Wheaton's *Elements of international law* states that *'Uti possidetis* is the basis for every treaty of peace, unless the contrary is stipulated'.[21] The 5th edition, 1916, has *uti possidetis* as an agreement to waive all discussions about the original causes of the war; forbid the revival of the same war for the same causes; and maintain the existing state of possession until altered by treaty.[22] The conqueror thus has a right to his conquest (*usufructuary* right) until the terms of the peace treaty extinguishes his right to the territory.

The following outlines the history of *uti possidetis*, its presumed application to the decolonization of the Spanish Empire in South and Central America, and the subsequent use or misuse of the principle in the light of opinions expressed in regard to this principle by eminent jurists, John Bassett Moore, C.C. Hyde, Paul de La Pradelle and Sir Humphrey Waldock.

Uti possidetis and Decolonization in South America

On 13 January 1750 a treaty was made between Spain and Portugal that recognised boundaries between their colonial possessions as being designated by the best-known landmarks such as rivers and mountains; they also agreed to accept the *status quo* that each party should remain in possession of what territory they held. Twenty-seven years later the Treaty of San Ildefonso finalised this Treaty.[23] During the mid 16th century Spanish American territories were divided into two great viceroyalties, and these viceroyalties

---

[20] MOORE, JB *Memorandum on uti possidetis: Costa Rica-Panama arbitration*, 1911, p. 32.

[21] WHEATON, H *Elements of international law*, 8th ed., edited with notes by Richard Henry Dana Jr, 1866. Chapter IV, Treaty of Peace, Effects of a treaty of peace #545. [http://books.google.com.au/books?id=vECPAAAAMAAJ&pg=PA503&source=gbs_toc_r&cad=3 - v=onepage&q&f=false]

[22] WHEATON H, PHILLIPSON C *Elements of International Law*, 5th ed. London, Stevens, 1916, pp. 806. [https://archive.org.details/wheatonselements00whearich].

[23] LALONDE, S *Determining boundaries in a conflicted world: the role of Uti Possidetis* Montreal, McGill-Queens University Press, 2002, p. 20.

were each divided into two royal *audiencias* (major provinces), and then further divided into captaincies-general with further subdivisions. The viceroyalty of Nueva Espana is an example, being divided into four audiencias: San Domingo (1526), Mexico (1527), Guatemala (1543) and Guadaljara (1548).[24] These were followed by further subdivisions, each major province being governed autonomously.

Independence for South and Central America commenced in the early 1800's and was achieved by force of arms. The *status quo* principle was accepted and territorial claims became based upon original Spanish and Portuguese legal titles such as treaties (Treaties of Tordesillas, Lisbon, Utrecht, Madrid, Pardo and San Ildefonso). They claimed that they fell heir to all that had been claimed by Spain and Portugal including as yet unexplored territory. Claiming the *status quo* meant that there was no territory that could be claimed by another State; they would respect each other's territory and it also enabled the discussions about exact boundaries to be postponed. In reality the new countries did not have reliable records of the former colonial boundaries and much of the territories were unexplored and sometimes inhabited by hostile tribes not to mention a variety of lethal flora and fauna.[25] A further problem concerned the exact interpretation of the principle *uti possidetis*. Did it mean effective possession at the exact time of independence (*uti possidetis de facto*) or did it refer to the areas rightfully occupied by the administration of the former colonial unit (*uti possidetis juris*).[26]

Brazilian jurists insisted on *uti possidetis de facto* in their dealings with the Spanish Americans as it corresponded better to the situation following a war, the war in question being between Spain and Portugal. According to De La Pradelle both forms of the principle must be rejected because of the legal

[24] LALONDE, S 2002, p. 26.
[25] CLARK, L *The rivers ran east* London, Hutchison, 1954.
[26] LALONDE, S *Determining boundaries in a conflicted world: the role of Uti Possidetis* Montreal, McGill-Queen's University Press, 2002, p. 57.

incorrectness of their foundation. *Uti possidetis juris* is thus, for De La Pradelle, a pleonasm, a superfluous word, as *uti possidetis* implies a situation calling for a legal solution within international law that may or may not confer a right of possession. Under Roman law *uti possidetis* was a solution that maintained the status quo until a final determination could be made.[27] The Latin American version, *uti possidetis* 'implies right of possession and *uti possidetis de facto* is a cloak for effective possession'.[28]

In her examination of constitutions and treaties of newly independent states and territories of Spanish America, Suzanne Lalonde found that of the forty-three *constitutions* drawn up between 1811 and 1850 just one referred to *uti possidetis,* and of forty between 1850 and 1901 only four referred to *uti possidetis* (three of them were revised constitutions of the Republic of Costa Rica). In terms of *treaties*, with the exception of Brazil's, there was no reference to *uti possidetis* in any of the fifty treaties between the Spanish republics between 1811 and 1850 (even though thirty-one of the treaties specifically referenced 'territories' or 'boundaries'). Only five treaties out of seventy-seven in the second half of the nineteenth century referenced *uti possidetis*.[29] Colombia's constitution mentioned it only to exclude it. In reality, the newly independent States often did not take the precise boundaries of the old audiencias, presidencias, or provinceas, but instead united (only to split again later).[30] Spanish American republics relied more on the general principles of international law, and *uti possidetis* was not the most important of these, especially because of its limitations around unexplored territory, barely recognised boundaries, and in some cases no boundaries at all.[31]

---

[27] DE LA PRADELLE, P 'La frontiere: Les editions internationales', 1928, pp. 86-87. Cited in Abdelhamid El *Quali Territorial integrity in a globalized world : international law and States quest for survival*, Springer, 2012, pp. 132-134.
[28] LALONDE, S. *Determining boundaries in a conflicted world : the role of Uti Possidetis*, Montreal, McGill-Queen's University Press, 2002, p. 57.
[29] LALONDE, S 2002, p. 33.
[30] LALONDE, 2002, p. 35.
[31] LALONDE, 2002, pp. 58-9.

In relation to an ongoing boundary dispute between Guatemala and Honduras, F.C. Fisher described attempts to invoke the principle of *uti possidetis*:

> [i]n support of their opposing contentions each of the parties invoked the indefinite and illusory concept of *uti possidetis*, the meaning of which is still as uncertain as when the effort was first made, over a century ago to elevate it to the dignity of a principle of American International law.[32]

Humphrey Waldock noted the ambiguities raised by the difference between possession *de jure* (meaning boundaries defined by Royal Spanish decree) and possession *de facto* (boundaries acknowledged by colonial administration).[33]

C.C. Hyde, on the conflicting interpretations of the principle adopted by the parties in the Guatemala-Honduras boundary dispute, submits:

> [t]he circumstances showed the unwisdom of reliance upon a phrase such as *uti possidetis*, not indicative of a rule of law and constituting little more than a rough description of a practice that had been variously followed when no supervising policy interposed, and in itself easily susceptible to divergent interpretations, as the basis for the adjudication of a boundary dispute.[34]

John Bassett Moore stated:

> ['t]he principle was not expressly referred to in the earlier treaties and had not been so constantly invoked nor has its practical effect been by any means so important as writers and learned advocates have sometimes asserted.[35]

---

[32] FISHER, FC *The arbitration of the Guatamalan-Honduran boundary dispute* American Journal of International Law, vol. 27, 1933, p. 415.

[33] WALDOCK, CHM 'Disputed sovereignty in the Falkland Islands dependencies' British Yearbook of International Law, vol. 25, 1948, p. 311 at 25 *et seq*. Retrieved from AKWEENDA, S *International law and the protection of Namibia's territorial integrity: boundaries and territorial claims* Netherlands, Martinus Nijhoff, 1997, p. 48.

[34] HYDE, CC *International law: chiefly as interpreted and applied by the United States* vol. 1, Boston, Little Brown and Company, 1948, p. 509 [https://archive.org/details/internationallaw033123mbp].

[35] MOORE, JB *Memorandum on uti possidetis: Cost Rica-Panama arbitration* 1911, p. 32. [https://archive.org/details/costaricapanamaa00moor].

Fernanda Jankov and Vesna Coric examined the application of *uti possidetis* in the *Kosovo Case.*[36] They question its status as a legal principle, as a general principle of international law, a customary international rule, and in judicial decisions. They concluded that it is not a general norm of international law to be applied whenever independence takes place. To be a norm of customary law, State general practice must reflect the rule (generality requirement) and States must follow the rule in the belief that it is a legal requirement (*opinio juris sive necessitatis* requirement). These two important elements are pre-requisite for *uti possidetis juris* to be considered a norm of customary law.

Uti possidetis and decolonization in Africa

The 'scramble for Africa', as it was called, began in the late 1800's, a conference in 1884 producing the *Berlin Act* that recognised European spheres of influence. By 1920 the partition of Africa was complete, and in 1964, the Organization of African Unity (OAU) froze the boundaries. As such the old territorial divisions became the framework for independent Africa.

The French territories were divided into Afrique Occidentale Francaise (AOF) and Afrique Equatoriale Francaise (AEF). The AOF was partitioned into eight colonies, a process that involved many boundary readjustments. By 1960 independence had been granted. Africans were discontented with colonial boundaries and wished that they followed cultural, religious and linguistic borders. However, the spectre of conflict encouraged them to maintain the status quo, and the *OAU Charter* exhorts Africans to cherish their hard-won independence and defend their territorial integrity. The OAU conference in Addis Ababa in 1964 reaffirmed the principles expressed in the UN Charter, *Universal declaration of human rights,* and UNGA Resolution 1514 (XV) *Declaration on the granting of independence to colonial countries.*

[36] JANKOV, FF, CORIC, V 'The legality of uti possidetis in the definition of Kosovo's legal status', 2nd ESIL Research Forum *The power of international law in times of European integration* Budapest, 28-29 September, 2007, pp. 9-11.

Siegfried Weissner has pointed out, however, that the choice of a political future was not given to the individual conquered peoples but to the inhabitants of territories colonized by European conquerors within the boundary lines drawn by the conqueror: 'African people were divided, unified regions ripped apart, hostile societies were thrown together, hinterlands were disrupted and migration routes closed off and boundaries became barriers'.[37]

The difference between the independence of African territories and Latin American republics was that African states were granted independence as a right under the UN Charter, Chapter XI (article 73), Chapter XII (article 76) and the Colonial Declaration, United Nations General Assembly Resolution 1514 (XV). This was an existing legal framework which also worked as a legal guide.[38] The African colonies were assured the right of territorially defined self-determination together with the principle of territorial integrity that protected them from internal and external claims. In contrast, the Latin American republics, having won their independence through revolution, were required to create the *status quo* through treaties. The Latin American principle of *uti possidetis* had been intended to help settle the territorial limits of States that acceded to independence with uncertain boundaries. However, its application was of little assistance, since the 1810 Spanish administrative 'lines' on paper were ill-defined, based on vague and inaccurate geographical information, and often bore no relationship to actual occupation. For the South American republics the question was further complicated by the uncertainties involved in the use of the principle of *uti possidetis:* whether *de facto* (boundaries based on those at the time of independence) or *de juris* (boundaries determined by Spanish juridical decision with an agreed date).

[37] WEISSNER, S. Cited in Blij HJ de, Muller PO *Geography, realms, regions and concepts* 14th ed., Wiley and Sons, 1997, p. 340.
[38] LALONDE, S 2002, p. 231; also 'The role of uti possidetis in determining boundaries' In Jovanovic MA, Hanrard, K eds *Sovereignty and diversity* Utrecht, Eleven Publications, 2008, p. 59.

Uti possidetis and the Frontier Case

The Frontier Dispute, *(Burkina Faso/Republic of Mali)* is the most important pronouncement with respect to the role of *uti possidetis* in Africa and as such is the cause of much discussion.[39] Most of the common boundary between the two states (both former colonies of France) had already been delimited but a section of desert land was still in dispute. The Parties agreed that the dispute should be settled according to the 'principle of intangibility of frontiers inherited from colonization'. However, the Court maintained that it could not disregard the *uti possidetis* principle, noting that it **seemed** to have been applied in Spanish America—the first continent in a decolonization process involving the formation of sovereign states on territory formerly belonging to a single metropolitan state.[40] The Court stated that *uti possidetis* does not pertain to just one system of international law, but is a general principle that is **'logically connected with the phenomenon of the obtaining of independence wherever it occurs'** and that it is **' a principle of a general kind which is logically connected with this form of decolonization wherever it occurs'.**[41] (Emphasis added).

A situation has now arisen that any suggestion that a new State that has delimited its boundaries by reference to the former colonial boundary must be an example of the *uti possidetis* principle. In a Separate Opinion in this case Judge Georges Abi-Saab criticised the over-emphasis on the excessive analysis of maps and documents and was of the opinion that equity *infra legem* (within international law) would have been better than the difficulty caused by *uti possidetis* considering that the area was nomadic and access to water was vital.[42] In a Separate Opinion in the same case Judge Luchaire pointed out the difficulties inherent in a strict adoption of *uti possidetis*. He began by pointing

[39] Frontier Dispute, (Burkina Faso/Republic of Mali), Judgement, I.C.J. Reports, 1986, par. 20.
[40] LALONDE S 2002, p. 127; Frontier Dispute, Judgement, I.C.J. Reports, 1986, par. 20.
[41] Frontier Dispute, (Burkina Faso/Republic of Mali), Judgement, I.C.J. Reports, 1986, par. 20.
[42] Frontier Dispute, (Burkina Faso/Republic of Mali), I.C.J. Reports, 1986, pars 13, 17 (Separate Opinion of Judge Georges Abi-Saab).

out that colonization and independence were not opposites but that independence was 'rather its crowning achievement' especially when it has been obtained from an administration that has 'facilitated the cultural, economic, social and political progress of the inhabitants such progress being fundamental to any genuine independence'. He points out that independence can be achieved in a number of ways according to the General Assembly Declaration 1514 (XV) and he also points to General Assembly Declaration 648 (VII) 1952,[43] which stipulates the variety of choices: 'independence within the aforesaid geographical framework [same frontier as the former colony but accession to independence], or integration into the territory of the administering power with strict equality of rights...' or voluntary association with the former metropolis. 'Finally, the exercise of the right of self-determination **may evidently lead certain plainly individualized parts of the former colony to a different option from that followed by the other parts'**.[44] (Emphasis added).

The judgement in the *Frontier case* strongly influenced boundary delimitation during the break up of the Federal Republic of Yugoslavia to the detriment of some peoples left on the 'wrong' side of the boundary and thus vulnerable to ethnic cleansing and genocide.[45] Yugoslavia was a federation of six republics plagued by instability. Frontiers could not be changed without the consent of all of the republics and autonomous provinces. The break-up of the Socialist Federal Republic of Yugoslavia happened outside the provisions of international law; international law is neutral in the situation as secession is a political act. Cassese, commenting on the break-up, said:

> [h]owever, the body of international rules on self-determination has had a remarkable bearing on the whole process of secession. Their impact has been two-

[43] *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-governance* United Nations General Assembly Resolution 648 (VII) 10 December 1952.
[44] Frontier Dispute, I.C.J. Reports, 1986, p. 652-3, (Separate Opinion Judge Luchaire).
[45] RATNER, S *Drawing a better line: uti possidetis and the borders of new states* The American Journal of International law, vol. 90, no. 4, 1996, p. 591.

> fold although at different levels. Firstly, self-determination has operated at the level of *political rhetoric,* as a *set of political principles* legitimizing the secession of national States from central, oppressive State structures. Second, self-determination has provided the legal tools for establishing the demands of the seceding peoples to achieve independent statehood: referendums have been held in almost all the breakaway republics in order to verify the will of the populations concerned.[46]

After the European Economic Community established its criteria for recognizing new states, self-determination lost its status as the sole arbitrator in decolonization issues. In 1973 the European States had considered the German proposal that a provision on self-determination be included in the *Final Act of Helsinki*.[47] France wished to include both internal and external self-determination; other members believed states should have the right to change their political, economic, social or cultural systems free from external interference. The Netherlands proposed a link between self-determination and human rights, with self-determination as an evolving, ever renewing, right.

The following two paragraphs were included in the *Final Act of Helsinki* 1975:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.
>
> The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.[48]

---

[46] CASESSE, A *The self- determination of peoples: a legal reappraisal* Cambridge University Press, 1995, p. 273.

[47] Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (OSCE), *Final Act of Helsinki*, 1 August 1975.

[48] Organization for Security and Co-operation in Europe (OSCE). Conference on Security and Co-operation in Europe (OSCE). *Final Act of Helsinki*, 1 August 1975, Principle VIII, p. 7.

The target of *uti possidetis* are the borders,[49] but because of the different function of international and internal borders the rote application of *uti possidetis* raises problems in their determination. Internal and external boundaries have been drawn and redrawn and even abolished for a variety of reasons, as we can see in the Indonesian government's 2003 decision to partition the historic province of West Papua into two provinces, West Papua and Papua.[50]

States have emerged from colonial rule with other than their pre-independence borders and on other occasions states were split.[51] Ratner suggests that *uti possidetis* should revert to its more historic meaning, to that of a principle for maintaining the status quo of a border until the determination of a comprehensive legal judgement. He claims that '[t]o date, states, courts and scholars have agreed on the unexceptional proposition that there is no universal rule for arriving at an ideal line to divide territory-whether by adopting linguistic boundaries, natural frontiers or *uti possidetis'*.[52]

In summary, the *uti possidetis* principle has been extended from situations involving private disagreements over possession of real estate, to situations where territory has been taken by force of war, to situations where possession has been acquired as a result of discovery, exploration and settlement. In Latin America, the principle was applied to colonial boundaries arising from former Spanish colonies. In the break-up of the Federal Republic of Yugoslavia it was used for what was in reality a unilateral secession. Jancovic and Coric—in considering the normative status of *uti possidetis* embraced by the Badinter Commission, which ruled that new international frontiers should, after

[49] RATNER, S *Drawing a better line: uti possidetis and the borders of new states* The American Journal of International law, vol. 90, no. 4, 1996, p. 601.
[50] MCDONALD, H *Democrasi: Indonesia in the 21st century* Melbourne, Black Inc, 2014, p. 235.
[51] JANKOV FF, CORIC, V *The legality of uti possidetis in the definition of Kosovo's legal status* 2nd ESIL Research Forum 'The power of international law in times of European integration', Budapest, 28-29 September, 2007, pp. 10-11.
[52] RATNER, SR *Drawing a better line: Uti possidetis and the borders of new states* The American Journal of International Law, vol. 90, no. 4, 1996, pp. 600, 618.

secession, inherit the exact boundaries of their former republics in accord with the principle of *uti possidetis*—concluded that self-determination, being a norm of *jus cogens,* should take precedence over the principle of *uti possidetis*.[53]

[53] JANKOV, FF, CORIC, V. The legality of *uti possidetis* in the definition of Kosovo's legal *status.* 2nd ESIL Research Forum "The power of international law in times of European integration", Budapest, 28-29 September, 2007, pp. 14, 15, 24.

CHAPTER 4: SELF-DETERMINATION AND THE UNITED NATIONS

Territorial integrity and the norm of self-determination have been the subject of much discussion and numerous United Nations documents. However, the concept of self-determination has itself undergone a transformation over time, which this chapter seeks to elucidate.

Self-determination as a right

The principle of self-determination has a long history.[1] It began with the *American declaration of independence* (1776) that was in part the inspiration for that important document of the French Revolution *The rights of man and the citizen* of 1789. It was stressed by Woodrow Wilson at the Treaty of Versailles at the end of World War I, although it was Lenin who first insisted on the importance of self-determination as a criterion for the liberation of peoples.[2] It was during the period between the two world wars that the principle of self-determination leading to self-government as a result of decolonization, was first espoused. This was championed by the Soviet Union, which firmly fixed the principle of self-determination, particularly in terms of decolonization, in the international arena. The right of self-determination and secession were both enshrined in the constitution of the Soviet Union.

Following World War II, the rights of **all peoples** were emphasized in numerous United Nations documents. The relevant parts of these instruments are listed below. Although these instruments speak of 'all peoples' having the right to self-determination, in reality the right to self-government derives from the fact of being colonized by European States. Thus, former colonies have this right, but not minorities or sub-national units within States. Only in the

[1] FRANCK, T *The emerging right to democratic governance* American Society of International Law, vol. 86, no. 1, 1992, p. 52.
[2] CASESSE, A *The self- determination of peoples—a legal reappraisal* Cambridge University Press, 1995, pp. 14, 15.

case of severe abuse of the peoples of a State by the State has the right of self-determination leading to secession been contemplated. In August 1972 Bangladesh, formerly East Pakistan, was, as a result of a liberation war, recognized by eighty-six countries and became a Member of the United Nations. Similarly, various units of the Spanish empire became separate independent States, as did the Baltic States, and parts of the Soviet Union.

United Nations Charter and Self-determination

Article 1, in paragraph 2 of the Charter[3] speaks of the 'self-determination of peoples'. The Charter also concerned itself with the post Second World War demands for the end of colonialism. Several Articles in the Charter are of particular interest to the management of this new phenomenon and were aimed at ensuring that the rights of the inhabitants of colonized countries were taken into consideration**.** Article 1 (2) speaks of the 'equal rights' and 'self-determination of peoples' as 'appropriate measures to strengthen universal peace. Article 2 (4) states 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Article 55 speaks of 'higher standards of living, full employment' ….((a)), 'solutions of international economic, social, health and related problems …' ((b)), 'universal respect for and observance of, human rights'.

Chapter X1: Declaration regarding Non-Self-Governing Territories, Article 73 of the UN Charter speaks of the paramount interests of peoples who have not yet attained a full measure of self government; of those administering the territories having a 'sacred trust' ... 'to ensure with due respect for the culture of the peoples concerned their political, economic, social and educational advancement, their just treatment, and their protection against abuses' (a); 'to

[3] Charter of the United Nations and Statute of the International Court of Justice, San Fransisco, 1945.

develop self-government ... '(b); 'to further international peace and security' (c); 'to promote constructive measures of development ... ' (d); 'to transmit regularly to the Secretary-General statistical and other information ... related to economic, social and educational conditions in the territories for which they are responsible other than those [Trust] territories to which Chapters XII and XIII apply'.

Trust territories were administered under Chapters XII and XIII of the Charter of the United Nations. The basic objectives and reporting requirements were similar to those outlined in Chapter XI for Non-Self-governing Territories. They can be accessed from Chapters XII and XIII of the Charter. The UN Charter does not stand alone, but is reinforced by subsequent resolutions and declarations, International Court of Justice judgements, and the opinions of influential jurists and writers of legal publications.

Resolution 1541 (XV) 15 December 1960

This resolution was the first serious effort to **stipulate the test for determining whether or not a territory is non-self-governing** within the meaning of Article 73e.[4] The Annex to this resolution is titled *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for in Article 73(e) of the Charter of the United Nations*.[5] It lists twelve principles, including:

> Principle III: The obligation to transmit information under article 73 (e) of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

[4] FRANCK, T *The emerging right of democratic governance* American Society of International Law, vol. 86, no. 1, 1992, p. 57.

[5] An earlier document was UNGA Resolution 742 (VIII) 1952 with an annex entitled 'The factors that are indicative of the attainment of independence or of other separate systems of self-government'.

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

Principle V: Once it has been established that a *prima facie* case of geographical or ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia* [among others], of an administrative, political, juridical, economic or historical nature. If 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 the information under Article 73(e) of the Charter.

Principle VI: A non-self governing territory can be said to have reached a full measure of self-governance by:
a) emergence as a sovereign independent state;
b) free association with an independent state; or
c) integration with an independent state.

Principle IX: Integration should come about in the following circumstances:

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

Resolution 1514 (XV) 14 December 1960

The principle of self-determination acquired legal strength from 1960 after the UN General Assembly adopted Resolution 1514 (XV) *On the granting of independence to colonial countries and peoples*. Christian Tomuschat maintains 'the existing structural network of international relations was profoundly shaken by that almost revolutionary act'.[6] The resolution 'in conjunction with the UN Charter contributed to the gradual transformation of

[6] TOMUSCHAT, C ed. *Modern law of self-determination* Martinus Nijhoff Publishers, 1993, p. vii.

the "principle" of self-determination to a legal right for non-self-governing peoples'.[7]

> Article 1: 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 the promotion of world peace and co-operation.
>
> Article 2: All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[8]

Resolution 2625 (XXV) 24 October 1970

United Nations General Assembly Resolution 2625 (XXV) *Declaration on principles of international law friendly relations and cooperation among states in accordance with the Charter of the United Nations* further influenced customary international law and was responsible for a growing consensus that self-determination could apply **in areas other than de-colonisation**.[9]

The Friendly relations declaration is **the last** of eight United Nations precursor **resolutions** that date back as far as 18 December 1962 on the subject of the development and codification of the principles of international law concerning friendly relations and co-operation among States. It is noteworthy that the actual framing of these documents influenced UN member States to expand their views and practices on the subject of self-determination. Their views were also expanded by rulings of international courts, statements made in other forums such as State parliaments, and practices that in their turn 'made up the

[7] CASSESE, A *Self-determination of peoples—a legal reappraisal* Cambridge University Press, 1995, p. 70.
[8] United Nations General Assembly Resolution 1514 (X) 24 October 1960.
[9] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. I.C.J. Report (2010), p. 16, 4 (written statement of Finland). (Emphasis added).

bulk of *usus* and *opinio juris*[10] in the matter'.[11]

Under the heading of 'The principle of equal rights and self-determination of peoples' the declaratory Resolution 2625 (XXV) states:[12]

> '..all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter' (par.1);
>
> and
>
> 'bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principles, as well as a denial of fundamental human rights and fundamental freedoms in accordance with the Charter' (par.2);
>
> 'The establishment of a sovereign and independent State, the free association or integration with an independent State or emergence into any other political status freely determined by a people constitutes modes of implementing the right to self-determination by that people' (par.4).

A State, then, has the right to choose its political status, whether to become a sovereign independent state or seek some other solution and should do so free of any action that deprives it of its right to self-determination and moreover has the right to seek support for that right in accordance with the Charter of the United Nations. Whereas,

> 'a colony or Non-Self-Governing Territory has … a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist **until** the people of the colony or Non-Self-Governing Territory **have exercised their right of self-determination in accordance with**

[10] A legally binding custom is made up of two elements: *usus* and *opinio juris*. *Usus* refers to the use of a principle of law; *opinio juris* denotes what is called a subjective element, meaning the opinion of a State that is bound to the law in question. Cornell University Law School, Legal Information Institute *Opinio juris* (international law) [https://www..law.cornell.edu/wex/opinio_juris--international-law].

[11] CASSESE, *A Self-determination of peoples—a legal reappraisal* Cambridge University Press, 1995, p.70.

[12] UNGA Resolution 2625 (XXV) Resolutions adopted on the reports of the sixth committee, General Assembly, 25th Session, Annex, pp. 1-4. [https://documents-dds ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf].

the United Nations Charter, and particularly its purposes and principles' (par. 6). (Emphasis added).

'Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part the territorial integrity or political unity of sovereign or independent states **conducting themselves in compliance with the equal rights and self-determination of peoples** as described above and thus possessed of a government representing the whole people of the territory without distinction as to race, creed or colour' (par. 7). (Emphasis added).

The Two Covenants

The United Nations Universal Declaration of Human Rights 1948, was the foundation of modern human rights law and the inspiration for the two Covenants on human rights approved almost unanimously by the United Nations General Assembly in 1966.[13] The covenants are the *International covenant on civil and political rights* (ICCPR), 16 December 1966 and the *International covenant on economic social and cultural rights* (ICESCR), 16 December 1966. Together with their Optional Protocols the covenants are legally binding and must be applied in good faith. The ICCPR commits its parties to respect the civil and political rights of individuals including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. The ICCPR is monitored by the Human Rights Council created by the General Assembly on 15 March 2006. The following three articles are common to both covenants:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and

[13] *United Nations Universal declaration on human rights* http://www.un.org/en/documents/udhr/hr_law.shtml

international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of non-self-governing and trust territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

States have expressed reservations to various articles of the Covenant. However, it should be noted that a reservation that is 'incompatible with the object and purposes of a treaty' is void as a matter of the *Vienna convention on the law of treaties and international law*.[14]

Resolution 51/84, 28 February 1997

[r]eaffirms that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights.[15]

Responsibility to Protect, report of 2001

This report addresses the clash between sovereignty and humanitarian intervention where a sovereign State fails to protect its own people, whereupon responsibility should be taken up by the wider international community and may include as a last resort military intervention.[16] The 2005 World Summit Outcome,[17] in three separate paragraphs, made the following propositions, that:

[e]ach individual state has a responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity (**par. 138**); [and to] use appropriate diplomatic humanitarian and other peaceful means, in accordance with

[14] Vienna Convention on the law of Treaties, United Nations Treaty Series, art.19, vol. 1155, p. 331.
[15] United Nations *Universal realization of the right of peoples to self-determination* A/Res/51/84, 28 February 1997 [http://www.un.org/documents/ga/res/51/ares51-84.htm].
[16] EVANS, G 'Afterword' In BROINOWSKI, A WILKINSON, J *The third way: can the UN work?* Melbourne, Scribe, 2005, pp. 253-254.
[17] United Nations. General Assembly, 2005 World Summit Outcome: resolution adopted by the General Assembly, 24 October 2005, A/RES/60/1.

> Chapters VI & VIII of the Charter to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context we are prepared to take collective action in a timely and decisive manner through the Security Council, in accordance with the Charter, including Chapter VII... (**par. 139);** [and to] fully support the mission of the Special Advisor of the Secretary General on the Prevention of Genocide **(par. 140).**

The Right to Protect (R2P) as enunciated by the World Summit was reaffirmed by the Security Council's Resolution 1674 (2006).[18]

Self-determination v Territorial Integrity

While the right of self-determination is firmly accepted as a norm of *jus cogens* (meaning that it cannot be derogated from), it nevertheless can collide, or appear to collide, with the principle of territorial integrity in the **post-colonial** situation. However, in the context of **decolonization**, Judge Nagendra Singh, in the 1975 *Western Sahara* Advisory Opinion of the International Court of Justice said:

> [t]he consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration, or association or independence...thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people-the very *sine qua non* [essential requirement] of all decolonization'.[19]

The principle of territorial integrity is central to the maintenance of international security and stability; the principle of self-determination is one of the fundamental human rights established in international law.[20] Self-determination implies the right of the individual within a state to exercise the

[18] Asia-Pacific Centre for the Right to Protect. The right to protect and the protection of civilians: Asia-Pacific in the UN Security Council, 22 June 2008, p. 16. [http://www.r2pasiapacific.org/docs/R2P Reports/Asia-Pacific POC June 08.pdf].
[19] Western Sahara, I.C.J. Reports, p. 12, 78, 81 (16 October 1975) (Declaration of Judge Nagendra Singh).
[20] GUDELEVICIUTE, V *Does the principle of self-determination prevail over the principle of territorial integrity?* International Journal of Baltic Law, vol. 2, no. 2 April 2005, p. 48.

expression of their free will. It is a universal right and the obligations arising from it are *erga omnes* (applicable to all) and thus applicable to the whole international community; to assign it to some but not all peoples would result in discrimination.[21] Finland spoke of the precedence in international law created by the *Aaland Islands Case* '[t]hat territorial integrity may be overridden in exceptional cases was affirmed expressly, and with particular relevance to the situation in the area of former Yugoslavia in the early *locus classicus* [authoritative passage] by the Commission of Jurists in the *Aaland Islands* question in 1920'. The International Committee of Jurists, in its advisory opinion to the Council of the League of Nations stated:

> [f]rom the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law [...]. Under such circumstances, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests in the internal and external peace of nations.[22]

The Finland submission refers to the fact that self-determination was not abolished at the end of the decolonization process as it would create 'an arbitrary distinction between entities seeking self-determination and the various "situations of fact" in which claims are made, it also misunderstands the rationale of the principle itself, as expressed in the *Aaland Islands Case* and later'. 'This rationale was echoed in UNGA 2625 (XXV) the Friendly Relations Declaration of 1970, which referred to States that conduct themselves in compliance with the relevant principles [of equal rights and self-

[21] GUDELEVICIUTE, V 2005, pp. 52, 53.
[22] Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Island question, League of Nations Official Journal, October 1920, p. 6.

determination of peoples] and possess a government representing the whole people belonging to the territory'.[23]

[23] Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. Request for Advisory Opinion, ICJ Report (2010), p. 403, 4, par. 8 (written statement of Finland); Report presented to the Council of the League of Nations by the Commission of Rapporteurs. LN Council Doc. B7 21/68/106.

CHAPTER 5: PEOPLE IN INTERNATIONAL LAW

The *Charter of the United Nations,* developed in the shadow of World War II*,* opens with the words 'we the peoples' and inspired concepts such as *erga omnes* (applying to all) and *jus cogens* (cannot be derogated from).[1] The United Nations defines 'a people' as a group of individual human beings who enjoy some or all of the common features of:

a) common historical traditions;
b) racial or ethnic identity
c) cultural homogeneity;
d) linguistic unity;
e) religious or ideological affinity;
f) territorial connections;
g) common economic life.[2]

The plain meaning of the term 'all peoples' includes peoples under colonial or alien subjugation, those under occupation, indigenous peoples, and other communities satisfying the criteria generally accepted for determining the existence of a people.[3] These are in one sense objective factors. Gudeleviciute maintains that '[t]he **subjective factor of self-consciousness** and the will to maintain distinctiveness on the basis of objective characteristics are also necessary'.[4]

---

[1] VIDMAR, J 'Norm conflicts and hierarchy in international law: towards a vertical international legal system', Ch. 2 in De WET, E, VIDMAR, J eds. *Hierarchy in international law: the place of human rights.* Oxford University Press, 2012, pp. 4-5.

[2] United Nations Educational, Scientific and Cultural Organisation. International meeting of experts on further study of the concept of the rights of peoples, UNESCO, Paris, 27-30 November 1989. Final Report and Recommendations. SHS-89/CONF. 602/7, Paris, 22 February 1990, p. 7-8.

[3] VAN WAALT VAN PRAAG, MC, SEROO, O eds *The implementation of the right to self-determination as a contribution to conflict prevention* Report of International Conference of Experts in Barcelona, 21-27 November 1998. Barcelona, Centre de Catalunya, 1999, p. 11.

[4] GUDELEVICIUTE, V *Does the principle of self-determination prevail over the principle of territorial integrity?* International Journal of Baltic Law, vol. 2, no. 2, April 2005, note 20, p. 53.

'A people' under present international law is defined as the:

a) entire population of an independent state;
b) entire population of a Non-Self-Governing Territory;
c) entire population of a territory living under foreign military occupation;
d) an entire unrepresented/oppressed part of a population of a particular territorial unit.

The primary connection between peoples and territory means that a claim to external self-determination covers a claim to territory. Secession is a territorial change where part of an independent state or Non-Self-Governing Territory separates itself to become a new independent state.[5]

According to the International Court of Justice, the United Nations General Assembly cannot make international customary law, but a unanimously adopted resolution expresses the *opinio juris communis* (customary international law) and if it relates to state practice (*usus*) it normally qualifies as customary law.[6] Thus, while UNGA resolutions are not, **of themselves**, *opinio juris communis*, they nevertheless formed international customary rules about the external self-determination of colonial peoples and peoples under foreign military occupation.

Human Rights and Peoples Rights

Human Rights and Peoples Rights are two distinct concepts even though they are both aspects of the international rights debate and affect individual human beings. The two concepts should not be confused, for even though they are complementary, each has its own history and legal sources. A full enjoyment of individual human rights is not possible if the people, of whom the individual is one, is denied the right to existence, economic development, self-

[5] GUDELEVICIUTE, V *Does the principle of self-determination prevail over the principle of territorial integrity?* International Journal of Baltic Law, vol. 2, no. 2, April 2005, p. 54.
[6] GUDELEVICIUTE, V 2005, p. 55.

determination, cultural identity and so on. Similarly the attainment of people's rights, for example, to self-determination, requires for its fulfilment freedom of expression and the exercise of other individual human rights.[7]

Territory and Peoples and Self-Determination

In this section, we consider the rights of peoples in international law in contrast to territorial claims by third States during decolonization. This is necessary because modern international law supported by eminent publicists (people learned in international law) has in recent times widened the meaning of territory and territorial sovereignty to include their essential links with people. For instance, in 1975, the International Court of Justice was asked to address the question of legal ties between Western Sahara and the Kingdom of Morocco and the Mauritanian entity.[8] The judges, in their advisory opinion remarked that such legal ties could not have been 'limited to ties established directly with the territory and without reference to the people who may be found in it' and 'legal ties are normally established in relation to people'.[9] In his declaration in the same case Judge Nagendra Singh said that

> [t]he consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method ...is integration or association or independence...thus even if integration of a territory was demanded by an interested State...it could not be had without ascertaining the freely expressed will of the people-the very *sine qua non* of all decolonization.[10]

Shaw points out that following decolonization, States have rights and guarantees including Article 2 (4) of the Charter that prohibits the use of force

---

[7] United Nations Educational, Scientific and Cultural Organisation. International meeting of experts on further study of the concept of the rights of peoples, UNESCO, Paris 27-30 November 1989. Final Report and Recommendations, SHS-89/CONF, 602/7, Paris, 22 February 1990, p. 5.

[8] Morocco and Mauritania were claiming sovereignty over Western Sahara, with Morocco refusing to accept any referendum where the outcome for the Sahrawis people was independence.

[9] Western Sahara, Advisory Opinion, I.C.J. Reports, 1975, p. 41, par. 85; SHARMA, SP *Territorial acquisition, disputes and international law*, The Hague, Martinus Nijhoff, 1997, p. 4.

[10] LALONDE, S 2002, p.155; Western Sahara, Declaration of Judge Nagendra Singh, I.C.J. Reports, 16 October 1975, pp. 12, 81.

against the territorial integrity of the newly formed State. Before the completion of the decolonization process, however, the right of self-determination cannot be derogated from on the basis of the need to preserve the territorial integrity of the metropolitan State.[11] Judge Dillard, in his Separate Opinion in the Western Sahara case stated that:

> [i]t seems hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes...it is for the people to determine the destiny of the territory and not the territory the destiny of the people.[12]

In an ICJ case concerning the Philippines' claim of historic title over North Borneo, Judge Franck in a separate opinion stated that:

> [t]he point of law is quite simple but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot-except in the most extraordinary circumstances-prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of *bona fide* self-determination.[13]

James Crawford maintains that '(a)nother State may well be **interested in the result of an act of self-determination**, in that it may stand to gain or regain territory. But to treat self-determination as a right of that State would be to deny the reality of the alternative options open to the people concerned'.[14]

---

[11] SHAW, M *International law,* 5th ed, Cambridge University Press, 2003. p. 391.
[12] Western Sahara, I.C.J. Reports, 1975, p.12, 116, 122 (16 October) (Separate Opinion of Judge Dillard).
[13] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia). Application for permission by the Philippines to intervene, I.C.J. Reports, 2001, p. 575, 652, par. 2 (Separate Opinion, Ad hoc Judge Franck).
[14] CRAWFORD, J *The creation of States in international law,* 2nd ed, Oxford University Press, 2006, pp. 617- 618. (Emphasis added).

CHAPTER 6: WEST PAPUA AND INDONESIA

This chapter looks at competing arguments regarding the future of West New Guinea and arguments put forward by Indonesia, the Kingdom of the Netherlands and Australia. The role of the principle of uti possidetis is examined in the light of the opinions of eminent jurists.

As far as Sukarno was concerned the Republic of Indonesia was the legal successor of all territories of the Netherlands East Indies including West New Guinea, and 'West Irian' had been part of Indonesia since the declaration of independence on 17 August 1945. He maintained the people of West Irian had been an integral part of a national movement and together with the other peoples of Indonesia had won their independence in 1949. The so-called political immaturity of the Irians was irrelevant as they saw self-determination as internal rather than external. External self-development equalled independence for the peoples of West Irian and this the Indonesians would not tolerate. Indonesia's agreement with the Netherlands, signed at the UN in 1962, gave the people of West Irian two choices: to stay with Indonesia or to separate. Other clauses contained in the Agreement, based on Chapter XI of the UN Charter were considered to be 'of a purely face-saving character'.[1] The Indonesian government saw all the peoples of the archipelago as different from the Dutch, racially, culturally, linguistically and geographically, but not from each other. That Indonesian people did have their aspirations, or might object to their government's was not given weight.[2]

[1] RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice*. Leiden, Sijthoff, 1973, p. 232.
[2] RIGO SUREDA, A 1973, p. 231.

West New Guinea had been withheld by the Netherlands from the transfer of sovereignty to Indonesia in December 1949, and was listed with the UN as a Non-Self-Governing Territory in 1950.[3] Article 2 of the Charter of Transfer of Sovereignty to Indonesia reads:

> The *status quo* of the Residency of New Guinea shall be maintained with the stipulation that with 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 New Guinea be determined by negotiation between Indonesia and the Netherlands.[4]

During the three-month conference in The Hague that culminated in the transfer of sovereignty, there had been controversy over the term *status quo.* Indonesia argued that *status quo* did not mean 'sovereignty', but that 'territorial integrity' meant Indonesian sovereignty over all the territories of the Netherlands East Indies, an entity for more than three centuries that had always included West Irian. Indonesia also claimed that the Netherlands had no right 'to fix the boundaries of a territorial unit', but then agreed that the Netherlands was competent to fix boundaries. Delegates to the United Nations First Committee in 1954 asked 'so when did this competence cease to exist.[5]

West New Guinea and the United Nations First Committee, 1957

The question of West New Guinea was referred to the twelfth session of the United Nations General Assembly in 1957, and was considered by the First Committee at eight meetings between 20 and 26 November 1957.[6] The draft resolution submitted by nineteen members asked the Assembly to find a solution to the dispute that conformed with the principles of the United

[3] In December 1950, the General Assembly agreed, in UNGA Res. 448 (V), that the Netherlands in West New Guinea was still subject to Article 73 (Ch XI) obligations.
[4] Charter of the transfer of sovereignty over Indonesia, The Hague, 2 November 1949.
[5] RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Nijhoff, 1973, p. 145-146.
[6] The status of West New Guinea was discussed at the 9th (1954), 10th (1955), and 11th (1956) sessions of the General Assembly by the First Committee which deals with disarmament, global challenges, and threats to peace (Par. 844, http://legal.un.org/repertory/art73/english/rep_supp3_vol3-art73_e.pdf).

Nations Charter. Indonesia and the Netherlands clearly stated their positions.[7] The following is a slightly edited version of the UN Yearbook summary of submissions by Indonesia, Netherlands and Australia.[8]

Indonesian Representative

The Indonesian representative claimed that his country was 'fighting for reunification and national unity' but that 'certain powers were invoking the principle of 'self-determination' to prevent a peaceful settlement … conducting a movement exactly in reverse of the principle of reunification and national unity with respect to West Irian'.[9] He further stated that Indonesia was in a position to promote the educational and social advancement of the population, but should the Netherlands persist in its present position Indonesia would have to concentrate on its physical defences.[10] He also complained about the Joint Statement of the Netherlands and Australia of 6 November 1957 regarding their future policies in West Irian and East New Guinea, fearing they might form a military alliance against Indonesia.

Rigo Sureda was of the opinion that 'Indonesia showed from the beginning a completely different understanding of what self-determination meant'. At an earlier First Committee meeting the Indonesian delegate claimed 'the Netherlands was treating West Irian as a colony, but when it was reunited with

[7] CASSESE, A *Self-determination of peoples—a legal reappraisal* Cambridge University Press, 1995, p. 82.
[8] UN Yearbook 1957 Part 1: The United Nations: Section 1: Political and Security Questions, Chapter 8: The Question of West Irian (West New Guinea) [http://cdn.un.org/unyearbook/yun/chapter_pdf/1957YUN/1957_P1_SEC1_CH8.pdf].
[9] Earlier ideas were that the nation should be perceived as viable and thus it was deemed necessary that the nation should look towards unification and expansion. This idea, called the 'threshold principle', was abandoned in the second phase of nationalism between 1880 and 1914 (TRBOVICH, AS *A legal geography of Yugoslavia's disintegration*, New York, Oxford University Press, 2008, p. 7).
[10] UN Yearbook 1957, p. 77. [http://cdn.un.org/unyearbook/yun/chapter_pdf/1957YUN/1957_P1_SEC1_CH8.pdf].

the rest of Indonesia "it would take its place as one of the territories of Indonesia with the greatest possible autonomy"'.[11]

Netherlands Representative

The Netherlands representative explained that his country was fulfilling its obligations under the Charter's Article 73 and has assured the people of West Irian that they would be able to decide their own political future. Furthermore: The Agreement on Transnational Measures signed by Indonesia and the Netherlands at the Round Table Conference of 1949 had established the right of territories to exercise self-determination with regard to their position within the Federal Republic of Indonesia and with regard to the possibility of negotiating a special relationship outside the Republic. In 1950 the Republic of the United States of Indonesia had been replaced by the unitary state in which there was no place for any federal states or territories, or special relationships with Indonesia or the Netherlands. In 1956 Indonesia had abrogated the Round Table Agreement.

The Netherlands representative further stated that Indonesia was not really advocating negotiations with the Netherlands so as to reach a solution by common consent that would take into account the wishes of the territory's inhabitants. On the contrary it was urging the General Assembly to advocate negotiation on the basis of two assumptions: (1) that the Netherlands New Guinea was legally part of Indonesia and (2) that the territory should be transferred to Indonesia without its population being previously consulted. The Netherlands, he said, was willing to have the first assumption tested by the International Court of Justice. The second assumption was a denial of the right of self-determination and thus contrary to the United Nations Charter. There were indications that the Indonesian government was trying to create a threat to international peace when it was clear that West New Guinea posed no such

[11] UNGA Official Records, 9th session, First Committee, 726th meeting, par. 50, cited in RIGO SUREDA A *Evolution of the right of self-determination: a study of United Nations practice* Nijhoff, 1973, p. 230.

threat. Outrages had been committed against Netherlands nationals in Indonesia and the Indonesian president had indicated that Indonesia would resort to methods that would *startle the world* if the United Nations did not comply with his government's wishes. The Netherlands representative explained that the joint Australia-Netherlands statement of 6 November 1957 clarified the aims and principles of the co-operation of the two authorities administering the area. It did not prejudice the decision which the inhabitants would eventually have to make for themselves. It recognised their ethnological and geological affinity and opened up possibilities for their future development along sound lines for their existence in the modern world.[12]

Australian Representative

The Australian representative regretted that the Indonesian government had brought this question before the Assembly just eight months after the Assembly had rejected a draft resolution advocating the Indonesian claim that there was a case for negotiations over Western New Guinea. The Netherlands government, he felt, was attacking the task of promoting the territory's development with determination and in accordance with the principles and policies set forth in Chapter XI of the Charter. It was abiding by its obligation under Article 73 but these obligations would cease to exist if the territory became part of the Republic of Indonesia, since the latter would then be in a position to reject any claim by the United Nations for information on conditions in West New Guinea. He also emphasized that the Australia-Netherlands statement of 6 November 1957 was fully consistent with the terms of Chapter XI of the Charter and was a solemn undertaking by the two governments that their policies were such as to prepare the people of New Guinea for a time when they would be able to determine their own future. Their statements had no military implications. He stated that Indonesia's claim

[12] UN Yearbook 1957 Part 1: The United Nations: Section 1: Political and Security Questions, Chapter 8: The Question of West Irian (West New Guinea), p. 77-78. [http://cdn.un.org/unyearbook/yun/chapter_pdf/1957YUN/1957_P1_SEC1_CH8.pdf].

for negotiations was purely political since it had refused to submit its case to the International Court of Justice and had unilaterally abrogated the very Agreements it sought to invoke. In Australia's view adopting the draft would mean that the UN was implicitly supporting a unilateral claim of one Member State to some of the territory of another Member State.[13]

Australia and West Papua, 1950—1962

Australia had long regarded the importance of New Guinea in terms of security, and even more so after the 1942 attack by Japan on Darwin had come via the Dutch East Indies. In 1943 Herbert Vere Evatt, as Minister for Internal Affairs in the Chifley Labor government, had stated 'Australia was entitled to be vitally concerned as to who shall live in, develop and control theses areas so vital to her security from aggression'.[14] Thus Evatt supported the Dutch position on security grounds. Officials of the Department of External Affairs Pacific Division also saw the area's strategic importance, but also argued that the inhabitants of West New Guinea were ethnically distinct and their interests would be better served under a trusteeship agreement.

Two significant shifts during the 1950's changed the support by Australia and other countries for the Netherlands position. One was the increasing number of decolonised countries becoming members of the United Nations and as the 'Afro-Asian bloc' putting pressure on countries like the Netherlands and Australia that were still administering colonies. The other change was the rise of the Communist Party in Indonesia and consequent upgrading of American interest. Australia hoped that the Dutch would continue to hang on to West New Guinea, but in November 1961 the Netherlands presented the Luns Plan to the General Assembly, whereby it would withdraw from the territory and a

[13] UN Yearbook 1957, pp. 78-79.
[14] EVATT, HV Address to the Overseas Club, New York, 28 April 1943, In EVATT, HV *Foreign policy of Australia:* speeches, Sydney, Angus & Robertson, 1945, p. 166; Cited in COTTON J and LEE D eds *Australia and the United Nations* Australia, Department of Foreign Affairs and Trade, 2012, p. 37.

'member-state study commission' (but not Indonesia) under UN supervision would be set up. The plan failed to obtain a majority vote, and three weeks later, on 19 December 1961, Sukarno called for the total mobilization of the Indonesian people to liberate West New Guinea.

Garfield Barwick, Minister for External Affairs (also Attorney-General, and Australia's Representative at the United Nations) advised Prime Minister Menzies that since neither the United States nor the United Kingdom would militarily intervene on behalf of the Netherlands, Australia would be wise to rethink her position. By early 1962 Barwick had convinced his cabinet colleagues that it was not in Australia's interests to support the Dutch promise of self-determination for West Papuans. He believed that an independent West Papua was not compatible with Australia's 'strategic imperative to develop close co-operative relations with a preferably non-communist Indonesia'.[15]

In August 1962 the Netherlands agreed to the transfer of West New Guinea to the United Nations, which would pass the administration to Indonesia in May 1963 on the condition that a plebiscite would be held under United Nations auspices. The Australian Labor Party criticised the Agreement as having been reached through 'power blocs and log-rolling campaigns by international parties'. Menzies conceded the point, further protesting that the United Nations had failed to uphold the right of self-determination for the West Papuans. 'We desire a peaceful settlement, that Australia is not a party principal [a Party not directly involved], and that we will respect an agreement made freely and not under threat of war …. but above all things, we stand for the principle of self-determination for the future of the Papuan people'.[16] These views, he added, 'have been stated by us here, in the press and in the

[15] CHAUVEL, R *Fifty years on, Australia's Papua policy is still failing* Inside Story, 27 September 2012.
[16] MENZIES, R Speech to House of Representatives, 29 March 1962, reproduced in MEANEY N *Australia and the world: a documentary history from the 1870's to the 1970's* Longman Cheshire, 1985. Also in Jordan M 'Decolonisation' in COTTON J and LEE D eds 'Australia and the United Nations,' Australia, Department of Foreign Affairs and Trade, 2012, pp. 118.

United Nations … They have been debated around the world …. This idea of transferring your burden to the United Nations is no policy at all'. 'However' he continued 'it comes down to 'peace or war in this part of the world' and 'where Great Britain or the United States stand is of vital moment to this country'. Thus, Australia realizing that the United States would not aid the Netherlands or Australia if Indonesia invaded West New Guinea, declared:

> '... it would be impossible to ally itself with the Netherlands without the cooperation of the USA and Britain'.[17]

Competing interpretations of self-determination for West Papua

Indonesia added further weight to its claim that West New Guinea was part of Indonesia by reference to the legal principle of *uti possidetis*.[18] Anti-colonial states in the United Nations were strongly attached to the doctrine of *uti possidetis* and Indonesia argued that if the Netherlands granted West New Guinea independence it would be an act of separatism against the Indonesian state.[19] *Uti possidetis* is not a customary norm of international law, but a principle that has not demonstrated the generality requirement that firstly, practice must reflect the rule and secondly, that States must follow the rule in the belief that the rule is legally required: *the opinio juris sive necessitas*.[20] Indonesia therefore asserted that the boundaries of nascent-post-colonial countries *must* conform to their colonial boundaries and that this principle alone conferred on them the right to a title to a particular territory. In regard to the subject of boundary change by the Netherlands Rigo Sureda concluded:

---

[17] PENDERS, CLM *The West New Guinea debacle: Dutch decolonisation and Indonesia 1945-1962* Adelaide, Crawford House, 2002, p. 325.

[18] Permanent Mission of the Republic of Indonesia to the United Nations in New York, April 2001, PapuaPost.com

[19] SALTFORD J *The United Nations and the Indonesian takeover of West Papua 1962-1969* Routledge, 2003, p. 8.

[20] JANKOV FF, CORIC V *The legality of uti possidetis in the definition of Kosovo's legal status* 2nd ESIL Research Forum 'The power of international law in times of European integration' Budapest 28-29 September 2007, p. 7.

> First for the purpose of determining the subject of self-determination an Administering Authority can unilaterally change the territorial boundaries of a non-self-governing territory until the very moment of its independence, provided the change is not made with a view of defeating a claim by the emerging state to self-determination as a whole. Once a claim to the independence of the whole territory is made, the unilateral competency to partition the territory becomes questionable and the validity of any partition will depend upon the extent to which the partition is a recognition of the distinct claims of two separate peoples.[21]

Indonesia claimed that the Netherlands, the Administering Power over West New Guinea was treating the territory as a colony and invoking the right of self-determination to prevent a part of Indonesia from becoming independent.[22] James Crawford notes that the International Court of Justice in the *Western Sahara* case noted that the future status of a Non-Self-Governing Territory did not bear any relationship to the existing sovereignty over the territory.[23] For instance, even though the Court recognized Spain as the Administering Power Spain was not claiming sovereignty or a right of adjudication over the territory.[24] Similarly, the Netherlands saw West New Guinea as a non-self-governing entity entitled, on account of the factors listed in General Assembly Resolutions 742 (VIII) and 1541(XV), to a genuine act of self-determination, and were not claiming sovereignty over the territory.

Administering States have more freedom with respect to termination of Non-Self-Governing status than with respect to termination of Trusteeships. Article 73b, plus the fact of self-determination, limits the sovereignty of an Administering State.[25] The General Assembly has never revoked a State's administration of a Non-Self-Governing Territory. The most it has done is call upon a State to terminate such status by granting independence. Furthermore,

---

[21] RIGO SUREDA A *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Nijhoff, 1973, p. 147; UNGA Res. 742 (VIII) 27 November 1953 *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.*

[22] RIGO SUREDA A 1973, p. 231.

[23] CRAWFORD J *The creation of States in international law* 2nd ed., Oxford University Press, 2006, p. 615.

[24] Western Sahara, Advisory Opinion, I.C.J. Reports, 1975 pp. 12, 28, par. 43, (16 October).

[25] CRAWFORD J 2006, p. 614.

domestic jurisdiction is irrelevant to a trust territory. For example at no time did Australia consider that it had sovereignty over Papua and Papua New Guinea, the latter being a trust territory administered by Australia.

The Dutch considered that the difference between the peoples of the Netherlands East Indies was such that a separate claim of self-determination for West New Guinea was applicable. Rigo Sureda contends that Indonesia and the Netherlands held conflicting views of self-determination, the Netherlands arguing that there was no connection between the racially distinct Papuan inhabitants and the Indonesians except that they were both administered from Batavia, (an issue raised by the Burma delegate to the 9th session of the First Committee 733rd meeting) but that this link did not justify a territorial claim.[26] Two issues emerge here: the first revolves around the question of what is a colony, and how colonial and anti-colonial powers interpret the definition. How a territory ceases to be a colony, and at what stage of political development can a colony shed its colonial status? [27]

Indonesia's claim was based on nationality as a political concept. The Dutch view of nationality is that it is a racial, cultural concept.[28] The Netherlands saw that education of the inhabitants was necessary in order to develop a political consciousness that would ultimately lead to an act of self-determination. The Netherlands concluded that if 'West New Guinea was ceded to Indonesia it would still be a Non-Self-Governing Territory, although Indonesia would administer it as an integral part of its territory and would not transmit any information under Article 73(e) of the Charter'.[29] The Netherlands would, however, continue to transmit annual reports on its administration of Netherlands New Guinea to the Secretary General under the

[26] RIGO SUREDA A, *Evolution of the right of self-determination: a study of United Nations practice* Leiden, Nijhoff, 1973, p. 148.
[27] RIGO SUREDA A, 1973, pp. 228-229.
[28] RIGO SUREDA A, 1973, p. 149.
[29] RIGO SUREDA A, 1973, p. 229.

provision of Article 73e of the Charter, as indeed they had done since 1950, and would, at the appropriate time give the inhabitants of West New Guinea an opportunity to determine their own future. (Indonesia had, since 1953, regularly protested the submission of the Netherlands reports as illegal).[30] In order to apply Resolution 1514 (XV) the Netherlands would propose the setting up of a United Nations commission to investigate the opinion of the population as to its future and the overall development of the territory. They also proposed an international development program under the United Nations. Its proposed plebiscite included the choices of 1) Integration with Indonesia; 2) Independence; 3) Association with other parts of the island of New Guinea and other islands of the Pacific region.[31] 'The General Assembly, in approving this agreement, in effect endorsed the Indonesian concept of self-determination, what is a corollary to the acceptance of the delimitation of the subject of self-determination as put forward by Indonesia'.[32]

Indonesia's use of *uti possidetis*

It is clear from a perusal of customary international law that sovereignty is not conveyed by the principle of *uti possidetis*. *Uti possidetis* is not a binding norm of international law, and there is no legal requirement to use it.[33] Rather it is one of many mechanisms that can be used to delimit a boundary. Examples from decolonising Spanish America and boundary disputes taken to the International Court of Justice give an idea of the variety of principles evoked and permutations used to delimit borders between States, whether they be States emerging from colonisation or interstate boundaries. For example the independent countries of Guatemala, Salvador, Honduras, Nicaragua and

[30] BONE RC *The dynamics of the Western New Guinea problem* Equinox Publishing, 2009, Note 19, p. 134.
[31] RIGO SUREDA A *Evolution of the right of self-determination: a study of United Nations practice* Leiden, Nijhoff, 1973, p. 230.
[32] RIGO SUREDA A 1973, p. 232-233.
[33] RATNER, SR *Drawing a better line: uti possidetis and the borders of new states* American Journal of International Law, Vol. 90, no. 4,1996, pp. 599-600; JANKOV FF, CORIC V *The legality of uti possidetis in the definition of Kosovo's legal status* 2nd ESIL Research Forum 'The power of international law in times of European integration' Budapest, 28-29 September, 2007, pp. 9-11.

Cost Rica were, until 1821, all part of the Central American Republic under the Captaincy-General of Guatemala. In 1821, as the Central American Congress, they declared independence from Spain. However, the union was unstable, Nicaragua separated in 1838, and civil war erupted. The other states followed Nicaragua's example, and declared their independence, and in 1840 the Union folded. Another example is Kiribati and Tuvalu (Gilbert and Ellice Islands) in the Pacific, which had been a single British colony since 1916. A referendum in 1974 sought clarification as to whether the peoples—one predominately Micronesian and the other predominately Polynesian—wanted separate administrations, which resulted in both acceding to independence, as the individual countries of Kiribati and Tuvalu, in 1976.[34] An African example was the transition of the British Cameroons, a mandate territory with two administrations. At the time of decolonization the United Nations authorized a referendum to be held in both parts, which resulted in the Muslim-majority northern opting for union with neighbouring Nigeria and the southern becoming the independent state of Cameroon.

The transfer of West Papua to the Republic of Indonesia was effected through a combination of actual military force, the threat of military force and aggressive diplomacy. All this took place in spite of numerous United Nations declarations that 'all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'.[35] Sukarno, unable to secure the territory by motions in the General Assembly in 1954, 1955, 1956, 1957 and 1961, threatened to invade the territory and secure it by force. The Netherlands insisted on the principle of self-determination and Indonesia saw negotiation between the Netherlands and the Republic of Indonesia as the safest way to achieve its goal of annexation without an act of self-determination. The

[34] POMERANCE, M *Self-determination in law and practice: the new doctrine in the United Nations* Leiden, Martinus Nijhoff, 1982, p. 19.
[35] Article 2 (4) of the UN Charter; UNGA Res. 1815 (XVII); UNGA Res. 2625 (XXV) Introduction (par. 8) and articles 1(a) and 3 (a).

Netherlands offered to take the case to the International Court of Justice but Indonesia was unwilling to go down this route.[36]

[36] UN Yearbook 1957 Part 1: The United Nations: Section 1: Political and Security Questions, Chapter 8: The Question of West Irian (West New Guinea). pp. 77-78. [http://cdn.un.org/unyearbook/yun/chapter_pdf/1957YUN/1957_P1_SEC1_CH8.pdf].

CHAPTER 7: INDONESIA AND THE NETHERLANDS AGREEMENT

This chapter briefly considers events leading up to the Indonesia and Netherlands Agreement in 1962 and the subsequent role of the United Nations in the disposition of the territory to the Republic of Indonesia.

The Netherlands did not have continuous settlement in West Papua until 1897, and until 1935 were established only along the coastline. According to Rottman, the administration was part of the government of the Great East with its capital at Makassar in the Celebes (current day Sulawesi). Mainland Dutch New Guinea was divided into North, West and South Divisions with administration centres at Manokwari, Fakfak, and Merauke, the provincial capital.[1] There were expeditions into the interior searching for oil and precious metals, but no substantial social development until the 1950's when the administration began preparing the people for independence. Several regional councils were established, and in 1961 elections were held for the West New Guinea Council (*Niew Guinea Raad)*. Indigenous Papuans were elected to twenty-two of the twenty-eight seats in the *Raad.* They held rights of petition, interpellation amendment, and parliamentary immunity, and shared responsibility for framing the budget and writing legislation with the Governor and Council of departmental heads.[2] On 1 December 1961, four days after the Netherlands proposal to the United Nations didn't attract a two-thirds majority vote, the Council in Hollandia (now Jayapura) raised the Morning Star flag alongside the flag of the Kingdom of the Netherlands, the country was named West Papua (Papua Barat), and a national anthem was adopted. Nineteen days later, Sukarno announced he was invading and occupying West Papua.[3]

---

[1] ROTTMAN GL *World War II Pacific guide: a geo-military study* Westport, Conn. Greenwood Press, 2001, p. 223.
[2] PENDERS CLM *The West New Guinea debacle: Dutch colonisation and Indonesia 1945-1962* Adelaide, Crawford House, 2002, p. 391.
[3] GRUSS, D *UNTEA and West New Guinea* Yearbook of the United Nations, vol. 9, 2005 [http://www.mpil.de/files/pdf2/mpunyb_gruss_9_97_126.pdf].

Indonesia and Netherlands Agreement, 15 August 1962

The United States' Kennedy administration, motivated by fear of the Communist Party in Indonesia, and alarmed by Indonesian belligerence off the south coast of West Papua (in the Aru Seas), brokered an agreement between the Netherlands and the Republic of Indonesia. The New York Agreement between Indonesia and the Kingdom of the Netherlands was signed at the Headquarters of the United Nations on 15 August 1962.[4] Under the Agreement the Netherlands transferred the administration of this Non-Self-Governing Territory to a United Nations Temporary Executive Authority (UNTEA).

The Agreement did not transfer sovereignty of West New Guinea to Indonesia. It transferred the administration of West Papua (a Non-Self-Governing Territory registered with the UN since 1950) to a United Nations Temporary Executive Authority (UNTEA). The UN Administrator was given the discretion to transfer administration of the territory to Indonesia at any time after 1 May 1963, and the inhabitants were entitled to exercise their right to self-determination at any time before 1969. Article 1 of The Agreement required the two parties to raise a pre-prepared joint motion in the General Assembly that noted the Agreement, acknowledged the role of the Secretary-General, and authorized him to carry out the tasks entrusted to him. The draft-motion passed as UNGA Resolution 1752 (XVII) on 21 September 1962.[5]

The Agreement between Indonesia and The Netherlands was brought on by Sukarno's intransigent and militaristically aggressive stance and the involvement of the United States—despite West Papua's status as a Non-Self-Governing Territory, and the facts that it was not geologically, geographically,

[4] UN Yearbook 1962, Political questions: Chapter IX: Concerning Asia and the Far East: The question of West New Guinea, pp. 124-128. [http://cdn.un.org/unyearbook/yun/chapter_pdf/1962YUN/1962_P1_SEC1_CH9.pdf].

[5] United Nations General Resolution 1752 (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian).

ecologically or ethnographically part of South East Asia. Furthermore, the indigenous Melanesian inhabitants were not consulted, even though many had said they did not wish to be part of the Republic of Indonesia.[6]

Article XVIII of the Indonesia and Netherlands Agreement stipulated that:

> Indonesia will make arrangements, with the assistance and participation of the United Nations Representative and his staff, to give the people of the territory the opportunity to exercise freedom of choice. Such arrangements will include:
>
> (a) Consultations (*musjawarah)* with the representative councils on procedures and appropriate methods for ascertaining the freely expressed will of the people;
>
> (b) The determination of the actual date of the exercise of free choice within the period established by the present Agreement.
>
> (c) Formulation of the questions in such a way as to permit the inhabitants to decide (a) whether they wish to remain with Indonesia or (b) sever their ties with Indonesia'.

The arrangements would also include, according to Section (d), Article XVIII:

> [t]he 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, who are resident at the time of the signing of the present agreement and at the time of the act of self-determination, including those residents who departed after 1945 and who return to the territory to resume residence after the termination of Netherlands administration.[7]

United Nations Temporary Executive Authority, 1 Oct 1962-1 May 1963

Paul van der Veur cites an example of irregular practice by UNTEA officials. Three members of the regional council *dafonsoro* of the Kota Baru area requested an interview with UN Under Secretary-General Narasimhan during

[6] DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua* Oxford, Oneworld Publications, 2009, pp. 721-724.

[7] Indonesia and Netherlands Agreement, UN Headquarters, New York, 15 August 1962. [http://peacemaker.un.org/sites/peacemaker.un.org/files/ID%20NL_620815_AgreementConcerningWestNewGuinea.pdf].

his visit to West Irian in February 1963. This request was made through Benedictus Sarwom, the Papuan chief of the information section, who relayed it to the local UNTEA representative Aly Khalil. Khalil discussed the matter with his (Indonesian) deputy. The next evening an Indonesian intelligence officer visited Sarwom and informed him that a discussion about the status of West Irian was now 'an internal matter which should not be discussed with foreigners' and 'the request by the three regional councillors was very unwise and there could be repercussions after 1 May 1963. The three members of the regional council's executive committee did not receive an official response to their request and did not meet the United Nations representative'.[8]

Act of Free Choice, 14 July—2 August 1969

Article XVIII of the Indonesia and Netherlands Agreement deals with the formal self-determination process. It stipulated 'the eligibility of all adults, male and female, not foreign nations, to participate in the act of self-determination to be carried out in accordance with international practice'. However, the Act of Free Choice in 1969 involved voting by 'enlarged' regional councils, amounting to 1,026 coerced and terrified elders voting—in eight different locations over a period of nineteen days—to became part of Indonesia. The United Nations Representative, Fernando Ortiz Sanz, had pointed out that the internationally recognised 'one man one vote' formula could be used in urban areas where the comparatively advanced cultural level of the population and the availability of administrative support would make this method satisfactory. The Indonesian authorities would not accept this, and insisted on using the *musjawarah* (consultation) system whereby 1,026 individuals voted for the entire population.[9] Voting took place between 14 July and 2 August 1969, each voting centre under tight military control.

[8] VAN DER VEUR P *The United Nations in West Irian: a critique* International Organization, vol. 18, no. 1, Winter, 1964, p. 70.

[9] Report of the UN Secretary General concerning the Act of Self-Determination in West Irian, 24th General Assembly, Agenda item 98, UN Declaration 7723, 6 November 1969, 29-30 (paras 82, 84-85).

The UN Representative recorded that 'I have to express my reservation regarding the implementation of Article XXIII of the Agreement relating to the rights including the rights of free speech, freedom of movement and of assembly of the inhabitants of the area'. In New York on 19 November 1969, the General Assembly noted the Secretary-General's Report and concluded the Indonesia and Netherlands Agreement (UNGA Resolution 2504).[10]

Eye Witness Accounts of the Act of Free Choice

Reliable reports placed the numbers held in custody as in the tens of thousands; soldiers were seen everywhere with rifles at the ready, journalists had their freedom of movement curtailed; those chosen to vote were assembled in barracks and not allowed contact with the outside world and forced to learn previously prepared texts by heart in which they would declare their allegiance to Indonesia. Pulitzer prize-winning journalist Peter R. Kann of the *Wall Street Journal* wrote how Lt-Col Sarwo Edhie told everyone that Papuans who chose their freedom from Indonesia 'would have to face 115 million Indonesians'. The reporter also noted that the United Nations building in Jayapura was constantly guarded in order to prevent ordinary Papuans from speaking with those within. Foreign visitors who managed to evade the all-pervasive security guards were instantly surrounded by Papuans whispering the word 'merdeka' or the word 'Indonesia' with thumbs pointed down.[11]

[10] CASSESE A *Self-determination of peoples—a legal reappraisal*, Cambridge University Press, 1995, p. 85; United Nations General Assembly A/7725 24th agenda item 98, 6 November 1969, Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian). Report of the Secretary General regarding the act of self-determination in West Irian, and Report by UN Secretary-General Representative Ortiz Sanz, and Report of the Indonesian Government at http://papuaweb.org/dlib/pbb/unga-1969-pepera.PDF

[11] KANN P *A world apart* Wall Street Journal, 12 August 1969. Cited in DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua* Oxford, Oneworld Publications, 2009, p. 723; Kann commented that if West New Guinea went to Indonesia it would become another Biafra, or perhaps another Congo. Wall Street Journal Index, 1969.

CHAPTER 8: GROSS DISREGARD FOR SELF-DETERMINATION IN THE AGREEMENT BETWEEN INDONESIA AND THE NETHERLANDS

This chapter looks at various expressions of disquiet about the conduct of the Act of Free Choice, expressing the views of international lawyers as well as the views of The Special Representative of the Secretary General

The following is the text of the draft resolution jointly presented to the General Assembly by Indonesia and the Netherlands on 21 September 1962, as required of them in Article 1 of the Indonesia and Netherlands Agreement signed on 15 August 1962. The General Assembly members were given no time to study the resolution, or the agreement, or seek legal advice before voting. Nevertheless, they voted in favour of the resolution. Following the vote some States expressed their dismay including Dahomey and Togo.

Resolution 1752 (XVII) 21 September 1962

The General Assembly,

Considering that the government of Indonesia and the Netherlands have resolved their dispute concerning West New Guinea (West Irian),

Noting with appreciation the successful efforts of the Acting Secretary General to bring about this peaceful settlement,

Having taken cognizance of the Agreement between Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)

1. *Takes note* of the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands;

2. *Acknowledges* the role conferred upon the Secretary General in the Agreement;

3. *Authorises* the Secretary General to carry out the tasks entrusted to him in the Agreement.

1127th plenary meeting
21 September 1962

Right from the earliest days of the United Nations there appears to be a denial of the fact that West New Guinea was a Non-Self-Governing Territory under Chapter XI of the Charter. The Agreement of 15 August, 1962 contained no clause concerning the obligation under Article 73(e) of the Charter that requires the Administering Authority to transmit regular reports to the Secretary-General 'relating to economic, social and educational conditions' in the territory for which they are responsible. These reports inform the Secretary-General of the progress that a Non-Self-Governing Territory is making towards the eventual outcome of independence. The Netherlands had submitted reports regarding the progress of West New Guinea since 1950.

Resolution 915 (X) 16 December 1955 *The question of West Irian (West New Guinea)* makes no reference to the territory as a Non-Self-Governing Territory:

The General Assembly

Having considered the item on the agenda of its tenth session entitled "The question of West Irian (West New Guinea)",

Hoping that the problem will be peacefully resolved,

Noting the joint statement issued by the governments of Indonesia and the Netherlands on 7 December 1955

Expresses the hope that the negotiations referred to in the said joint statement will be fruitful.

559th plenary meeting,
16 December 1955

It is useful to compare the above **UNGA Resolution 915 (X)** with **Resolution 747 (VIII)** *Cessation of the transmission of information under Article 73(e) of the Charter in respect of the Netherlands Antilles and Surinam* (27 November 1953). Antilles and Surinam were also Netherlands colonies, in the process of changing status during the same decade, but the documentation relating to their case is of a completely different quality.

Resolution 747 (VIII) 27 November 1953

The General Assembly,

Recalling that in its resolution 648 (VII) of 20 December 1952, it invited the Committee set up to study the 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 to examine carefully the documents submitted by the Netherlands government relating to the Netherlands Antilles and Surinam in the light of resolution 648 (VII),

Having received and considered the report of the *Ad Hoc* Committee on Factors (Non-Self-Governing Territories) established by Resolution 648 (VII)

1. *Notes with satisfaction* the progress made by the Netherlands Antilles and Surinam towards self-government;

2. *Considers* that the new status of the Netherlands Antilles and Surinam can only be rightly appraised after the said negotiations have led to a final result and this has been embodied in constitutional provisions;

3. *Expresses* to the Netherlands government its confidence, that as a result of negotiations, a new status will be attained by the Netherlands Antilles and Surinam representing a full measure of self-government in fulfilment of the objectives set forth in Chapter XI of the Charter;

4. *Invites* the Government of the Netherlands to communicate to the Secretary-General the result of these negotiations as well as the provisions mentioned in paragraph 2 above;

5. *Invites* the Committee on Information from Non-Self-Governing Territories to examine these communications in connexion with the information already transmitted and to report thereon to the General Assembly;

6. *Requests* the Government of the Netherlands to transmit regularly to the Secretary-General the information specified in Article 73 e of the Charter in regard to the Netherlands Antilles and Surinam until such time as the General Assembly takes a decision that the transmission of information in regard to these Territories should be discontinued.

459 plenary meeting
27 November 1953

Note the mention in this resolution of: Chapter XI of the United Nations Charter, the Ad Hoc Committee on Non-Self-Governing Territories, Resolution 648 (VII) 1952 as precursor to UNGA Resolutions 742 (VIII) and ultimately 1541 (XV) 1960. Note also that the resolution invites the Netherlands to communicate with the Secretary-General and the Committee on Information from Non-Self-Governing Territories to examine past and present communications. Note that Antilles and Surinam attained full independence on 25 November 1975.

Irregularities noted by eminent international lawyers

Antonio Cassese and Andres Rigo Sureda have highlighted the irregularities within the transfer of the administration of West New Guinea to the United Nations and then Indonesia. Cassese looked at the United Nations record of implementing self-determination in terms of its own standards, and considered the record impressive.[1] Apart from certain cases where independence was **not** achieved by an exercise of self-determination, he observed 'approximately a dozen 'situations' still outstanding and one case, that of East Timor (annexed by Indonesia in 1975) which was settled with total disregard for UN pronouncements and without UN approval'.[2] In **three** cases he noted a '**gross** disregard for' and 'substantial denial of' the principle of self-determination:

i) The Indian annexation of the Portuguese enclaves within Goa, Damao and Diu in 1961.
ii) The integration of West Irian into Indonesia in 1969.
iii) The occupation and subsequent annexation of East Timor by Indonesia in 1975.[3]

[1] CASSESE A *Self-determination of peoples—a legal reappraisal* Cambridge University Press, 1999, p. 74.
[2] CASSESE A, 1999, p. 75-76.
[3] CASSESE, A 1999, p. 79.

In the case of West New Guinea, Cassese describes the main irregularities as:

1. **'**The choice for the people provided for in the bilateral agreement of 1962 was limited to whether they 'wished to remain with Indonesia' or 'wished to sever their ties with Indonesia', with no reference to possible alternatives if the vote was in favour of leaving Indonesia;

2. The criteria for establishing if a territory is no longer a Non-Self-Governing Territory, as listed in General Assembly Resolutions 742 (VIII) and 1541 (XV), was not met in the 1962 agreement between Indonesia and The Netherlands.

3. The method used for voting in the 'act of free choice' did not meet the international standards of one-person-one-vote stipulated in the 1962 Indonesia and Netherlands Agreement or UNGA Resolution 1752 (XVII).

4. There was **'**no real and direct consultation of the population'. The 'consultation' was indirect, in that Regional Councils (enlarged by three classes of representatives: regional, organizational, and tribal) were called upon to decide which option to accept.

5. By reason of insufficient United Nations personnel (due to budget cuts by the Netherlands and Indonesia and to the inability of the Indonesian authorities to provide the UN mission with adequate housing) there was insufficient supervision of the elections for the consultative assemblies.

6. The Indonesian authorities put strong pressure on the people of West Irian to support integration with Indonesia.

Cassese stated that:

> [t]he critical comments that have been made concerning this pseudo-choice—which, as shown above, actually proved to be a charade and a substantive betrayal of the principle of self-determination—by such authors as Pomerance and Franck are fully justified as are the views put forward by the Dutch delegate to the General

> Assembly in 1962, which were rightly referred to by Franck as 'an eloquent epitaph to self-determination'.[4]

According to Rigo Sureda:

> [a]fter the Agreement of 1962 was concluded the General Assembly approved it without any reference to the fact that West Irian was a Non-Self-Governing Territory; it is suggested that while before the signature of the said agreement the General Assembly may have been reluctant to take any action because of doubts about its competence, the failure of the General Assembly to determine whether West Irian was a Non-Self-Governing Territory or not after the settlement of the territorial claim can be interpreted as an implicit acceptance of the Indonesian view that the territory was part of Indonesia.
>
> Indeed, since the Agreement between Indonesia and the Netherlands was not in accord with the factors listed by the General Assembly in Resolutions 742 (VIII) and 1541 (XV) as indicative of a territory ceasing to be Non-Self-Governing, the attitude taken by the General Assembly can be taken to mean that West Irian was regarded already as 'an integral' part of Indonesia and therefore there was no need for it to go through the process indicated by the General Assembly to achieve self-determination.[5]

When the conclusion of the 1962 Agreement (the 'act of free choice') came to the vote before the General Assembly in 1969, 'many African and Central American States were profoundly distressed by the spurious, non-democratic methods used to ascertain the wishes of the Papuan population and strove, in vain, to secure for that population a future right of final and genuine self-determination ....'.[6] The Indian representative stated 'the method is appropriate for the "special circumstances" of West Irian and cannot, under any circumstances be considered a precedent for the process of the right of self-determination under completely different conditions in territories still under

[4] CASSESE A *Self-determination of peoples—a legal reappraisal* Cambridge University Press, 1995, p.86.
[5] RIGO SUREDA, A *The evolution of the right of self-determination: a study of United Nations practice*, Leiden, Sijthoff, 1973, p. 151.
[6] POMERANCE, M *Self-determination in law and practice: the new doctrine in the United Nations* Netherlands, Martinus Nijhoff, 1982, p. 33.

colonial domination'.[7] Mishla Pomerance notes 'that the "special circumstances" were the preference for Indonesia's "territorial integrity" claim over any separate right the Papuans might have to self-determination'.[8] In fact some General Assembly members declared 'the issue before the Assembly was not one of self-determination, but of the affirmation of the national unity and territorial integrity of the Republic of Indonesia'.[9] In the last analysis, it was the 'favoring of the claim of the Indonesian "self" which rendered the method– any method– acceptable, or indeed irrelevant. Once more, the integral link between methods of self-determination and the identification of the "self" became manifest'.[10]

There were other irregularities in the 1962 Agreement between Indonesia and The Netherlands. West Papua was a Non-Self-Governing Territory and its inhabitants were classified as 'a people', therefore self-determination applied to them separately from the remainder of the Netherlands East Indies. However, citing Principle 6 of General Assembly Resolution 1514 (XV), Indonesia claimed that it was 'reintegrating' West New Guinea. Principle 6 states that '[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the United Nations.' The purpose of the principles is to protect a country's national unity and territorial integrity. But in this case to which State or territory was the protection owed? Since West New Guinea was a Non-Self-Governing Territory, the principle applied to West Papua's national unity and territorial integrity, not Indonesia's.[11] This being so, the

[7] JORDAN, M 'Decolonisation' In COTTON, J and LEE, D (eds) *Australia and the United Nations,* Barton, ACT, Department of Foreign Affairs and Trade, 2012, p. 114.
[8] POMERANCE, M *Self-determination in law and practice: the new doctrine in the United Nations* Netherlands, Martinus Nijhoff, 1982, p. 33.
[9] United Nations Yearbook 1969, Questions relating to Asia and the Far East, Questions concerning West New Guinea (West Irian) pp. 175-179. [http://cdn.un.org/unyearbook/yun/chapter_pdf/1969YUN/1969_P1_SEC1_CH8.pdf].
[10] POMERANCE, M 1982, p. 33-34.
[11] MUSGRAVE, T 'An analysis of the 1969 Act of Free Choice in West Papua' In CHINKIN C, BACTENS F *Sovereignty, Statehood and State responsibility: essays in honour of James Crawford* Cambridge University Press, 2015, Chapter 12 [unpaginated].

question then for West Papuans in Article XVIII (c) of the Agreement should not have been did they wish to *remain* with Indonesia or *sever* their ties with Indonesia, but whether they wanted to integrate with Indonesia.[12]

General Assembly resolution 1514 (XV), the Colonial Declaration, speaks of self-determination with independence the ultimate conclusion. Paragraph 3 states that 'unpreparedness should never be a pretext for denying independence'. The issue of integration as a choice is elaborated in UNGA resolution 1541 (XV), and unlike resolution 1514 (XV), whose ultimate aim is independence, resolution 1541 (XV) requires quite stringent conditions to be met. These conditions are quite different from paragraph 3 of resolution 1514 (XV) as this resolution applies only to the attainment of independence.

Resolution 1541 (XV), Principle IX (a) states: 'the integrating territory should have attained an advanced stage of self-government with free political institutions so that its peoples would have the capacity to make a responsible choice through informed and democratic processes'. Principle IX (b) requires integration 'to 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'. Principle VIII requires integration to occur only 'on the basis of complete equality'. Musgrave concludes that the conditions set out in Resolution 1541 (XV) 'were egregiously violated by Indonesia'; and that the act of self-determination should not have taken place when it did as the people had not 'attained an advanced stage of self-government with free political institutions'.[13]

[12] MUSGRAVE, T 'An analysis of the 1969 Act of Free Choice in West Papua', In CHINKIN, C, BAETENS, F *Sovereignty, statehood and state responsibility: essays in honour of James Crawford.* Cambridge University Press, 2015, Chapter 12 [unpaginated].
[13] MUSGRAVE, T 2015, Chapter 12 [unpaginated].

CHAPTER 9: UNITED NATIONS CRITERIA FOR DETERMINING THE STATUS OF NON-SELF-GOVERNING TERRITORIES

This chapter looks at the principles contained in United Nations General Assembly resolutions regarding criteria for determining the status of Non-Self-Governing Territories.

Principles in the following United Nations documents provide guidelines for the Administering Authority of a Non-Self-Governing Territory in deciding whether an obligation exits to transmit information to the United Nations Decolonization Committee. In other words, these principles inform a Colonial Power that parts of its territory are Non-Self-Governing Territories and that it is obliged, as Administering Authority, to report on progress in the preparation of the peoples of the territory for a full measure of self-government. A close examination of two resolutions, 742 (VIII) and 1541(XV), throws some light on this particular element of decolonization.

When the process of decolonization began in the 1940's any Member State responsible for the administration of a Non-Self-Governing Territory had only to inform the General Assembly of its decision to cease transmitting information under Article 73(e) of the Charter. By the 1950s the General Assembly had registered its competence to decide whether a Non-Self-Governing Territory has or has not attained a full measure of self-government as detailed in Chapter XI of the Charter with Resolution 748 (VIII) 27 Nov 1953; Resolution 849 (IX) 22 Nov 1954 and Resolution 945 (X) 15 Dec1955.[1]

[1] MENDOZA XL *Elements for the development of a substantive declaration* Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Pacific Regional Seminar, Fiji, May 2014. Mendoza attached details of two UNGA resolutions that inform the General Assembly of cessation of the need to transmit information under Article 73(e) of the Charter, and one communication as an example of this type of UN instrument. [https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/086/13/IMG/NR008613.pdf?OpenElement].

Resolution 742 (VIII) 27 November 1953 *Factors which should be taken into consideration in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government.*

The General Assembly,

1. *Takes note* of the conclusions of the report of the *Ad Hoc* Committee on Factors (Non-Self-Governing Territories);

2. *Approves* the list of factors adopted by the Fourth Committee;

3. *Recommends* that the annexed list of factors be used by the General Assembly and the Administering Member as a guide in determining whether any Territory, due to changes in its constitutional status, is or is no longer within the scope of Chapter XI of the Charter, in order that, in view of documentation provided under Resolution 222 (III) of 3 November 1948, a decision may be taken by the General Assembly on the continuation or cessation of the transmission of information required by Article XI;

4. *Reasserts* that each concrete case should be considered and decided upon in the light of the particular circumstances of the case and taking into account the right of self-determination of peoples, where applicable;

5. *Considers* that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan **or any other country** essentially depends on the freely expressed will of the people at the time of taking the decision. (Emphasis added).

This resolution contains three parts:

Part 1. Factors indicative of the attainment of independence.
Part 2. Factors indicative of other separate systems of self-government.
Part 3. Factors indicative of the free association of a territory on equal basis with the Metropolitan or other country as an integral part of that country.

These three parts correspond to the different outcomes in Principle VI of UNGA Resolution 1541(XV) and the factors listed that convey to the General Assembly whether the territory is a sovereign independent State, in free association with another State, or integrated with an independent State. Part 1 deals with factors indicative of the attainment of independence; Part 2 with factors indicative of the attainment of other systems of self-government. Part 3 deals with the possibility of the Non-Self-Governing Territory choosing free association on an equal basis with the metropolitan or other country as an integral part of that country or in any other form. The important criteria are:

A. General

1. Opinion of the population. The opinion of the population of the Territory, freely expressed by informed and democratic process, as to the status or change in status which they desire.

2. Freedom of choice. The freedom of the population of a Non-Self-Governing Territory which has associated itself with the metropolitan country as an integral part of that country or in any other form to modify this status through the expression of their will by democratic means.

3. Geographical considerations. The extent to which the relations of the Territory with the capital of the central government may be affected by circumstances arising out of their respective geographical positions, such as separation by land, sea or other natural obstacles. The right of the metropolitan country or the territory to change the political status of that territory in the light of the consideration whether that territory is or is not subject to any claim or litigation on the part of another State.

4. Ethnic and cultural considerations. The extent to which the population are of different race, language or religion or have a distinct cultural heritage, interests or aspirations distinguishing them from the people.

B. International status

2. The right of the metropolitan country or the territory to change the political status of that country in the light of the consideration whether that territory is or is not subject to any claim or litigation on the part of another State.

Resolution 1541(XV) 15 December 1960

United Nations General Assembly Resolution 1541(XV) 1960 *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'* contains a twelve-point list prepared in order to guide 'UN members in determining whether or not an obligation exists to transmit the information'. It also exhorts members to bear in mind the list of factors annexed to General Assembly Resolution 742 (VIII) of 27 November 1953. Article 73 of the Charter states that '[m]embers of the United Nations that have assumed responsibility for the administration of territories whose people have not yet attained a full measure of independence have an obligation to: (e) transmit regularly to the Secretary-General...statistical and other information ... relating to economic, social, and educational conditions in the territories ... for which they are responsible ...'

This resolution contains in its preamble the following: 'The General Assembly [...] Decides that these principles should be applied in the light of the facts and the circumstances of each case to determine whether or not an obligation exists to transmit information under Article 73e of the Charter'.

The following principles are relevant to the criteria as applied to the situation of West Papua.

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

Principle V
Once it has been established that a prima facie case of geographical or ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, inter alia [among others], of an administrative, political, juridical, economic or historical nature. If 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 the information under Article 73(e) of the Charter.

Principle VI
A Non-Self Governing Territory can be said to have reached a full measure of self-governance by: a) emergence as a sovereign independent state; b) free association with an independent state; c) integration with an independent state.

Principle VII
Free association should be the result of free and voluntary choice by the peoples of the territory expressed through informed and democratic processes.

Principle VIII
Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination.

Principle IX (b)
The integration should be the result of the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes.

Resolution 850 (IX) 22 November 1954 considers that the General Assembly should learn from its experiences gained from previous dealings with decolonization and use that experience to perfect its methods and procedures. Communications received from Members concerning the cessation of the transfer of information under Article 73(e) in respect of any Non-Self-Governing Territories should be examined as indicated in Resolution 742

(VIII) with particular **emphasis on the manner in which the right of self-determination has been attained and freely exercised.**[2]

The 1962 Agreement between Indonesia and The Netherlands, and the associated UNGA Resolution 1752 (XVII), failed to include any reference to the extent of the territory or its geographical coordinates. It failed to include a history of the territory, and did not specify the territory's status. The term 'sovereignty' is not mentioned, nor the 'sacred trust' of the preamble to Article 73 of the United Nations Charter. There is no mention of the need for compliance with requirements listed in Chapter XI, *Declaration regarding Non-Self-Governing Territories* of the UN Charter or criteria listed in Resolutions 742 (VIII) and 1541(XV). It is interesting to note that the Netherlands, as Administrator, had faithfully complied with the factors and principles outlined in these two documents.

The whole theme of the United Nations Charter and its instruments can be encapsulated in the preamble to the Annex, item 5, UNGA Res 742 (VIII), whereby the United Nations *'Considers* that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan **or any other country** essentially depends **on the freely expressed will of the people at the time of the taking of the decision'.**[3] [Emphasis added]. There was therefore a moral obligation on the United Nations and then the Republic of Indonesia to fulfil the obligations outlined in Chapters 11 and 12 of the Charter of the United Nations. In fact only the Netherlands fulfilled these obligations.

[2] MENDOZA, XL *Elements for the development of a substantive declaration* Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. Pacific Regional Seminar, Fiji, May 2014.

[3] United Nations General Assembly Resolution 742 (VIII) *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* 459th Plenary meeting, 27 November 1953.

James Crawford, in a chapter entitled 'International Dispositive Powers' summarised The Agreement between Indonesia and The Netherlands signed on 15 August 1962 in the United Nation headquarters in New York:

> Although Indonesia had been granted independence by the Netherlands in 1949, West New Guinea (West Irian) remained under Dutch administration, and its status and disposition became the subject of a lengthy dispute between the two States. In 1962 it was agreed that, subject to the consent of the General Assembly, 'the Netherlands [would] transfer administration of the territory to a United Nations Temporary Executive Authority established by and under the jurisdiction of the Secretary General', which would in turn 'transfer the administration to Indonesia in accordance with Article XII'. The United Nations Administrator was to have full authority 'to administer the territory for the period of the UNTEA administration in accordance with the terms of the present agreement'. The United Nations flag was to be flown alongside the Netherlands flag until 31 December 1962, thereafter alongside the Indonesian flag (Art VI). Security forces were to be provided, in addition to local police (Art VIII) [should read Art VII]. The United Nations Administrator was instructed to replace senior Dutch officials by non-Indonesian officials as soon as possible and was empowered in general terms to legislate for the territory (Art IX), to issue travel documents, and, after 1 January 1963,[4] to transfer authority to the Government of Indonesia. All the costs of the administration were to be met by Indonesia and the Netherlands jointly: the two governments were also to furnish consular protection for the inhabitants of the territory. 'General Assembly approval of the delegation of authority to the Secretary General was given, and the Temporary Executive Authority took over responsibility for the territory on 1 October 1962. Control was eventually and without disturbances handed over to Indonesia after 1 May 1963. Although other aspects of the West Irian controversy raise serious questions, no one suggested that United Nations participation in the transfer of authority was *ultra vires'* [above the law]'.[5]

[4] Article IX of the Agreement between Indonesia and the Netherlands stated that the first phase of UNTEA administration would be 'completed on 1 May 1963'.

[5] CRAWFORD, J *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, p. 555.

CHAPTER 10: MANDATES, TRUSTEESHIPS AND NON-SELF-GOVERNING TERRITORIES

History of Mandate and Trusteeship systems, sovereignty issues, trusteeship principles and their connection with private trusteeship law.

The League of Nations was formed in 1919, subsequent to Article XIV of Woodrow Wilson's 1918 Statement of Principles for World Peace (*Fourteen Points)* that 'a general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike'.

Article 22 of the Covenant of the League of Nations dealt with the mandate system that covered territories relinquished by the Ottoman Empire and Germany after World War I. The League's mandate system was replaced by the United Nations Trusteeship System under Chapters XII and XIII of the UN Charter. A mandate is a dispositive treaty and survived the dissolution of the League of Nations. A Mandatory is a State that is responsible for a mandated territory and according to Article 22 of the League's Covenant the Mandatory has a 'sacred trust' to fulfil its obligations to uphold and respect the wellbeing and development of the communities living on the territory at the time that the mandate was established.

Mandates and the UN Charter

Article 75 of Chapter XII of the UN Charter states that the international Trusteeship System is designed for the 'administration and supervision of such territories as may be placed hereunder by subsequent individual agreements'.

Article 76 of Chapter XII states that the basic objectives of the Trusteeship System accord with the Purposes of the United Nations, as laid down in

Article 1 of the Charter, to (a) further international peace and security and (b) to promote the political and economic, social and educational advancement of the inhabitants of trust territories and their progressive development towards self-governance or independence as may be appropriate.

Article 77 of Chapter XII states that:

1. The Trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a) territories now held under mandate;
b) territories which may be detached from enemy states as a result of the Second World War; and
c) territories voluntarily placed under the system by states responsible for their administration.

Mandates, the Trusteeship System and Sovereignty

The issue of sovereignty in mandate and trust territories was the subject of conflicting legal discussion for decades with many believing 'the concept of sovereignty was simply inapplicable in mandated and trust territories'. A consensus was reached when Lord McNair in his Separate Opinion in the *International Status of South West Africa Case* said:[1]

> [t]he Mandates system (and the 'corresponding principles' of the International Trusteeship System) is a new institution - a new relationship between territory and its inhabitants on the one hand and the governments which represents them internationally on the other - a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to the new system. **Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State ... sovereignty will revive and invest in the new State**. What matters in considering this new institution is

[1] CRAWFORD, J *The creation of States in international law* 2nd ed., Oxford University Press, 2006, p. 571.

not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of the territory being administered by it.[2] (Emphasis added).

Sources of Trusteeship principles

McNair, in the same Separate Opinion in the ICJ *International status of South West Africa*, comments upon established Anglo-American private law sources as having relevance for the international law trusteeship system established in 1950, where a person, not *sui juris* (having the capacity to manage one's own affairs) 'can be entrusted to a responsible person as a trustee'. 'Trusts have been used to support the weak and the dependent' and 'the vesting of property in trustees and its management by them' so that a benefit may ensue for the beneficiary. Trusts have been vigorously pursued and enforced by the English Courts, and McNair mentions three important principles:

1. That the control of the trustee over the property is limited;
2. The trustee is under a moral and legal obligation to carry out the trust or mission 'confided to him for the benefit of some other person or for some public purpose';
3. That any attempt by the trustee 'to absorb the property entrusted to him' would constitute an illegal act.[3]

Private law and the Trusteeship system

Lord McNair suggested that private trust law should be a fertile field for exploration and study in terms of the trusteeship system established in international law in 1950. According to The Farlax Legal dictionary:

'A trust is defined as a relationship created at the direction of an individual in which one or more persons hold the individual's property subject to certain duties to use and protect it for the benefit of others. The person who creates the trust is

[2] International status of South-West Africa, I.C.J. Reports, 1950, pp. 128, 150 (11 July) (Separate Opinion of Sir Arnold McNair). [http://www.icj-cij.org/docket/files/10/1895.pdf].
[3] International status of South-West Africa, I.C.J. Reports, 1950, pp. 128, 149 (11 July) (Separate Opinion of Sir Arnold McNair).

the settlor. The person who holds the property for another's benefit is called the trustee. The person who is benefiting by the trust is the beneficiary or *cestui que trust.* The property that comprises the trust is the *trust corpus* or *trust res*., principal or subject matter. A fiduciary relationship exists in the law of trusts whenever the settlor relies on the trustee and places special confidence in [them].[4] The trustee must act in good faith with strict honesty and due regard to protect and serve the interests of the beneficiaries. The trustee also has a fiduciary relationship with the beneficiaries of the trust. Although the trustee in a trusteeship does appear to have complete ownership and possession they don't have the right to receive any benefit from the property. The rights to benefit from the property known as equitable title belong to the beneficiary. The terms of the trust are the duties and powers of the trustee and the rights of the beneficiaries conferred by the settlor when he created the trust. The intention to create a trust can be orally or in writing but if it involves property it must be in writing.

There are four elements to a trust: 1) the intention of the settlor to create the trust; 2) a *res*. or subject matter; 3) a trustee; 4) a beneficiary.

The settlor **must intend to impose enforceable duties on a trustee** to deal with the property for the benefit of another. Intent can be demonstrated by words, conduct or both. It is **immaterial whether the word 'trust' is used in the trust document**. Words that express merely the desire to do something, these precatory words expressing a wish may create a moral obligation but they do not create a legal one. In this situation a court will consider the entire document and the circumstances of the person who attempted to create the trust to determine whether a trust should be established. The settlor must intend to create a present trust; an essential element of every trust is the trust property or *res*. That is, the property must exist. The period of time to which a trust is to operate is usually expressly prescribed in the trust instrument. When this period expires the trust ends.[5]

Mandates and Self-determination

The principle of self-determination was applicable to both mandates and trusteeship territories and the aim for both was for the peoples of these

[4] Collins Concise Dictionary, Australian edition, 5th ed, 2001 defines the noun 'fiduciary' as 'a person bound to act for another's benefit, as a trustee' and the adjective as 'having the nature of a trust (2a), and ‘of or relating to a trust or trustee' (2b).

[5] TRUST *The free dictionary by Farlax* [Slightly edited], at http://www.thefreedictionary.com/

territories to progress towards independence.[6] Chapter 22 of the Covenant of the League of Nations states that 'the well-being of these peoples forms a sacred trust of civilization'. This 'sacred trust', taken up by the United Nations in 1945, became part of the Charter as expressed in Article 1.4 and Article 55. UNGA Resolution 1514 (XV) 1960 tied decolonization to the right of self-determination.

The principle of self-determination was applicable to both mandates and trusteeship territories and the aim for both was for the peoples of these territories to progress towards independence. Article V of Woodrow Wilson's *Fourteen Points* of 1918 states that:

> [a] free, open-minded and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle in determining all such questions of sovereign interest, the interests of the population concerned must have equal weight with the equitable claims of the government whose title is to be determined.

Chapter XI of the Charter places substantial obligations on metropolitan States with respect to their Non-Self-Governing Territories, not different in substance from the Trusteeship System. The Mandate and Trusteeship System were however, subject to greater international control and accountability than that placed upon Administrators of Non-Self-Governing Territories (territories whose peoples were ready for self-governance). United Nations Members retained sovereignty over their Non-Self-Governing (colonial) Territories. A Mandatory or an Administering Authority could not unilaterally determine the status of a mandated or trust territory as action through the United Nations was needed. This did not mean **that either the League or the United Nations were themselves sovereign over mandated or trust territories. Their function was supervision**.

[6] CRAWFORD, J *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, p. 573.

Termination of Trusteeships

James Crawford states that the termination of trusteeships 'was for the most part an orderly process' and usually involved an 'agreement between the Assembly and the Administering Authority' following a plebiscite under the authority of the United Nations. He notes the interesting case of the **Trust Territory of the Pacific Islands** which was administered under a Japanese Mandate and then, following World War II, designated a 'strategic area' under Article 82 of the UN Charter, by which it became a UN Security Council responsibility. When the United States wished to wind up the Trusteeship, the Trusteeship Council and the General Assembly insisted that the principle of 'territorial integrity' applied to trust territories and that the territory should be granted independence as a single unit. However, the peoples of the territory **opposed this** through 'referenda, plebiscites and negotiations through the 1970s and 1980s', expressing the wish 'to be constituted as four different entities'. The US Permanent Representative wrote that although the US regretted the outcome it agreed that it was ultimately up to the Micronesians to choose their political future and that '[t]o take any other position, for example, that unity should be imposed upon the people of the Trust Territory would make a mockery of the concept of self-determination as democratically conceived'.[7]

[7] CRAWFORD, J *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, p. 582.

CHAPTER 11: WEST PAPUA AND THE UNITED NATIONS TRUSTEESHIP SYSTEM

Until 1962, West New Guinea was listed in General Assembly Resolution 66 (I) as a Non-Self-Governing Territory under the Administrative Authority of the Netherlands and ceded to Indonesia in 1962 subject to UN supervised referendum in 1969.[1] The suggestion that West Papua was actually a trust territory has been raised and seriously considered. Why is this?

Chapters XI, XII and XIII of the United Nations Charter deal with Non-Self-Governing Territories and Trusteeships: Chapter XI with Non-Self-Governing Territories; Chapter XII with the International Trusteeship System, and Chapter XIII with the functions and powers of the Trusteeship Council.

Article 76 (Ch XII) of the UN Charter accords with the Purposes of the United Nations as laid down in Article 1 of the Charter:

> Article 1 (2). To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples and to take other measures to strengthen universal peace.

Article 76 (a) and (b) states that:

> The basic objectives of the trusteeship system in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter shall be to:
>
> a. further international peace and security;
> b. 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 the trusteeship agreement.

[1] CRAWFORD, J *The creation of States in international law,* 2nd ed., Oxford University Press, 2006, p. 748.

West New Guinea as a possible trust territory reflected in US documents

Many documents created by US agencies during the 1960s are now publicly accessible (see websites, Foreign Relations of the United States, 1958-1960, Vol XVII, Indonesia; United States Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia).[2] They reveal much about discussions leading up to the 1962 Agreement between the Indonesian Republic and the Kingdom of the Netherlands. The term 'trusteeship' occurs throughout these documents and the index to Pieter Drooglever's monograph records twenty entries, some referring to multiple pages. A trusteeship was considered an appropriate solution to the problem as although West New Guinea was a Non-Self-Governing Territory it was not considered to be ready for decolonization.

Drooglever records that a trusteeship over the territory of West New Guinea was proposed as early as 1949 and seriously considered by the Dutch as a solution to the problem.[3] In 1956, international law expert Van Asbeck spoke strongly in favour of a United Nations Trusteeship administered by the Netherlands.[4] Andrew Johnson points to several telegrams from the US Embassy in Indonesia to the United States Department of State. The first (Document 174, 23 January 1959) from Ambassador Howard Jones is about West New Guinea in terms of 'alternatives which would better serve free world interests', and obviate Indonesia 'passing under communist domination'.[5] Jones acknowledges the Netherlands 'burden', that ‘colonialism is finished’, that a solution to the impasse over West New Guinea is required to defeat communism and free Indonesia from political dependence on USSR.[6] This

[2] Foreign Relations of the United States, 1958-1960, Vol XVII, Indonesia [https://history.state.gov/historicaldocuments/frus1958-60v17]; Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia [https://history.state.gov/historicaldocuments/frus1961-63v23/ch4].
[3] DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua*, Oxford, Oneworld Publication, 2009, p. 155.
[4] DROOGLEVER, P 2009, p. 392.
[5] JOHNSON, A Colony of West Papua: United Nations trusteeship of West Papua [n.d]
[6] Foreign Relations of the United States, 1958-1960, Vol XVII, Indonesia, 174, 23 January 1959 [https://history.state.gov/historicaldocuments/frus1958-60v17].

document is followed some months later by two communiqués from Political Counselor John W. Henderson (Doc. 203, dispatch 905, 26 May 1959; Document 202 dispatch 904, 26 May 1959) who proposed a *special* UN Trusteeship over West New Guinea, with sovereignty transferred to Indonesia after five years, in exchange for compensation payments for Dutch assets seized in Indonesia and the removal of discriminatory restrictions against Dutch nationals. Henderson proposed a three-nation trusteeship—Indonesia, Netherlands and one other Power, possibly Mexico, Turkey or Canada.[7] Johnson regards this proposal 'an improper but legal trusteeship arrangement' that traded the people and their land for a large sum of money. Indonesia liked the proposal as long as the trusteeship was not called a trusteeship.[8]

By the summer of 1960 there was conflict between Theo Bot (State Secretary of the Interior, including Netherlands New Guinea) and Joseph Luns (Minister of Foreign Affairs) who '... did not want to hear of any such thing as seeking the help of the United Nations and working towards some sort of trusteeship', which he felt was giving into Indonesia's demands and 'not what we promised' the Papuans.[9] Other Dutch ministers favoured the idea so it stayed on the Netherlands' agenda.[10] By October 1960 the idea of a trusteeship was espoused by Christian Herter (United States Under Secretary of State) and Subandrio (Indonesian Minister for Foreign Affairs).[11] A State Department Editorial note stressed that the US would have to take the initiative in promoting a direct UN trusteeship for West New Guinea under Article 81 of UN Charter.[12]

---

[7] Foreign Relations of the United States, 1958-1960, Vol XVII, Indonesia, 202, May 26 1959: Doc. 203, May 26, 1959 [https://history.state.gov/historicaldocuments/frus1958-60v17].
[8] JOHNSON, A Personal communication, 13 July, 2016.
[9] DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua* Oxford, Oneworld Publication, 2009, p. 398.
[10] DROOGLEVER, P 2009, p. 397.
[11] Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia, Doc 288, 12 October 1960 [https://history.state.gov/historicaldocuments/frus1958-60v17].
[12] Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia, Doc 289, Editorial (n.d) probably 12 Oct 1960 [https://history.state.gov/historicaldocuments/frus1958-60v17].

On 20 October 1960 Tunku Abdul Rahman, Prime Minister of the Malaysian Federation, proposed that if Malaysia were a trustee, he would mediate the conflict between Indonesia and the Netherlands. His proposal was not accepted, because Indonesia had consistently demanded that West New Guinea be passed to them with a minimum of discussion after two years. United Nations Secretary-General Dag Hammarskjold therefore informed Abdul Rahman that his proposal was not reconcilable with the right of self-determination.[13] In a cable to the State Department on 3 March 1961, Ambassador Howard Jones claimed Rahman's offers 'attracted far more interest on part of both Dutch and Indonesians than might reasonably have been expected a year or two ago … for example, the Indos once contended that UN trusteeship would be anathema under any circumstances …. Now, 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'.[14] (Emphasis added).

A memorandum on 6 April 1961 from Assistant Secretary of State for European Affairs to Secretary of State Dean Rusk notes 'Indonesian officials have indicated a willingness to agree to a "transitional trusteeship" which would assure the transfer of the territory to Indonesia in one or two years'. He mentions the threat of hostilities from the Indonesians, the impending visit of Luns on April 10 1961, and proposed a) the establishment of a UN trusteeship for West New Guinea making the government of Malaya trustee with full powers and authority to administer the territory; and b) a consortium of States to support the Malayan mandate with personnel and funds.[15]

---

[13] DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua* Oxford, Oneworld Publication, 2009, p. 403-404.

[14] Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia, Doc. 150, 3 March 1961 [https://history.state.gov/historicaldocuments/frus1961-63v23/ch4].

[15] Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia, Doc. 160, 6 April 1961 [https://history.state.gov/historicaldocuments/frus1961-63v23/ch4].

The possibility of a trusteeship agreement was intermittently discussed during the following twelve months and even near the end of that time a trusteeship under United Nations auspices was still being considered by Luns. Luns did not think that Indonesia would like the idea of a trusteeship. In Document 192 dated 16 September 1961, Adlai Stevenson telegrammed the Department of State from 'the Mission to the UN' that the Netherlands was prepared to divest itself of sovereignty over West New Guinea providing General Assembly endorsement is found for UN administration leading to self-determination for the Papuan people. Adlai wrote 'I am very favourably impressed with this new Dutch position which I think goes long way towards establishing Dutch *bona fides* and exposing Indonesia's territorial ambitions'.[16] On 26 September 1961, Luns told the UNGA that the Netherlands was prepared to transfer control of West New Guinea to the United Nations. He proposed that the United Nations send a commission of enquiry to West New Guinea with a view to organizing a plebiscite to determine Papuan self-determination. He also proposed that the United Nations should, at the same time, replace the Netherlands as the trusteeship authority responsible for the administration of the territory and its economic development.[17]

The positions of the three States

At this stage it might be helpful to outline the positions of each of the three States involved in these protracted discussions.

Indonesia

Firstly, for Indonesia, Sukarno's obsession with adding the territory of West New Guinea to the territory of the Republic of Indonesia led to intransigence

[16] Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia, Doc 192, 16 Sept 1961 [https://history.state.gov/historicaldocuments/frus1961-63v23/ch4].

[17] Foreign Relations of the United States, 1961-1963, Vol XXIII, Southeast Asia, Doc 193, 16 Dec 1961, Editorial note [https://history.state.gov/historicaldocuments/frus1961-63v23/ch4].

during negotiations and a desire at all costs to minimize the importance of self-determination. Indonesians basically refused to negotiate unless a fixed outcome preceded negotiations. Neither the United States nor the Netherlands were prepared to do this and were only prepared to support negotiations without preconditions.

The Netherlands

The Dutch, once they got over the potential loss of West New Guinea, started to focus on the right of the Papuans to a genuine act of self-determination. The Dutch were in fact the only protagonists in this drama who had any knowledge of, or relationship with the Papuans and the territory that they inhabited. The Dutch were adamant that an act of self-determination be included in any agreement and that it would be a real right rather than a farce.

United States of America

The United States, whilst attempting to be impartial during the negotiations, had more than one agenda and these agenda resulted in much prevarication and a sense of deep frustration at times with both Indonesia and the Netherlands. They feared that Indonesia would embrace the Soviet bloc that was already financing Indonesia's military ambitions. They feared that Sukarno's belligerence would erupt into a war between Indonesia and the Netherlands, a war that the United States would not want to take sides. They did not want to lose the friendship of the Netherlands with their strong attachment to NATO of which the United States was also a member. They regarded the Papuans, about whom they knew nothing as 'stone-age savages' unable to govern themselves. As a result of these agenda and attitude there was pressure to solve the 'problem' as quickly as possible rather than adopt a measured attitude involving fact-finding missions and consultation with the Papuans. This haste, exacerbated by Sukarno's warlike attitude and intransigence, resulted in America losing patience with the Netherlands, which insisted on upholding the West Papuans' right to self-determination in accord with United Nations

General Assembly Resolutions 742 (VIII) and 1541 (XV). It has also been suggested that West Papua's mineral wealth was subverting due process, as well as the agendas of the States involved. This situation is covered more fully by Greg Poulgrain.[18]

The Rome Agreement

The Rome Agreement was signed by Indonesia, United States of America and the Kingdom of the Netherlands on 30 September 1962, just nine days after the General Assembly voted in favour of the 1962 Agreement between Indonesia and the Netherlands in the form of Resolution 1752 (XVII).[19] The architect of that agreement, Ellsworth Bunker, also organised the secret meeting in Rome, which affirmed quid pro quo understandings between Indonesia and the United States of America. The essence of the Agreement is as follows:

1. That the Act of Free Choice to be delayed or cancelled;
2. That *Musyawarah* be used rather than one-person-one-vote;
3. That the UN report to the UNGA be accepted without debate;
4. That Indonesia would rule West Papua for twenty-five years after 1963;
5. That the US could exploit natural resources in partnership with Indonesian-state companies;
6. That the US underwrite an Asian Development Bank grant for US$30,000,000 and guarantee World Bank funds for transmigration program beginning in 1977.[20]

Essentially, the Rome Agreement relieved Indonesia's fear of losing West Papua in 1969, and gifted the US and Indonesia with economic and political hegemony until 1985 (including security of US investment in the Freeport mine). US underwriting of World Bank funds for transmigration guaranteed

[18] POULGRAIN G *The incubus of intervention: conflicting Indonesia strategies of John F. Kennedy and Allen Dulles* Strategic Information and Research Development Centre, Kuala Lumpar, 2014.
[19] WAJOY, H *Rome Agreement* West Papua Liberation Organization [n.d] [www.wplo.org/romeagreement.htm].
[20] Herman Wajoy risked his life pillaging the Rome Agreement files from the Foreign Ministry in Jakarta. He instructed Herman Wainggai to publish them after he died.

the physical security of an Indonesian population that would eventually outnumber the indigenous Melanesians. And US underwriting of the Asian Development Bank grant—matching Holland's $US30 million to the UN Fund for Development of West Irian/FUNDWI—diluted the influence of Dutch development principles.

West New Guinea as a Trust Territory

Andrew Johnson argues that subsequent events point to West New Guinea as being a trust territory but without the label "trusteeship" being attached.[21] We have seen already from a perusal of private trust law, as suggested by Lord McNair, that the agreements do not necessarily have to be labelled as such and that where this label is lacking, a scrutiny of the actual contents of a document thought to be a trusteeship agreement is in order.[22] On the subject of the exact nature of an agreement it is, according to Crawford, a cardinal principle that 'the legal incidents of a given relationship are to be determined not by inference from the label attached to it but from an examination of the constituent documents and the circumstances of the case'.[23]

By Resolution 1752 (XVII) of 21 September 1961 the General Assembly approved the Agreement between Indonesia and the Netherlands. Johnson argues that the content of that agreement, the formula of its design, and the history of events before and after the approval of the United Nations point to it being the type of trusteeship agreement defined in Chapter XII (the International Trusteeship System of the Charter of the United Nations). The Agreement's opening statement that the signatories, 'having in mind the interests and welfare of the people of the territory of West New Guinea (West Irian)' clearly identifies these people 'as the beneficiaries of some kind of trusteeship arrangement'.

[21] JOHNSON, A *UN as a protector or abuser of human rights?* Dissident Voice, 5 March 2013, p. 2.
[22] Farlax Legal Dictionary, Trust [Slightly edited] http://www.thefreedictionary.com/
[23] CRAWFORD, J *The creation of states in international law* 2nd ed., Oxford University Press, 2006, p. 284.

Johnson argues that the Agreement also fulfils a specific formula defined in Articles 75-85 (Chapter XII of the Charter dealing with the Trusteeship System). This formula requires an individual agreement for each territory (art.75); that the subject territory not be a Member of the United Nations (art.78); agreement on the terms of trusteeship by the states directly concerned (art.70); agreement on the terms under which the territory is to be administered and who the administrator of the territory is (art.81); specifying as optional and unnecessary any strategic issue (art.82); approval by the UN General Assembly for territories not alleged to be strategic (art.85, part 1).[24]

By General Assembly Resolution 448 (V) 1950 the Netherlands noted it would cease to transmit information required under UN Charter 73(e) on Indonesia but would continue to present a report on West New Guinea. This was an acceptance of the 'sacred trust' to prepare the territory for independence as stipulated in Article 73 of the Charter. After the passage of UNGA Resolution 1752 (XVII) in September 1962, the Netherlands stopped transmitting information about West New Guinea. This could only have happened because the status of the territory had changed. Article 73(e) requires the transmission of information by Administrators of Non-Self-Governing Territories but not by 'those [trusteeship] territories to which Chapters XII and XII apply'. When the General Assembly fulfilled the requirement of Article 85 part 1 by approving the Agreement between Indonesia and the Netherlands, West New Guinea became a territory to which Chapters XII and XIII (dealing with the Trusteeship system and the Trusteeship Council) applied.

Johnson argues there are only two ways for the UN to deploy a military force (as it did in West New Guinea in 1962). Article 42 (Chapter VII) authorises the Security Council to '...take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.' Article 48 (Chapter VII) provides '[t]he action required to carry out the decisions of the

[24] JOHNSON, A Personal communication, 13 July 2016.

Security Council shall be taken by all the Members of the United Nations or by some of them as the Security Council may determine.' Given that, as Johnson rightly claims, 'West Papua has never been on the agenda of the Security Council nor has the territory been the subject of any Security Council resolution', the 'authorisation for the deployment of UN troops from Pakistan to occupy the colony of West Papua' was by passage of Resolution 1752 (XVII) in the General Assembly.[25] Recall that Resolution 1752 (XVII) was itself no more, and no less, than Article 1 of the 1962 Agreement between Indonesia and Netherlands. Recall also that Article 84 of Chapter XII (International Trusteeship System) states that: '[t]he administering authority may make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligation towards the Security Council undertaken in this regard by the administering authority as well as for local defence and maintenance of law and order within the trust territory'.

A surprising manoeuvre

With Resolution 1752 (XVII) 21 September 1962 the General Assembly acknowledged the Indonesia and Netherlands Agreement, and was then able to authorise the formation of United Nations Temporary Executive Authority (UNTEA). Daniel Gruss records that '[t]he resolution conferred onto the Secretary-General, *and not onto the Security Council*, the power to establish UNTEA under his jurisdiction and to convey to him the power to carry out the Agreement'.[26] He continues:

> Rosalyn Higgins points out the lack of debate concerning this issue at that time was surprising, especially with regard to the role of the Soviet Union. Soviets had earlier pointed out—concerning the Congo operations—that it was the right of the **Security Council** and **not that of the Secretary-General** to select the participating contingents participating in a United Nations peacekeeping action.

[25] JOHNSON, A *UN as a protector or abuser of human rights?* Dissident Voice, 5 March 2013, [p. 2].
[26] GRUSS, D *UNTEA and West New Guinea* Max Planck Yearbook of the United Nations, vol. 9, 2005, p. 106 [http://www.mpil.de/files/pdf2/mpunyb_gruss_9_97_126.pdf].

> Nevertheless **Article 14** of the Charter was interpreted in such a way allowing the Secretary-General a great deal of competencies'.[27] (Emphasis added).

Article 14 of the UN Charter provides:

> **[s]ubject to the provisions of Article 12** the General Assembly may recommend measures for the peaceful adjustment of any situation regardless of origin, which is deemed likely to impair the general welfare or friendly relations among nations ...' (Emphasis added).

Article 12 of the Charter stating that:

> [t]he Secretary-General**,** with the **consent of the Security Council** shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council ...'. (Emphasis added).

It would appear that the consent of the Security Council was not sought in this case, that is, in the deployment of UN troops from Pakistan to occupy the colony of West Papua in October 1962.

Indonesia and Netherlands Agreement (1962) and the Purposes of the United Nations

Chapters XI and XII provide for the inclusion in treaties of sociological elements that are delineated in Article 76 of Chapter XII (International Trusteeship System) and which refer back to the Purposes of the United Nations delineated in Article I of Chapter 1 of the UN Charter.

According to Article 1, the Purposes of the United Nations are: 'To maintain international peace and security for all...' (art 1.1); 'To develop friendly relations among nations based on respect for equal rights and self-

[27] HIGGINS, R *United Nations peacekeeping documents and commentary 1946-1967 Vol. 2, 1969*, p. 121, footnotes 12, 51. In GRUSS, D *UNTEA and West New Guinea* Max Planck Yearbook of the United Nations, vol. 9, 2005, p. 106.

determination of peoples...' (art 1.2); 'To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion...' (art 1.3).

The Indonesia and Netherlands Agreement (1962) does not anywhere refer to the furtherance of 'peace and security' even though, in the years preceding the Agreement Indonesia constantly referred to the Netherlands in terms of threats to these values. There is also no mention of 'equal rights and self-determination of peoples' as the basis of relations between the nations concerned. Self-determination is recorded as an act rather than a right; for example Article XX states '[t]he act of self-determination will be completed before the end of 1969'. In similar fashion, Article XV describes Indonesia's administrative responsibility as 'intensifying the education of the people, combating illiteracy, advancing social, cultural, and economic development'. There is more than a hint of abasement when people are suddenly to be educated '... in accordance with present Indonesian practice to accelerate the participation of the people in local government through periodic elections' (Article XV), without mention of their political development or progressive development towards self-government or independence. Article VIII of the Agreement echoes Article 73(e) Charter obligations for Non-Self-Governing Territories, requiring the United Nations Administrator to send periodic reports to the Secretary-General. However, it does not refer to the 'sacred trust' which requires that:

> [m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories ...

Postponement or failure to place a territory under the Trusteeship System

Article 77(c) of the Charter states that territories may be placed voluntarily under the trusteeship system by States that are responsible for their administration. However States sometimes have less than altruistic motives when seeking to place a territory under the trusteeship system.[28] Making an agreement that reads as a trusteeship agreement but is not placed under the system, or by postponing the placement of the territory under the system suggests motives not in accordance with the 'sacred trust' espoused by the Charter unless of course the outcome has been independence or other choice acceptable under UNGA Resolutions 742 (VIII) 1953 or 1541(XV) 1960.

Johnson suggests that the term "trust" was not used because Indonesia was 'uncomfortable with the legal reality'.[29] The legal reality was of course that a trusteeship agreement entailed levels of responsibility and accountability that the Republic of Indonesia was not willing to accept. There would have been periodic visits by Council members to the trust territory, which would have exposed the administration to levels of scrutiny from an unpredictable mix of Trusteeship Council Members. It would have involved the submission by Indonesia of reports to the Trusteeship Council and exposure to queries regarding petitions that the Trusteeship Council is bound to receive. The way in which the framers of the Agreement avoided the Trusteeship Council was, according to Johnson, to place West New Guinea under the administration of a United Nations Temporary Executive Authority. The manoeuvre was legal: Article 81 of the Charter requires a Trust Agreement to 'designate the authority which will exercise the administration of the trust territory'.[30] For the 1962 Indonesia and Netherlands Agreement, the United Nations Temporary Executive Authority (UNTEA) was the authority exercising the administration

[28] *The positive effects of postponement of the Italian colonies question* Central Intelligence Agency, 2 November 1948. ORE 61-48.
[29] JOHNSON, A *UN as a protector or abuser of human rights*? Dissident Voice, 5 March 2013, p. 5.
[30] JOHNSON, A 5 March 2013, p. 5.

that was passed to Indonesia on 1 May 1963. The creation of the UNTEA was a means of satisfying the requirements of Chapter XII of the Charter.

In framing the Agreement the Indonesians hoped that the customary practice of *musjawarah* (community consensus), would allow them more latitude to manipulate the vote. However, the inclusion in the Agreement, probably by Constantin Stavropoulos (the UN Legal Officer), of the phrase 'to be carried out in accordance with international practice'[31] rendered any act of interference more difficult and would have been an added reason to not put the territory under the trusteeship system. Twenty years later, at a conference on the law of the sea, Stavropoulos spoke strongly against reaching agreement by way of consensus—rather than voting for or against a proposal—believing that it negated the opinion of delegates wanting to vote against a proposal but were left with only the opportunity of stating their reservations.[32]

Rights of Non-Self-Governing Territories

James Crawford points out that the Friendly Relations Declaration 2625 (1975) states *inter alia* (among other things) that:

> [t]he territory of a colony or other Non-Self-Governing Territory, has, under the Charter, a status separate and distinct from the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter.
>
> It seems clear from this and other formulations of the principle of self-determination that where the principle applies, it does so as a right of the people concerned; it is not a matter simply of rights and obligations as between existing States. Another State may well be **interested in the result of an act of self-determination**, in that it may stand to gain or regain territory. But to treat self-

[31] DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua*, Oxford, Oneworld, 2009, p. 504.

[32] STAVROPOULOS, C Procedural problems of the Third Conference on the Law of the Sea: statement by Constantin Stavropoulos. In NORDQUIST, MH *United Nations Convention on the Law of the Sea, 1982: a commentary* Martinus Nijhoff, 1985, p. vii.

determination as a right of that State would be to deny the reality of the alternative options open to the people concerned.[33] (Emphasis added).

These are rights that are also documented in the Preamble of the UN Charter Preamble; in Chapter 1 (Purposes and Principles); in the Bill of Rights containing the *Universal declaration of human rights*, the *International covenant on civil and political rights*, and the *International covenant on economic, social and cultural rights*; in United Nations Resolution 1514 (XV) 1960 *Declaration on the granting of independence to colonial countries and peoples*; in Resolution 742 (VIII) 1953 *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;* and Resolution 1541(XV) 1960 *Defining the three options for self determination.*

The rights of Non-Self-Governing Territories are also safeguarded by Article 80 of the UN Charter, even if the placement of territories under the trusteeship system is postponed as provided for in **Article 80.1 and 80.2** which note:

Article 80.1 Except as may be agreed upon in individual trusteeship agreements, made under articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this chapter shall be construed in or of itself to alter in any manner **the rights whatsoever** of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties. (Emphasis added).

Article 80.2 Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

[33] CRAWFORD, J *The creation of States in international law,* 2nd ed, Oxford University Press, 2006, pp. 617- 618.

Trusteeships, Trust law, and Treaties in the context of West New Guinea

Using McNair's suggestion of comparison of trusteeship agreements with private trust laws, the following may have relevance. Firstly there needs to be a subject, not *sui juris*, that is a subject not yet capable of managing their affairs. West New Guinea was considered to be such a territory. The decision was made by the Netherlands after pressure from interested States to transfer sovereignty to Indonesia after a time of United Nations temporary supervision. The Netherlands in this case could be considered to be the settlor and Indonesia the trustee, with an interim time when the territory would be administered by a United Nations Temporary Executive Authority. The territory can be considered as the *trust res*. or *trust corpus* and the beneficiary, *cestui que trust,* the people of West New Guinea.

According to private trust law the 'settlor must intend to impose enforceable duties on a trustee to deal with the property for the benefit of another'.[34] Intent can be demonstrated by words, or conduct, or both. In the case of the Indonesia and Netherlands Agreement the stated obligations were outlined in Article 76 of the Charter:

> (a) to further peace and security ... (b) to promote the political, economic, social and educational advancement of the inhabitants of the 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 as may be provided by the terms of each trusteeship agreement ... (c) to encourage respect for human rights and fundamental freedoms ... (d) equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter....

The Indonesia and Netherlands Agreement of 1962 was a treaty, and as such was subject to rules governing treaties and subject to the Vienna Convention on the Law of Treaties, Part III, and in particular to Article 26: *Pacta sunt*

[34] Farlax Legal Dictionary, 'Trust' [slightly edited] http://www.thefreedictionary.com/. Accessed 9/03/2016.

servanda. *Pacta sunt servanda* provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[35] The main thrust of the Agreement was that once the United Nations Temporary Executive Authority withdrew and Indonesia took over the administration there would be, no later than 1969, an Act of Free Choice according to international practice. It has been widely accepted that the Act of Free Choice was a fiasco manipulated by Indonesia and a complete denial of the right of the Papuans. It is also well accepted by the international community that at the time of the Act of Free Choice there was widespread intimidation and brutality and frantic attempts made by Papuans to alert and inform UN officials, including the Secretary-General's Representative.

The Trusteeship System and the Indonesia—Netherlands Agreement 1962

The Indonesia and Netherlands Agreement does not contain the words 'trust' or 'trusteeship' even though, as already pointed out, it reads like a trusteeship agreement. The Agreement **was not** placed under the trusteeship system, even though there was provision for its placement within the category of 'territories voluntarily placed under the system by states responsible for their administration' (Article 77c). Nevertheless, it was an agreement, passed as such by the General Assembly, which entrusted a people entitled to an act of self-determination to another state, namely the Republic of Indonesia. Johnson points out that there is a difference between the Trusteeship System and the Trusteeship Council. Article 81 of Chapter XII of the Charter requires an agreement to 'designate the authority which will exercise the administration of the trust territory'. Johnson maintains that 'The creation of UNTEA was a means of satisfying the requirements of Chapter XII while not putting the colony under the control of the Trusteeship Council which Indonesia would not accept and without putting the UN administration under Indonesian control

[35] Vienna Convention on the Law of Treaties, Art.19, 1155 UNTS 331, entered into force 27 January 1980.

which the Netherlands would not accept'.[36] The Indonesia and Netherlands Agreement was flawed in its construction and the process by which the peoples of West New Guinea "chose" their future was also seriously flawed. Furthermore, according to Johnson, the Agreement fulfils Article 81 conditions (Chapter XII of the Charter) which requires a trust agreement to 'designate the authority which will exercise the administration of the trust territory'.

Johnson maintains that West Papua is still a trust territory:

> General Assembly Resolution 2504 (XXIV) 1969 says nothing about the sovereignty of West Papua and does not claim to have revoked UN trust status of the territory which was and still is administered by Indonesia pending 'an act of self determination' when the UN will hopefully acknowledge the sovereign choice of the West Papuan people'.[37]
>
> The United Nations has never endorsed or agreed to the Indonesian claim to any part of Papua. Resolution 2504 (XXIV) does not express any UN opinion about the ceremony Indonesia calls the 'act of free choice'. General Assembly Resolution 2504 is about the UN Secretary-General fulfilling his limited duties under the 1962 agreement. It does *not* document any change in the territorial status of West Papua.[38]

The Indonesia and Netherlands Agreement does not mention the United Nations Charter, or the Purposes of the United Nations one of which is '[t]o develop friendly relations among nations based on respect for the principle of equal rights **and self-determination** of peoples...'.[39] Self-determination is considered to be an important Purpose of the United Nations. There is also no mention of the 'sacred trust' that is central to the ethos of the United Nations Charter in regard to Trust Territories and Non-Self-Governing Territories[40]

[36] JOHNSON, A *UN as a protector or abuser of human rights?* Dissident Voice, 5 March 2013, p. 5.
[37] JOHNSON, A 2013, p. 6.
[38] JOHNSON, A Personal communication, 11 June 2016.
[39] United Nations Charter, Chapter I: Purposes and Principles, Article 1.2.
[40] UN Charter, Chapter XI: Declaration regarding Non-Self-Governing Territories, Preamble.

owed to the peoples of territories that have not yet attained self-government, as outlined in the preamble to Article 73:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principles that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost ... the wellbeing of the inhabitants of these territories...'

The Indonesia and Netherlands Agreement also failed to include the geographical coordinates of the territory failed to include a history of the territory, and failed to mention the status of the territory. It also does not address compliance requirements listed in Chapter XI of the Charter, or criteria listed in resolution 742 (VIII) 1953, 1541(XV) 1960, and 1752 (XVII) 1962. West New Guinea was a self-determination unit, so there were obligations under Chapter XI Article 73 of the Charter that were to be fulfilled by the Administering Power. The criteria in Resolutions 742 (VIII) and 1541 (XV) 1960 is meant to be used to assess whether a territory ceases to be a Non-Self-Governing Territory. These criteria should have been noted in the Agreement, whether or not West New Guinea was a trust territory, because it was still a Non-Self-Governing Territory entitled to an act of self-determination. As noted by Judge Dillard in the *Western Sahara case*: '[i]t seems hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes ... it is for the people to determine the destiny of the territory and not the territory the destiny of the people.[41]

In summary, the Indonesia and Netherlands Agreement, in its format and substantive content, as well as its historical trajectory resembles a Trusteeship agreement. It was created after persistent and long-term suggestions that a trusteeship agreement would be a prime way of solving what had become an impasse owing to the intransigence of the Indonesians who believed that West New Guinea was already part of the Republic of Indonesia and had constantly

[41] Western Sahara, ICJ Reports, 1975, p.12, 116, 122 (16 October) (separate opinion of Judge Dillard).

maintained that self-determination was a pretext employed by the Netherlands to deny them sovereignty of the territory.[42]

It is interesting to note that until 1962, the Netherlands Administration had faithfully complied with the factors and principles outlined in the Charter and the two relevant General Assembly resolutions. The whole theme of the United Nations Charter and its instruments can be encapsulated in the preamble to the Annex, item 5 (UNGA Res 742 (VIII) 1953. The United Nations 'Considers that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan **or any other country** essentially depends **on the freely expressed will of the people at the time of the taking of the decision'.**[43] (Emphasis added).

A Comparative Act

Towards the end of the 19th century, in the colonial era, Germany laid claim to a part of the territory of what is now the independent State of Papua New Guinea. Following the end of the First World War the League of Nations came into being and in June 1919 the former German territory, German New Guinea, was placed under a 'C' mandate to be administered by Australia.[44] This mandate lasted until the dissolution of the League of Nations in April 1946. The territory of New Guinea, was then placed under the United Nations trusteeship system and administered by Australia. The Papua New Guinea Act of 1949-1973, Section 5 contains the Schedules. The Second Schedule contains detailed coordinates for the territory of New Guinea, and designates the islands to be included in the Act. The Fourth Schedule is the *Trusteeship*

[42] UN Yearbook 1957, Part 1: The United Nations: Section 1: Political and Security Questions, Chapter 8: The Question of West Irian (West New Guinea), pp. 77-78. [http://cdn.un.org/unyearbook/yun/chapter_pdf/1957YUN/1957_P1_SEC1_CH8.pdf].

[43] United Nations General Assembly Resolution 742 (VIII) 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, 459th Plenary meeting, 27 November 1953,

[44] ROSS, J ed. *Chronicle of Australia* Penguin Books Australia, 2000, p. 536.

Agreement for the Mandated Territory of New Guinea as approved by the General Assembly of the United Nations on 13 December 1946.

Australia acknowledges her membership of the United Nations as a result of the United Nations Charter Act 1945 and her obligations as Trustee of New Guinea, a former German colony, under Chapter XII of the Charter. The Act acknowledges that the Charter of the United Nations, signed at San Francisco on 26 June 1945, provides by Article 75 ‘for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements' [par. 2]. ‘The Government of Australia now undertakes to place the territory of New Guinea under the trusteeship system on the terms set forth in the present Trusteeship Agreement' [par. 3]. 'Therefore the General Assembly of the United Nations, acting in pursuance of Article 85 of the Charter, approves the following terms of trusteeship for the Territory of New Guinea in substitution for the terms of the Mandate under which the territory has been administered' [par. 4].

Eight articles follow:

Article 1 refers to the mandate. Article 2 refers to Australia as Administrator. Article 3 provides that '[t]he Administering Authority undertakes to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the international trusteeship system, which are set forth in Article 76 of the Charter'. Article 6 refers to the Administering Authority's obligation to 'apply in the territory the provisions of such international agreements ... as referred to in Article 57 of the Charter ...'. Article 8 refers to the Administrating Authority's obligation 'to cooperate with the Trusteeship Council in the discharge of all the Council's functions under Articles 87 and 88 of the Charter'. It also refers to the fact that no rights over native land shall be transferred to 'any person not an indigenous inhabitant'.

Article 76 of the Charter states that the basic objectives of the trusteeship system are in accordance with the Purposes of the United Nations, one of which is to promote the territory's 'development towards independence' by the 'freely expressed wishes of the peoples concerned'.

The Australian Act is written in agreement with the Charter of the United Nations. There is no mention of the United Nations Charter in the Agreement between Indonesia and the Netherlands.

Status of West New Guinea during the UNTEA phase

A fundamental difference between territories that are mandates or trust territories and Non-Self-Governing Territories is that sovereignty, as Lord McNair stated in *West Africa (Status),* is in abeyance 'until the inhabitants of the territory obtain recognition as an independent State ... sovereignty will revive and invest in the new State'. As a Non-Self-Governing Territory, the people of West New Guinea could have chosen to become an independent State, or in free association with an independent State, or integrated with an independent State, or a trust territory. There is no other classification under the United Nations system when the subject of self-determination is a former colony or part of a former colonial state. Had West New Guinea been a Non-Self-Governing Territory, sovereignty may not have continued to be invested in the Netherlands during the UNTEA phase but according to Ralph Wilde it could have been a Non-Self-Governing Territory. Wilde has commented that: '... the transfer of control from the Netherlands to Indonesia via a short period of UN administration preceding the consultation treated the situation as if the people of West Irian did not enjoy a right to "external" self-determination'. He argues that the Agreement of 1962 'articulated a right of external self-determination on the part of the West Irianese but at a time when administrative arrangements clearly not based on such a right were adopted'. They 'enjoyed a right of external self-determination when UNTEA administered the territory, not because of separate treatment during the Dutch

administration of the East Indies colony (but without prejudice to this as an alternative base), but because the colonial power and the other State aspiring with respect to the territory had **agreed that this would be the case.** This echoes the historical practice of external self-determination based on specific ad hoc agreements rather than the post-war entitlements arising out of the status of the territory'.[45] (Emphasis added).

He continues:

> [i]f colonial title in the era of self-determination could be extinguished if territorial control by the colonial State was brought to an end, then West Irian ceased to be Dutch territory on the transfer of administrative authority to the United Nations. Thus for the duration of UN administration project the territory was a non-state territory with a special international legal status, a self-determination unit.

According to Crawford, regarding the exact nature of an agreement, it is a cardinal principle that 'the legal incidents of a given relationship are to be determined not by inference from the label attached to it but from an examination of the constituent documents and the circumstances of the case'.[46] He maintains that in certain cases

> [t]he clear distinction between the right of a dependent people to choose its own political future and the contingent interest of a neighbouring State in the exercise of that right has been **confused or conflated**. In particular the General Assembly has treated certain territories not as self-determination units but as **enclaves of a claimant State**, with the result that in the latter case [enclave], the only acceptable future status has been the surrender of the territory to the claimant State'. In spite of these unfortunate events the International Court's conclusion as to the right of colonial self-determination and the special status of a non-self-governing or trust territory remains firm.[47]

[45] WILDE, R *International territorial administration: how trusteeship and the civilizing mission never went away* Oxford University Press, 2008, pp. 169-170.
[46] CRAWFORD, J *The creation of states in international law* 2nd ed., Oxford University Press, 2006, p. 284.
[47] CRAWFORD, J 2006, p. 618.

Whilst West New Guinea was not mentioned as a possible enclave, Rigo Sureda's interpretation could indirectly lend weight to Crawford's observation regarding these territories that were not treated as non-self-governing units:

> [a]fter the Agreement of 1962 was concluded the General Assembly approved it without any reference to the fact that West Irian was a non-self-governing territory; it is suggested that while before the signature of the said agreement the General Assembly may have been reluctant to take any action because of doubts about its competence, the failure of the General Assembly to determine whether West Irian was a non-self-governing territory or not after the settlement of the territorial claim can be interpreted as an implicit acceptance of the Indonesian view that the territory was part of Indonesia.[48]

West New Guinea and the use of force

West New Guinea fulfilled the criteria for separate statehood—that of being separate geographically and having a people that was a different race and culturally distinct from the claimant State.[49]

Article 2, paragraph 4 of the United Nations Charter provides: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.

As a direct result of Sukarno's obsessional irredentist claim to the territory of West New Guinea, the history of West Papua from the mid 1940s is replete with the threat of force or the use of force. That this threat was creating angst can be seen by the fact that the Netherlands and Australia viewed as serious the possibility of armed aggression by Indonesia. Their concerns escalated after Indonesia published a four phase plan in the late 1950's to 'reclaim the territory' via the use of 1) propaganda; 2) political infiltration; 3) arms

[48] RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Sijthoff, 1973, p. 151.

[49] Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the charter. UNGA Resolution 1541 (XV), Principles iv, v.

importation and infiltrations to support resistance cells; 4) open military and political action by means of armed resistance cells.[50] Between 1952 and 1954 Indonesia authorised four infiltrations on the west coast of the territory, and in the 1950's Indonesian military forces were enhanced by loans for weapons and training from America and Russia.

On 11 January 1962 Sukarno announced the formation of a special force, *Komando Mandala* for the liberation of West Irian. Four days later, on 15 January, three Indonesian motorized torpedo boats (MTB's) were intercepted off the south-west coast of West New Guinea. A Dutch Neptune aircraft fired a flare and the Indonesians directed live fire at the Neptune. Two Dutch frigates approached and a live combat situation developed. One torpedo boat was sunk and the others fled. Dutch intelligence services had actually been aware of the incursion. In the engagement that followed the receipt of this intelligence, approximately 50 Indonesian naval and military personnel lost their lives.[51] Preparations for war were enhanced from March 1962 onwards with troops being moved to East Indonesia. On 27 March and in May paratroops were dropped near FakFak (on the south coast). On 12 May Sukarno made a statement claiming that the issue of West New Guinea could be solved with new arms purchased from Russia. In fact, between 15 January and 14 August, 1,800 Indonesian troops were dropped into West New Guinea. By 31 July Indonesia had forces ready for a major attack and troopships, submarines and motor torpedo boats were sighted in waters surrounding West New Guinea. Three thousand troops were waiting on the nearby island of Ambon, with 12,000 more troops ensconced in merchant ships.

[50] DROOGLEVER, P *An act of free choice: decolonisation and the right to self-determination in West Papua* Oxford, Oneworld, 2009, p. 367.
[51] DROOGLEVER, P 2009, p. 448.

Summary: Self-determination, *Uti possidetis* and the Trusteeship System

What can be concluded from all of the above? Several factors are at play here. The territorial integrity principle states that self-determination units must be granted self-determination as a whole. If the continued unity of the territory is clearly contrary to the wishes of the people or to international peace and security, schemes for partition will meet with the approval of United Nations organs.[52] It was clear to the Netherlands administration that the Papuans did not want to be ruled by Indonesia. It was also clear that the Netherlands had a right as the Administering Power under international law to withhold West Papua from the United States of the Republic of Indonesia in 1949.[53] The principle of *uti possidetis*, used by Indonesia to claim the exact territories of the Netherlands East Indies, has not been so regularly used in the break up of other colonial states as to become a norm of international law.[54] Thus West New Guinea was a self-determination unit entitled to the rights given by Article 73 of the Charter and invested in the Administering Power: that the interests of the people of the territory were paramount; that these interests were held as a sacred trust by the administrator; that their culture be respected and political aspirations recognized and overall, that progress in these aims be reported to the United Nations.[55] The fact that a trusteeship was so freely mooted from 1949 until 1962 as a solution to a 'problem' that was largely manufactured by Sukarno does suggest that the Indonesia and Netherlands Agreement could have been an attempt to avoid the scrutiny of a labelled trusteeship agreement. The irregular interpretations of Articles 12 and 14 of the Charter, as pointed out by Rosalyn Higgins, avoided the involvement of the Security Council. Similarly, as Johnson has pointed out, a sleight of hand

---

[52] CRAWFORD, J *The creation of states in international law* 2nd ed, Oxford University Press, 2006, p.336.
[53] RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice*, Leiden, Sijthoff, 1973, p. 147-148.
[54] JANKOV FF, CORIC, V *The legality of uti possidetis in the definition of Kosovo's legal status* 2nd ESIL Research Forum 'The power of international law in times of European integration', Budapest, 28-29 September 2007, pp. 9-11.
[55] United Nations Charter, Ch. XI, Art 73, [http://www.icj-cij.org/documents/index.php?p1=4&p2=1& - Chapter12].

manoeuvre was needed to avoid the legal reality and consequences of any involvement of the Trusteeship Council.[56] As already mentioned Article 81 of Chapter XII of the Charter requires an agreement to 'designate the authority which will exercise the administration of the trust territory'. 'The creation of UNTEA was a means of satisfying the requirements of Chapter XII while **not** putting the colony under the control of the Trusteeship Council which Indonesia would not accept, and without putting the UN administration under Indonesian control which the Netherlands would not accept'.[57]

From time to time there have been proposals that territories be voluntarily placed under the Trusteeship System under Charter Article 77 (1) (c) which provides for 'territories voluntarily placed under the system by States responsible for their administration'. According to Crawford, 'no such new trusteeships have been conferred and the system is defunct'. According to Article 78 the Trusteeship System 'shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principles of sovereign equality'. This prohibition would appear to apply not only to the whole territory of Member states but to parts of their territory, 'thus excluding situations such as Kosovo'.[58] It is however, eminently possible that West Papua could be placed onto the Decolonization Committee. The precedent for this could be the placement of Puerto Rico back on to that committee following General Assembly Resolution 748 (VIII) of 27 November 1953 when Puerto Rico became part of the 'commonwealth' of the United States.

[56] JOHNSON, A *UN as a protector or abuser of human rights?* Dissident Voice, 5 March 2013, p. 2.
[57] JOHNSON, A 5 March 2013, p.5.
[58] CRAWFORD, J *The creation of States in international law,* 2nd ed., Oxford University Press, 2006, pp. 600-601.

CHAPTER 12: PROGRESSIVE INTERPRETATION OF THE PRINCIPLE OF SELF-DETERMINATION

This chapter considers the progressive interpretation of the principle of self-determination that has occurred since the end of World War I and the contribution made by the Aaland Islands case, the Charter of the United Nations, the twin Covenants, the Colonial Declaration General Assembly Resolution 1514 (XV), and Resolution 1541 (XV) on Principles which should guide members in determining whether or not an obligation exists to transmit information called for under Article 73(e) of the Charter, as well as Customary international law—which together with treaty law—comprises general international law.

As we have already seen, the concept of self-determination arose in the early years of the 20th century and in particular in Woodrow Wilson's *Fourteen Points* of 1918, which stressed that the population of a territory should have a part in choosing its government. Wilson also connected self-determination with the settling of colonial claims, and saw the plebiscite and commissions of enquiry as the way to realize self-determination. Lenin saw self-determination as a way of distributing power within States and also a way of granting recognition to oppressed peoples under colonial domination. Post-war geopolitics, however, saw a swift end to these aspirations, and at this stage self-determination 'could not be considered an international legal norm'.[1]

The Commission of Jurists in the Aaland Island Case (1920) had firstly to consider an important question and that was to decide whether the case fell within the jurisdiction of the League of Nations or was a purely domestic matter. It decided that since Finland was recovering from Russian control and not yet a fully organized State, the case did come under the competency of the League of Nations. However, both League bodies, the Commission of Jurists in 1920 and the Commission of Rapporteurs in 1921 understood the

[1] CASSESE, A *Self-determination of peoples: a legal reappraisal* Cambridge University Press, 1995, pp. 24-28.

importance of the protection of minorities within a State and both also acknowledged that the persecution of minorities was no longer a domestic issue. The Commission of Rapporteurs took the view that in cases of oppression and persecution there ought to be a right of separation of the minority from the State.

In 1945, Article 1(2) of the UN Charter was drafted amid much controversy at the *United Nations Conference on international organization* in San Francisco. This article provided that one of the purposes of the United Nations was '... respect for the principle of equal rights and self-determination of peoples'. 'In the decades following the Second World War that principle embedded in Article 1(2) of the United Nations Charter evolved in a manner which those who drafted it could not have foreseen'. Socialist countries, third world countries and anti-colonial nations then advocated self-determination for peoples 'subject to racist regimes (like that of South Africa)', alien oppression, and colonial domination.[2]

In 1966, Article 1 of the Two Covenants—*International covenant on civil and political rights; International covenant on economic, social and cultural rights*—provided that '[a]ll peoples have the right of self-determination …by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Note that the use of the word 'have' suggests that the right extends beyond the colonial situation.[3] Cassese suggests that the rights outlined in the Covenants are so generic that States can easily claim that they allow these rights. He uses, *inter alia,* Articles 21 and 22 on peaceful assembly and freedom of association as examples, where a State might claim it allows these rights when in fact it might be seriously curtailing them.[4]

[2] CASSESE, A *Self-determination of peoples: a legal reappraisal* Cambridge University Press, 1995, p. 44.
[3] CASSESE, A 1995, p. 52.
[4] CASSESE, A 1995, p. 54.

In the 1950's and 60's the principle of self-determination evolved to increasingly support the termination of colonial rule. Two resolutions stand out in terms of the principle of human rights and self-determination of peoples. The first, resolution 1514 (XV) *Declaration on the granting of independence to colonial countries and peoples* which called for 'the necessity of bringing to a speedy and unconditional end, colonization in all its forms' has been hailed as a landmark in the history of the United Nations. In 1971, the International Court of Justice 'ruled on the validity and scope to be attributed to this declaration',[5] in the *Namibia Opinion* ICJ Report 1971, p. 31 par. 52:

> f]urthermore, 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** [all of the territories]. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government' (Article 73). Thus it clearly embraced territories under a colonial regime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. **A further stage** in the development was the *Declaration on the granting of independence to colonial countries and peoples* (General Assembly Resolution 1514 (XV) of 14 December (1960) which embraces all peoples and territories which 'have not yet attained independence'.[6]

Further, paragraph 53 of the *Namibia Opinion* refers to development in international law since 1919 and that concepts embodied in the League of Nations Covenant 22 were not static but were by definition evolutionary:

> [t]hese developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain as elsewhere the *corpus iuris gentium* [the law of nations'] has been considerably enriched.[7]

---

[5] East Timor (Portugal v. Australia), I.C.J. Reports, 1995, p. 10 (June 30) (separate pleading of P-M Dupuy).
[6] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res. 276 (1970) Advisory Opinion, I.C.J. Reports 1971, p. 16, par. 52.
[7] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, par. 53 (June 21).

The International Court of Justice in the *Western Sahara Opinion* contributed further to the normative status of Resolution 1514(XV), and through that resolution contributed to the principle of equal rights and self-determination of peoples as both a priority and their right in the colonial situation.[8] These sentiments have been reaffirmed by other ICJ cases, in particular by *East Timor* ICJ Report 1995, which confirmed self-determination as a norm of *jus cogens* (compelling law) and *erga omnes* (applicable to all).[9]

Resolution 1514 (XV) was the catalyst for development of 'structural measures' including the Committee of 24 (the Special Committee for implementing the granting of independence to colonial countries and peoples). The Committee of 24 administered all Non-Self-Governing Territories including Trust Territories.[10] The exercising of UNGA Res. 1514 was outlined in a second Resolution 1541 (XV) which included in its annex '[p]rinciples which should guide members in determining whether or not an obligation exists to transmit the information called for in article 73e of the Charter'. As noted in the previous chapter, Principle VI of Resolution 1541 (XV) states:

> 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.

Dupuy emphasizes the order of precedence and notes that **two** principles are devoted to the **integration choice**, namely Principle VIII and IX.[11] Principle VIII required integration to occur only 'on the basis of complete equality'; Principle IX emphasizes that: '(b) integration should be the result of **the freely expressed** wishes of the territory's peoples acting with full knowledge of their change in status, their wishes having been expressed through informed and democratic processes'.

[8] East Timor (Portugal v. Australia), I.C.J. Reports 1995, p. 90, 11-12 (separate pleading of P-M Dupuy).
[9] East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90, 103, par. 31.
[10] East Timor (Portugal v. Australia), I.C.J. Reports 1995, p. 90, 12 (separate pleading of P-M Dupuy).
[11] East Timor (Portugal v. Australia), I.C.J. Reports 1995, p. 90, pp. 13-14 (separate pleading of P-M Dupuy).

Another important resolution that impacted on the development of the right of self-determination is Resolution 2625 (XXV) *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.* This resolution has been regarded as codifying the principles embodied in the United Nations Charter. Raisman tells us that Article 1, paragraph 2 of the Charter states that one of the purposes of the UN Charter is 'to develop friendly relations between states' **not on any terms** but **'**based on respect for the principles of **equal rights and self-determination of peoples'**.[12] (Emphasis added).

Resolution 2625 (XXV) 'reaffirmed the principles of the Charter ... and it is in this context that we find affirmed, *inter alia*, the principle that no territorial acquisitions resulting from the use of force is to be recognized'.[13] First of all there is the noteworthy stress in the Declaration not only on the rights of peoples but correspondingly on the duties of all States, the first of which is to promote the disposal of colonial situations or instances of the domination by force of any people clearly identified as such. The preamble to the annex lists seven principles. Principle 1 is entitled **The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations:**

> 'The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition from the use of force shall be recognized as legal...' (Resolution 2625 (XXV) Principle 1, Rights and Duties of States, No. 10).

[12] RAISMAN, WM *Sovereignty and human rights in contemporary international law*, Yale Law School, Faculty Scholarship Series Paper 872, 1990, p. 867.
[13] East Timor (Portugal v. Australia), I.C.J. Reports 1995, pp. 90, 15 (separate pleading of M. P-M Dupuy).

‘Prominent among the principles ‘codified’ in this way is, of course, the principle of equal rights and self-determination’ of peoples [Principle 5]. Pierre-Marie Dupuy reminds us that the Resolution 2625 (XXV) affirms the need to preserve the territorial integrity or political unity of all sovereign States ‘[c]onducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour’.[14]

‘However, peoples subjected to colonial domination have the right not only to recover their political independence but also to control the economic means of ensuring their independence’.[15] Resolution 1803 (XVII) is a reference text adopted by 87 votes to 2 with 12 abstentions. Its preamble notes ‘the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence’.[16]

The legal force of the United Nations Charter has, over the intervening years, been strengthened by declaratory resolutions and their endorsement by the International Court of Justice. The provisions of the two resolutions, **1514 (XV) and 2625 (XXV)** have formed the basis of subsequent practice. Whilst the eventual destination of trust territories was always self-government, this was not always so clear in the case of Non-Self-Governing Territories, as James Crawford points out. In the framing of the UN Charter, he says:

> [t]here were those who sought to extend the Trusteeship system to all colonial territories and those who resisted this. The result was the acceptance of much the same substantive obligations [for colonial territories] as those under the Mandate and Trusteeship systems—in particular the principle that the interests of the inhabitants of these territories are paramount and of an obligation "to develop self-government" but with a much more attenuated [weaker] form of international

[14] East Timor (Portugal v. Australia), I.C.J. Reports 1995, p. 15 (separate pleading of P-M Dupuy).
[15] East Timor (Portugal v. Australia), I.C.J. Reports 1995, p. 15 (separate pleading of P-M Dupuy).
[16] East Timor (Portugal v. Australia), I.C.J. Reports 1995, pp. 15, 16 (separate pleading of P-M Dupuy).

accountability for non-self-governing territories. There has, however, been a progressive interpretation of the principle of self-determination and '[i]n practice Chapter XI of the Charter has been subjected to a pronounced progressive interpretation repeatedly endorsed by the International Court.[17]

Several key General Assembly resolutions have also contributed to this progressive interpretation. Pierre-Marie Dupuy pointed out in *Portugal v Australia* that '[o]ne of the most essential principles of international law in our day is the principle of respect for the rights of peoples'[18] These rights come from different sources but all are as important as each other. 'Two are of the nature of treaties, the Charter of the United Nations and the two human rights covenants' as mentioned above. 'The third is customary law, that is general international law of which the Court has noted that it continues "to exist and to apply, separately from international treaty law, even when the two categories of law have an identical content"'.[19]

In summary, what stands out for Crawford are the following principles:

a. no territorial acquisition resulting from the use of force to be recognized.[20]
b. the principle of equal rights and self-determination be recognized.
c. the stress on the rights and duties of States to dispose of colonial situations.
d. the rights of peoples dominated by force to be clearly identified.
e. the territorial integrity or political unity of sovereign States be preserved on the express condition that they are States 'conducting themselves in compliance with the principle of equal rights and self-determination of

[17] CRAWFORD, J *The creation of States in international law*, 2nd ed., Oxford University Press, 2006, p. 116.
[18] LACHS, M 'Fundamentals of international law' In *The Development and general trends in international law in our time*, Leiden, Nijhoff, 1980, pp. 19-28. Collected Courses of the Hague Academy of International Law; vol. 169. Cited by P-M Dupuy, East Timor (*Portugal v. Australia*), Separate pleading of P-M Dupuy, I.C.J. Reports 1995, p. 3.
[19] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports, Judgement 1986, p. 96, par. 179 (27 June). This paragraph alludes to the fact that for this case the United States made a reservation, the 'multilateral treaty reservation', to Article 36, par. 2, proviso (c) of the Statute of the International Court of Justice. This reservation excluded disputes arising under multilateral treaties and the Court added this to its declaration of jurisdiction; East Timor (Portugal v. Australia), I.C.J. Reports 1995, pp. 11-12 (Separate pleading, P-M Dupuy).
[20] East Timor (Portugal v. Australia), I.C.J. Reports 1995, pp. 90, 15-16 (separate pleading of P-M Dupuy).

peoples as described above and thus possessed of a government representing the whole people without distinction as to race, creed or colour'.

f. the rights of peoples and permanent sovereignty over their natural resources be respected as provided in General Assembly Resolution 1803 (XVIII).[21]

Justice Rosalyn Higgins on International Law and Effectivities

As regards the passage of time and support or lack of it from the member States of the United Nations, Justice Higgins stated that 'time is of itself legally neutral ... It is what happens over time and the legal qualifications of facts-through-time that is legally relevant.' Effectivities, a French term used in international law, means 'facts' but these facts Justice Higgins points out, only become legal facts by reference to rules of the international legal system; a wrongful effect cannot turn into a claimed legal right and does not displace all legal obligations.[22]

[21] CRAWFORD, J *The creation of states in international law* 2nd ed., Oxford University Press, 2006, pp. 127-128.

[22] East Timor (Portugal v. Australia) Oral Proceedings, I.C.J. Report CR 95/5, p.10 (2 February 1995).

CHAPTER 13: SECESSION AND INTERNATIONAL LAW

Those who drafted the United Nations Charter did not envisage the right of self-determination as giving rise to the right of secession. Until recently the right to independence was accorded only to peoples under colonial domination, alien domination and racist oppression.[1] The independence of a colony was not considered to be secession but a right to self-determination under Articles 1, 55 and 73 of the United Nations Charter.[2] Malcolm Shaw speaks of changing attitudes in international law:

> [s]tructural changes in the political, economic, social and cultural environments are altering the fundamental basis on which the exclusivity of the territorial state developed. As a result of this the state-centred framework of international law is in the process of being modified to accommodate these changes in the world system.[3]

Sharma adds that changes in international law, the growing impact of the principle of self-determination as a norm of *jus cogens* (compelling law), and respect for human rights 'appear to be penetrating the cloak of state sovereignty and territorial integrity'.[4]

The self-determination of peoples is now part of *jus cogens* and respect for human rights is accepted as a duty the State must respect. Peremptory norm (rules that must not be deviated from) exist to protect the values and interests that are fundamentally important to the international community as a whole.[5] Norms of *jus cogens* are usually connected with morality; all of humanity

---

[1] SCHARF, MP *Earned sovereignty: juridical underpinnings* Denver Journal of International Law and Policy, vol. 31, No, 3, 2004, p. 381.
[2] SCHARF, MP 2004, p. 378.
[3] SHAW, MN 'Title to territory in Africa: international legal issues' Clarendon Press, 1986, p. 5. Quoted in SHARMA, SP *Territorial acquisition, disputes and international law*, Martinus Nijhoff, 1997, p. 8.
[4] SHARMA, SP *Territorial acquisition, disputes and international law*, Martinus Nijhoff, 1997, p. 8.
[5] ORAKHELASHVILI, A *The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions* European Journal of International Law, vol.16, no.1, 2005, pp. 62-64; BIANCHI, A *Human rights and the magic of jus cogens* European Journal of International Law, vol. 19, no. 3, 2008, pp. 491-508.

finds, *inter alia* (among others) genocide, slavery, torture and apartheid abhorrent. These norms are called peremptory norms of general international law, or *jus cogens* (Latin for compelling law) and are *erga omnes,* that is that they apply to all States whether or not they are Members of the United Nations. These norms cannot be deviated from under any circumstances. This means that in legal terms peremptory norms are the highest in the hierarchy of norms. Under peremptory norms there are norms or rules that may be deviated from in certain circumstances of general international law. Peremptory norms vary from document to document but the following have been mentioned: the prohibition of genocide, slavery and slave trade, apartheid, murder, disappearance of individuals, torture, prolonged arbitrary detention and racial discrimination and other gross violations of human rights.[6]

Only in cases of emergency that threaten the life of a nation can some provisions be derogated from. Strict rules govern these cases and the situation is regulated by the *International covenant on civil and political rights (ICCPR)* Article 4 par. 1.[7] Other provisions are absolute values and even the United Nations Security Council cannot derogate from these. Cristescu states:

> ...the rights of a population living in the territory of a state are governed by the national constitutional law of that State. The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases the peoples have the right to regain their freedom and constitute themselves independent sovereign States.[8]

The *Universal declaration of human rights* (UDHR) is the foundation of international human rights law and has been the inspiration for more than 80

---

[6] MERON, T Discussion emanating from Part II, Ch.1 B 'To what extent are the traditional categories of *Lex Lata* and *Lex Ferenda* still viable' presented by J. Brownlie. In CASSESE A, WEILER, JH (eds) *Change and stability in international-law-making* Walter de Gruyter, 1988, p. 93.

[7] UN General Assembly, International Covenant on Civil and Political Rights, 16 Dec 1966. United Nations, Treaty Series, vol. 999, p. 171 [http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf].

[8] CRISTESCU, A *The right of self-determination: historical and current development on the basis of the United Nations instruments* New York, United Nations, 1981, p. 26, par. 173. [http://www.cetim.ch/legacy/en/documents/cristescu-rap-ang.pdf].

international human rights treaties as well as many other documents. The rights outlined belong to all human beings. Together with *the International covenant on civil and political rights (ICCPR)* and the *International covenant on economic social and cultural rights (ICESCR),* the UDHR makes up the Bill of Rights. It is now accepted as declaring customary international law.

The people of West Papua are denied a number of these rights listed in the *Universal declaration on human rights*, including [t]he right to life, liberty and security (art.3); to not be subject to torture or to inhumane and degrading treatment or punishment (art. 5); to be equal before the law (art. 7); to have complaints about the violation of fundamental rights heard by a national tribunal (art. 8); not to be subject to arbitrary arrest, detention or exile (art. 9); the right to freedom of expression (art. 19); to the freedom of peaceful assembly and association (art. 20); to a standard of living that supports health and well being (art.25); to participate in the cultural life of the community (art. 27). Article 21 (3) provides that the will of the people shall be the basis of the authority of government...

The right of secession and territorial integrity

On 19 October 2011 the Third Papuan Peoples Congress made a unilateral declaration of independence in West Papua. Indonesia claimed that the declaration was a violation of its right to territorial integrity. The right of territorial integrity is mentioned many times in United Nations instruments and first appears as Article 2, paragraph 4 of the United Nations Charter:

> [a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political integrity of any State or in any other manner inconsistent with the Purposes of the United Nations.

The International Court of Justice in its advisory opinion in the *Kosovo Case* of 2010 provided that:

> [d]uring the eighteenth, nineteenth and early twentieth centuries there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating a declaration was regarded as contrary to international law. During the second half of the 20th century the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.[9]

The Court gave examples of the latter as the presence of South Africa in Namibia, the Indonesian invasion of East Timor, and the Legal consequences of the construction of a wall in occupied Palestinian territory.[10] The I.C.J continues: '[t]here were, however, also instances of declarations of international law outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases'.[11]

Finland, in its written statement in the *Kosovo Case*, speaking of territorial integrity and self-determination provided that '... although the nexus is strong it is not and never has been absolute'.[12] Austria, in her written statement asserted:

> The proclamation of independence in the [Kosovo] Declaration does not contradict general international law which does not prohibit any part of a population of a

[9] Accordance with international law of the universal declaration of independence in respect of Kosovo. Advisory Opinion, I.C.J. Reports, 2010, pp. 403, 37, par. 79 (22 July).

[10] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, pars 52-53; East Timor (Portugal v Australia), Judgement, I.C.J. Reports 1995, p. 102, par. 29; Legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion, I.C.J. Reports, 2004 (I), pp. 171-172, par. 88.

[11] Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. Advisory Opinion, I.C.J. Report 2010, p. 37, par. 79.

[12] Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, I.C.J. Report 2010, Statement of Finland, p. 3.

> State to declare its independence. As such it is not subject to the obligation to respect the territorial integrity of States as was confirmed by the ILC.[13]

Austria also provided:

> Generally it has to be recognized that a declaration of independence as such is not addressed by international law since it cannot be attributed to a subject of international law capable of acting with international effect. International law is silent with regard to declarations of independence, thus no prohibition of the declaration can be derived from international law.[14]

When discussing Draft Article 18 of the *Declaration on the rights and duties of States* the International Law Commission (ILC) reiterated that the duty not to recognize acquisitions of territory by the use of force did not apply to secession as it addressed only States. Paragraph 127 of the ILC *Declaration* states that '... in case of secession there was no territorial acquisition since the situation developed within the frontiers of the original State. Hence the principle of non-recognition [of territory acquired by the use of force] should not be applied.'

In Paragraph 131 the Chairman proposed that Article 18 should read: '[e]very State has a duty to refrain from recognizing any territorial acquisition made **by another State** through force or the threat of force'. The addition of the words "by another State" eliminated the case of secession.' [15]

There have been suggestions that there is a prohibition against declarations of independence in the territorial integrity clauses particularly as they are

---

[13] Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. I.C.J. Report (2010), Statement by the Government of Austria, p. 21, par. 37.

[14] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Statement of the Government of Austria, I.C.J. Reports, 2010, par. 24, p. 14-15.

[15] Yearbook of International Law Commission *Draft Declaration on the Rights and Duties of States*. Summary records and documents of the 1st session including the report of the Commission to the General Assembly, 14th Meeting, 3 May 1949, A/CN.4/SR.14, p. 112, pars 127-131 (Topic: Fundamental rights and duties of States).

reiterated in other United Nations instruments, especially in UN General Assembly Resolution 2625 (XXV) *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations* which reflects customary international law. The principle of territorial integrity is however confined to the sphere of relationships between States. James Crawford states that '...secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally'.[16]

There have been instances where declarations of independence have been rejected and those rejections were not about the unilateral character of the declaration but the illegality stemming from their connection with the use of force 'or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.[17]

Remedial Rights to Secession, Denial of rights

Where a people who may seek independence are not discriminated against then the right to secede is usually denied. Two cases are often quoted: the **Aaland Island Case (1920)** and the decision of the **Supreme Court of Canada regarding the legality of the unilateral secession of Quebec, 1998.**

The remedial right to secession has its origins in the Aaland Island case. This case was the first time that the question of self-determination was linked to the rights of minorities. It concerned a Swedish population inhabiting islands in the Gulf of Bothnia between Sweden and Finland. The islands are a part of Finland but their Swedish inhabitants wished to secede to Sweden. In 1921 The League of Nations Commission of Rapporteurs held that they had the right

[16] CRAWFORD, J *The creation of States in international law* 2nd ed. Oxford University Press, 2006. p. 390.
[17] Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, I.C.J. Reports 2010, par. 81.

to separate if their culture was subject to disrespect. As this was not the case no separation occurred. The Rapporteurs stated that:

> The separation of a minority from the State of which it forms part and its incorporation into another State can only be considered as an altogether exceptional solution, a last resort when the State **lacks either the will or the power to enact and apply just and effective guarantees.**[18] (Emphasis added)

The Swedes from Aaland Island were entitled to guarantees for the preservation of their social, ethnic and religious character and Finland agreed to respect these rights. The Rapporteurs also suggested that 'justice and liberty' were 'embodied in the formula of self-determination'. They also considered history, geography and politics, and took into consideration the Islands geographical position as a geological continuation of the mainland of Finland and a dividing line between Finland and Sweden.[19] The findings in this case have served as a precedent to this day.

In the case of *Quebec v Canada* the Supreme Court of Canada found that the right of secession was tied to the right to internal self-determination and if this right was not respected then Quebec had the right of secession. The Supreme Court found that Quebec people were not part of a colonial empire; they were not subject to alien domination or exploitation and they were not denied the right to exercise internal self-determination. Thus they did not have the right to secede unless the Canadian government offered this.[20]

---

[18] Report presented to the Council of the League of Nations by the Commission of Rapporteurs. LN Council Doc. B7 21/68/106 (1921) p. 4.

[19] LALONDE, S 2002, p.75; Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations, Spec. Supp. 3 (1920).

[20] SCHARF, MP *Earned sovereignty: juridical underpinnings* Denver Journal of International Law and Policy, vol 31, no. 3, 2004, p. 384; Reference re Secession of Quebec, Supreme Court Judgement, 20 August 1998, Report [1998] 2 SCR 217, Case 25506, (3) Question 2.

Rights that may be accepted

Modern day international law embraces the right of non-colonial people to secede from an existing state 'when the group is collectively denied civil and political rights and subject to egregious abuses'. This right is known as the **remedial right to secession.**[21]

In more recent times the writings of numerous scholars; the Bill of Rights that includes the *Universal declaration of human rights* as well as the two Covenants; General Assembly resolutions; judicial opinions; the declarations of international organizations and State practices **have also given support to the right of secession from an existing state in cases where a group has been denied civil and political rights and has suffered extreme abuse**.[22] (Emphasis added).

A group with a common identity linked to a defined territory has the right to decide its political future 'in a democratic fashion'.[23] A claimant State may be assessed using the following criteria, that the claimant group should qualify as a 'people', meaning that it should 'share a common racial background, ethnicity, language, religion, history and cultural heritage. Another important objective factor is the territorial integrity of the area the group is claiming'.[24]

Anna Moltchanova explains that '...historically, national identities are not set in stone—nations are political communities that can be formed, change, and cease to exist' and that '... any group whose members share a particular kind of political culture—or set of beliefs and attitudes concerning politics—can be the subject of a primary moral right'. Moltchanova proposes a number of

[21] SCHARF, MP *Earned sovereignty: juridical underpinnings* Denver Journal of International Law and Policy, vol 31, no. 3, 2004, p. 382.
[22] SCHARF, MP 2004, pp. 387-9.
[23] STERIO, M *On the right to external self-determination: "Selfistans," Secession, and the Great Powers' Rule* Minnesota Journal of International Law, vol. 19, no. 1, 2010, p. 142.
[24] SCHARF, MP 2004, p. 380.

conditions that must be met before a group can qualify for a primary right of secession. The group must have a set of coherent beliefs that should be similar to other groups sharing similar aims and characteristics. The group should act upon their beliefs in ways that are compatible with the aims and beliefs of other groups that also seek self-determination. A group that conforms to these conditions qualifies for a primary right.[25]

Sterio examines 'the extent to which individuals in the group self-consciously perceive themselves collectively as a distinct "people" ' and 'the degree to which the group can form a viable political entity'. Once it has been determined that a group qualifies as a people and thus has the right to self-determination the next question becomes whether the right to self-determination creates a right to secession and independence.[26]

James Crawford suggests that self-determination and the criteria for independence have 'become much more variegated in the 20th century'. He speaks of secession as a self-determination unit where self-determination is forcibly prevented by the metropolitan State. 'Secession in this case will be reinforced by the principle of self-determination and the precondition to recognition much less extensive'.[27]

West New Guinea was a self-determination unit held firstly by the Netherlands and then as a result of Indonesia's military threats and actions coupled with her political aggression, resulted in the situation becoming internationalised. This resulted in the administration of the territory being transferred to the United Nations then to Indonesia, under the terms of an Agreement between Indonesia and the Netherlands. These terms included an act of self-determination at any

[25] MOLTCHANOVA, A *National self-determination and justice in multinational states* Springer, 2009, p. 45.
[26] STERIO, M *On the right to external self-determination: "Selfistans," Secession, and the Great Powers' Rule* Minnesota Journal of International Law, vol. 19, no. 1, 2010, p. 142.
[27] CRAWFORD, J *The creation of States in international law* 2nd ed., Oxford University Press, 2006, pp. 383-384.

time before 1969. The people of West New Guinea were forcibly denied an act of self-determination by Indonesia. This act, as pointed out by Ralph Wilde was promised to them in the Agreement.[28] The Act of free choice that took place in 1969 may have been accepted by the General Assembly of the United Nations as a *bona fide* act of self-determination but was nothing of the kind. In point of fact many States expressed extreme distress at the result.

Where do we find formal mention of these rights?

1. An agenda for peace, preventive diplomacy, peacemaking and peacekeeping, UN Secretary-General, 1992. After re-affirming the territorial sovereignty of States, the Secretary-General, in ***An agenda for peace*** (1992) declares there must be a balance between sovereignty and self-determination and that the two must not be permitted to work against each other; **'The time of absolute and exclusive sovereignty, however, has passed: it's theory was never matched by reality'**.[29]

2. General Assembly Resolution 2625 (XV) mentions discrimination based on race, creed or colour as justification for secession. Territorial integrity takes precedence over self-determination **as long as** the sovereign state conducts itself 'in compliance with the principle of equal rights and self-determination of people ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'

3. The Vienna Declaration and Programme of Action 1993 repeats the same clause contained in the Friendly Relations Declaration but widens the criteria to include 'the whole people of the territory without distinctions of any kind'.[30]

---

[28] WILDE, R *International territorial administration: how trusteeship and the civilizing mission never went away* Oxford University Press, 2008, pp. 169-170.

[29] *An agenda for peace, preventive diplomacy, peacemaking and peace-keeping* Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 - S/24111 17 June 1992, Art. 17-19.

[30] Vienna Declaration and Programme of Action. World conference on human rights, UN Document A/Conf 157/23 (1993) I.2-par. 3 [http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx].

4. UN Subcommission on Promotion and Protection of Human Rights

Protection of minorities: possible ways and means of facilitating the peaceful and constructive solutions of problems involving minorities. Section I (General) speaks of equality for all with 'separate group identities' and their ability to develop their identity without denying the rights of other groups. Minorities have the right to be protected and to share in the wealth of the state.[31]

Ethnic Identity and the Right to Secession

Dietrich Murswick argues that where a people is subject to such discrimination by the state that its very existence is in peril then 'the right of self-determination would be a hollow shell. If the extermination of a people were allowed, the people's **right** to its own political status or to dispose of its own natural resources would be worthless'. A people as a group which can be the holder of the right of self-determination exists only if it lives in a distinct territory and shares common characteristics of culture and tradition and religion. All measures aimed at destroying the basis of its existence, for example, imprisonment or execution of group leaders, 'instillation of members of the national majority in order to outnumber the people concerned on its own territory', suppression of the group's cultural life are incompatible with the right of self-determination.[32] Murswick points to the numerous instances of secession that have taken place during the 20th Century and concludes from these that in many cases the act of secession was granted by the State concerned. Examples here are the 1993 dissolution of Czechoslovakia into the Czech Republic and the Slovak Republic, the break up of the USSR and the eventual recognition of Latvia, Lithuania and Estonia as separate countries (as they had been prior to their occupation by USSR), and Croatia's independence

[31] UN Subcommission on the Promotion and Protection of Human Rights. Possible ways and means of facilitating the peaceful and constructive solutions of problems involving minorities: report submitted by Asbjorn Eide, Addendum 4. Recommendations. E/CN.4/Sub.2/1993/34/Add. 4, 11 August 1993. [http://www.refworld.org/docid/3b00efc528.html]

[32] MURSWICK, D 'The issue of a right of secession-reconsidered' In TOMUSCHAT, C ed. *Modern law of self-determination* Martinus Nijhoff, 1993, p. 26-27.

via a Declaration of Independence that was eventually recognised by the Economic Union and the United Nations.[33]

Murswick contends that when two norms conflict this does not mean that one cancels out the other.[34] Whilst sovereignty preserves international order there are situations that can be remedied by territorial alterations, by secession of a part of the territory or by a unit of the whole State. He refers to an 'offensive right of self-determination of a people that can be distinguished from other people by objective ethnic criteria particularly culture, language birth or history'. They must be settled on a coherent territory on which it forms a majority and have a traditional link to the territory. Self-determination implies independence from the State and the opportunity 'to live under those political, social and cultural conditions that correspond best with its characteristic singularity and to above all protect and develop its own identity'.[35] Only if a State deprives a people of the right to internal self-determination and they continue to show allegiance to that State as a whole, then 'must territorial integrity stand behind the right of self-determination'; autonomy is the best precaution against secession demands if only granted in time. 'The threat of the right to secession should then become a motivation for granting autonomy in time and thus making any wish for secession seem superfluous. In this sense the best precaution against secession is a right to secession'.[36]

Violation of Intrastate Autonomy

Allen Buchanan postulates that international law should protect human rights so as to avoid secession, and that the rights of some groups to intrastate (within states) autonomy should be strengthened and extended to groups before the human rights situation reaches a demand for secession. However, he

[33] MURSWICK, D 1993, p. 31.
[34] MURSWICK, D 1993, p. 35.
[35] MURSWICK, D 1993, p. 38.
[36] MURSWICK, D 1993, p. 39.

acknowledges that International law should support a right of secession for groups that have been given autonomy. Where violations of this right occur then these should be recognized as a violation of international law. 'The terms of the autonomy arrangement are to be upheld and the State may not unilaterally revoke the arrangement or substantially modify its terms'. This is particularly 'when the group's reason for seeking the autonomy arrangement in the first place was because it had suffered serious human rights violations'.[37]

Remedial Rights Theory can be invoked as explanation for the right to secede in several situations: a claim to territory that has been taken from the claimant, or claiming sovereignty over a territory as a result of persistent human rights abuses or the inability of autonomy to solve problems of human rights abuses. A State has a moral obligation to provide 'justice and protection to those who live within its jurisdiction' and can lose 'entitlement to its territory' if it fails to provide these basic rights and protections.[38]

Milano Sterio points out that 'If a government is extremely unrepresentative and abusive then much more potentially destabilizing modes of self-government, including independence, may be recognized as legitimate.[39]

Secession and territorial claims

Lea Brilmayer has pointed out that secession is not just the formation of a new political group but that the secessionist must have an independent territorial claim and self-determination must be tied to this claim. That the secessionist group constitutes a distinct people does not necessarily give the right to secede; this claim has more chance of success if it is presented with a

[37] BUCHANAN, A 'Uncoupling secession from nationalism and intrastate autonomy from secession' In Hanum, H & Babbitt, EF (eds) *Negotiating self-determination*, Lexington, 2008, p. 93.
[38] BUCHANAN, A 2008, p. 85.
[39] STERIO, M *On the right to external self-determination: "Selfistans," Secession, and the Great Powers' Rule* Minnesota Journal of International Law, vol. 19, no. 1, 2010, p. 146.

territorial claim. It (the claim) is a relationship between peoples, states and territory and '[s]ecession typically represents a remedy for past injustices'.[40]

This territorial argument is vital to a claim and should be emphasized and its 'relevance should be recognized under international law'. Brilmayer says that a claim that has an historical basis is the most appealing because 'the land belongs to the secessionist group ... and only came under the domination of the existing state by some unjustifiable historic event'. It is an important feature of a successful claim of secession that the present grievance relates closely to the original historical injustice. Brilmayer refers to acquisition by conquest but other methods of acquisition may be brought into the argument.

An example here is the incorporation of the Baltic States into the Soviet Union in 1939 as a result of a secret pact between foreign minister Molotov of Russia and Ribbentrop the foreign minister of Germany. In 1941 Germany invaded the Baltic States and in 1945, with the tacit approval of Britain and the United States, the Soviet Union again occupied the country. Gross human rights abuses occurred during all three occupations. The Baltic nations resisted Soviet rule, but did not win independence until the late 1990's. Each has declared itself as restoring the sovereign nations that existed between 1918 and 1940, 'a legal interpretation shared by United States, United Kingdom and other western democracies'.[41]

Brilmayer considers arguments that can be used by a secessionist group. The current dominant State from which the ethnic group wishes to secede had acquired the land by conquest and was enabled to acquire the land as a result of the actions of a third party, a State that was not party to the dispute but did

[40] BRILMAYER, L *Secession and self-determination: a territorial interpretation* Yale Journal of International law, vol. 16, no.177, 1991, p. 179.
[41] BALTIC STATES (2016, August 13) In *Wikipedia, The Free Encyclopedia*. Retrieved 26 August 2016 from https://en.wikipedia.org/w/index.php?

so for its own convenience; the annexation was improper and 'the wrongdoer is thus the current dominant State'.[42]

Historical claims must be investigated and it is important that the secessionist group identifies with and investigates the wrongs of the past and with the people who experienced these wrongs.[43] For example, how long ago did the historic injustice occur? [44] To what extent have the separatists kept the claim alive? Have these claims been kept alive by mostly peaceful means? To what extent has the dominant state moved populations favourable to the dominant state on to the territory claimed by the separatist group? 'Had the secessionists' territory not been improperly annexed, the newcomers could have been excluded entirely'.[45]

Recognition

For the State seeking independence, recognition and support by other States is important. Recognition is applied in an arbitrary way in that geopolitical realities may determine whether a breakaway state is recognised or not. International law does not confer the right to secede, but if a State does secede then there are rules that must be followed. A self-identified group seeking to disassociate itself from the parent State must show that it was denied the right to democratic self-government and that its people were denied basic human rights. It must also agree to accept the colonial or administrative boundaries and may not claim territory from a third State. Finally, the new State must respect the rule of law and democracy and human rights and conform to the norms of international law.[46] It must conform to criteria laid down by international law such as those in the Montevideo Convention (1933) that

[42] BRILMAYER, L *Secession and self-determination: a territorial interpretation* Yale Journal of International law, vol. 16, no.177, 1991, p. 189.
[43] BRILMAYER, L 1991, p. 191, 192.
[44] BRILMAYER, L 1991, p. 198-199.
[45] BRILMAYER, L 1991, p, 200.
[46] SCHARF, MP *Earned sovereignty: juridical underpinnings* Denver Journal of International Law and Policy vol, 31, no. 3, 2004, p. 386.

include having a defined territory, a permanent population, a government and the ability to relate to other states on the world stage.[47] Further rules such as those in the European Community Declaration on Yugoslavia and in *Guidelines on the recognition of new States* may apply.[48]

It is a well-established principle that a non-colonial people living in a discrete territory and sharing common characteristics including a historic attachment to that territory and who are subject to alien subjugation, domination and exploitation may have their claim to independence recognized by established States. International law does not confer the right to secede (as Austria noted in the Kosovo case) and international law says nothing about declarations of independence. There is, therefore no prohibition of these acts. United Nations General Assembly Resolution 2625 (XXV) specifically mentions that States must respect the territorial integrity of States 'conducting themselves in compliance with the equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

West Papua and the Decolonization Committee

Resolution 1514 (XV) of 1960, *Declaration on the granting of independence to colonial countries and peoples,* solemnly proclaimed the necessity 'to remedy immediately and unconditionally the colonial situation in all its forms and manifestations'. It furthermore declared that '[i]mmediate steps must be taken in Trust and Non-Self Governing territories or all other territories which have not yet attained independence, to transfer all the powers to the peoples of those territories'. This resolution led to the creation of the Special Decolonization Committee, which first met on 1 March 1962.

[47] Seventh International Conference of American States, Montevideo Convention on Rights and Duties of States, 26 December 1933, 3802 INTS 19, Article 1.

[48] European Community: Declaration on Yugoslavia and on the guidelines on the recognition of new states [16 December 1991] International Legal Materials, vol, 31, no. 6, November 1992, pp. 1485-1487.

From time to time there has been discussion regarding the possibility of West Papua—as a territory entitled to a genuine act of self-determination, that was a non-self governing territory with the Netherlands as administering power and a Non-Self-Governing Territory during the UNTEA administration—being put back onto the Decolonization Committee.

The Puerto Rico case

Puerto Rico provides a precedent for this.[49] Puerto Rico was placed on the list of Non-Self-Governing Territories by General Assembly Resolution 66 (1) 1946.[50] The resolution required the United States to submit an annual report on social, economic and educational conditions in accord with Article 73(e) of the United Nations Charter. Eight years later, Puerto Rico's change of status, from Non-Self-Governing Territory to member of the US 'commonwealth', was approved by United Nations General Assembly Resolution 748 (VIII) 27 November 1953. Consequently the United States declared it would cease transmitting annual reports.[51] However, when the General Assembly recognised Puerto Rico's change of status it did not apply the full list of criteria listed in Resolution 567 (VI) 18 January 1952 and Resolution 648 (VII) 10 December 1952.[52]

As a result of General Assembly Resolution 748 (VIII) of December 1953, Puerto Rico became a 'free associated State', an unincorporated territory of the United States, and—pursuant to the Territorial Clause of the United States Constitution—subject to the power of Congress. The Territorial Clause reads:

[49] LOPEZ AM, REARDON G *Puerto Rico at the United Nations* North American Congress on Latin America (NACLA) [n.d].
[50] Information from non-self-governing territories transmitted under Article 73e of the Charter, UNGA Resolution 66 (I) 14 December 1946.
[51] Cessation of the transmission of information under Article 73e of the Charter in respect of Puerto Rico. UNGA Resolution 748 (VIII) 27 November 1953.
[52] 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-determination, UNGA Res. 648 (VII), 14 Dec 1960.

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States or of any particular State.[53]

In its written submission to the United Nations in 1953, the United States did not represent that with Resolution 748 (VIII) Puerto Rico would be subject to the power of the United States Congress. That Puerto Rico has a constitution, but at the same time is still bound by United States law causes many problems. For instance, the death penalty is forbidden by Puerto Rico's constitution but is still legal in the United States. Lopez and Reardon characterized this confusion as 'a result of U.S. hegemony within the United Nations'.[54]

Since 1972 the Special Committee on Decolonization has made numerous resolutions regarding the status of Puerto Rico.[55] The earlier documents have proved elusive but one document dated November 19 1975, which was accessed by Wikileaks, is a memo entitled *Puerto Rico in the Committee of 24.* It revealed a secret United States-inspired plan involving Australia and Norway, whereby Australia would table a draft resolution in the Committee of 24 that would effectively call for the termination of the Committee's consideration of Puerto Rico 'unless the General Assembly should at some time decide otherwise'. Its author Daniel Moynihan emphasized 'it must not be apparent that the USG is in any way involved in the strategy'.[56].[57] Lopez and Reardon claim the language of the committee's resolutions has become 'more

---

[53] United States of America, Constitution, Section 3, New States and Federal Property.

[54] LOPEZ AM, REARDON, G *Puerto Rico at the United Nations* North American Congress on Latin America (NACLA) [n.d]

[55] UN Special committee on the situation with regard to implementation of Declaration on the granting of independence to colonial countries and peoples, General Assembly Special Committee concerning Puerto Rico, 18 June 2014, A/AC.109/2014/L.6. [http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.109/2014/L.6]; UN Special committee on the situation with regard to implementation of Declaration on the granting of independence to colonial countries and peoples, Special Committee decision 11 August 1998 concerning Puerto Rico, Report by Rapporteur Fayssal Mekdad (Syrian Arab Republic). A/AC.109/2000/L.3.

[56] WIKILEAKS, Puerto Rico in the Committee of 24. Access a link via A/AC.109/L.976.

[57] United Nations Decisions of the Committee of 24 on Puerto Rico. Documents from 1999 onwards at http://www.un.org/en/decolonization/decisions_puerto_rico.shtml.

assertive and explicit year after year', and that independence organizations have been harassed by United States security and intelligence forces.[58] The Rapporteur of the 2004 Special Committee Fayssal Mekdad stated:

> [s]ince 1953 the United States has maintained a consistent position regarding the status of Puerto Rico and the competence of United Nations organs to examine that status based on General Assembly Resolution 748(VIII) of 27 November 1953 by which the Assembly released the United States from its obligation under Chapter XI of the Charter of the United Nations. Since then the United States has maintained that Puerto Rico has exercised its right of self-determination, has attained a full measure of self-government, has decided freely and democratically to enter into free association with the United States, and is therefore, as stated explicitly in Resolution 748 (VIII) beyond the purview of United Nations consideration.[59]

[58] LOPEZ AM, REARDON, G *Puerto Rico at the United Nations* North American Congress on Latin America (NACLA) [n.d].

[59] UN Special committee on the situation with regard to implementation of Declaration on the granting of independence to colonial countries and peoples. Special Committee decision of 14 June 2004 concerning Puerto Rico. Report by Rapporteur of the Special Committee Fayssal Mekdad (Syrian Arab Republic). A/AC.109/2005/L.3, p.12.

CONCLUDING REMARKS: INDONESIA'S CLAIM TO WEST NEW GUINEA

Much background information has been included in this document so this chapter focuses on summarizing the incorporation of West Papua/West New Guinea into the Republic of Indonesia, with some new material included.

The development of the right of self-determination as reflected in United Nations instruments from the Charter of 1945 onwards, and its validation by the International Court of Justice is a story of revolutionary development in international law.

When, as a result of decolonization, Indonesia became a separate independent State called the United States of the Republic of Indonesia, the Netherlands withheld West New Guinea on the understanding that the peoples of the territory were Melanesians, different racially and culturally, geographically and historically from the Malay-dominated Indonesians. Rigo Sureda contended that Indonesia's claim was based on nationality as a political concept. He also stated that:

> [f]or the purpose of determining the subject of self-determination an Administering Authority can unilaterally change the territorial boundaries of a non-self-governing territory until the very moment of its independence, provided the change is not made with a view of defeating a claim by the emerging state to self-determination as a whole.[1]

A mix of threats of war and numerous attempts at invasion on the part of Indonesia plus the involvement of a third State, the United States of America, led to the signing on 15 August 1962 of a treaty between the Republic of Indonesia and the Kingdom of the Netherlands. The West Papuans were not

[1] RIGO SUREDA, A *Evolution of the right of self-determination: a study of United Nations practice* Leiden, Sijthoff, 1973, p. 147-148; United Nations General Assembly Resolution 742 (VIII) 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, 27 November 1953.

consulted at any stage of the process and were entirely reliant upon the Dutch to advocate for them. The Agreement read like a Trusteeship agreement but wasn't called a trusteeship agreement. The Netherlands, denied support from the major powers including Australia, was not prepared to precipitate a war and withdrew from the administration of the territory.

The UN General Assembly and The Agreement between the Republic of Indonesia and the Kingdom of the Netherlands

On 21 September 1962 at the 17th Session of the UN General Assembly Agenda item 89 concerning the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands came up for the vote. According to the United Nations Official Records of the 1127th Plenary Meeting, Indonesia's Foreign Minister Subandrio spoke of the development of West Irian 'so that the people of the territory can be emancipated into the social conditions prevailing among their brethren in the other parts of the Republic' (pars 172-181). The Netherlands Representative, Mr Schurmann, spoke, amongst other things, of his country's faithful reporting as required by Charter Article 73(e) and the need for an act of genuine self-determination for the people of the territory (pars 182-196). The President then put the draft resolution to the vote. A vote was taken by roll-call and 89 countries voted for the draft resolution and 14 abstained (par. 197). Following the vote the representative of Australia, Garfield Barwick stated that the dispute should have been taken to the International Court of Justice as it involved a juridical question (par. 213). He spoke of the Papuans right of self-determination and the concern expressed by the neighbouring peoples of the Australian administered territories of Papua and New Guinea for their own right of self-determination (par. 215). He said the Indonesians had previously stated that their claim to West New Guinea was based on political considerations of historical or consensual origins, but Australia was of the opinion that there was no room for territorial aggrandizement or the settlement of a claim to additional territory by the threat or use of force (par. 213). He said Australia would respect any

agreement between the Netherlands and Indonesia arrived at by peaceful means **but would not regard a forceful solution as binding** (par. 216). He said Australia deplored both the use of force and the threat of it during the period between the sixteenth session and the conclusion of this Agreement (par. 219).

The Representative for Dahomey[2] said '[m]y Government cannot endorse arrangements whereby a people of 700,000 is transferred from one Power to another under a bilateral treaty concluded without previous consultation with the party chiefly concerned, the Papuan people' (par. 242).

The representative of Togo, Mr Akakpo, thought it strange, considering the importance of the matter, that the vote was taken in some haste. 'The general debate of the 17th session had not yet been concluded, the text of the Agreement had only just been submitted to the General Assembly yet we already have a resolution under which the General Assembly takes certain action and authorizes the Secretary-General to carry out the tasks entrusted to him in the Agreement concluded between the two Governments' (par. 265). He stated his delegation 'would have liked so important a question to be studied in all its aspects and the agreement to be thoroughly examined ' so that 'the General Assembly should at least have been able, in full knowledge of the facts, to estimate what the probable results of the agreement would be' (par. 266). He was also critical of 'certain imperfections in the Agreement and the resolution on which we have just voted' (par. 268). Togo abstained from voting. Senegal later withdrew its acceptance and voted against the resolution.

The Agreement brought to an end the project of the Netherlands to prepare the Papuans for self-government. The territory, a self-determination unit, was handed first to a United Nations Temporary Executive Authority and six months later to Indonesia. The Agreement between Indonesia and the

[2] Dahomey changed its name to Benin in 1974.

Netherlands contained in Article XVIII a right to an act of self-determination, but at no stage did Indonesia show a willingness to consult the population of the territory or the International Court of Justice. Both the Netherlands and Indonesia promised the peoples of West Papua an act of self-determination, but to date no genuine act of self-determination has taken place. The 1969 Act of Free Choice was a farce dominated by threats of the most extreme kind. One thousand or more cowed people reluctantly raised their hands to indicate they 'wished' to be part of Indonesia.[3]

Status of Non-Self-Governing Territories

Indonesian nationalists considered that West New Guinea was an integral part of the Netherlands East Indies and that they had a right to this claim. They put forward various justifications for their claim, one being that West New Guinea was part of the Majapahit Empire. Majapahit was a trading land-based empire that flourished between AD 1293-1527. It had no centralized authority but it claimed relationships with countries including Cambodia, Burma, and Vietnam. Ricklets stated that '[t]he memory of Majapahit's greatness has lived on in Indonesia and is sometimes seen as establishing precedent for the present political boundaries of the Republic'.[4]

To press its claim to the territory, Indonesia used the principle of *uti possidetis*. *Uti possidetis* is a legal principle that States emerging from decolonisation shall inherit the colonial administrative borders at the time of independence. Due to the inconsistency of its use it is not part of customary international law and has been criticized by eminent international lawyers. Judge Luchaire in the *Frontier Case* and speaking *of uti possidetis,* provided that **'**... the exercise of the right of self-determination may evidently lead certain plainly individualized parts of the former colony to a different option from that

[3] DROOGLEVER, P *An act of free choice: decolonization and the right to self-determination in West Papua* Oxford, Oneworld Publications, 2009, pp. 721-724.
[4] RICKLETS MC *A history of modern Indonesia* McMillan, 1981, p. 17.

followed by the other parts'.[5] In a separate opinion in the same case Judge Georges Abi-Saab—who criticised the over-emphasis on the excessive analysis of maps and documents 'to satisfy a particular conception of the *uti possidetis* principle'—was of the opinion that 'equity *infra legem'* (acceptable in international law) would have been better than the difficulty caused by *uti possidetis* 'given that the region concerned is a nomadic one, subject to drought, so that access to water is vital'.[6]

The development of the right of self-determination

The Preamble to the Charter of the United Nations opens with '[w]e the peoples of the United Nations ...' and Article 1 outlines the Charter's purposes '[t]o maintain international peace and security' (1.1) and 'to develop friendly relations based on ... equal rights and self determination of peoples' (1.2).

The principle of self-determination drew legal strength from 1960 onwards when the UN General Assembly adopted Resolution 1514 (XV) *On the granting of independence to colonial countries and peoples*. This resolution 'in conjunction with the UN Charter, has contributed to the gradual transformation of the 'principle' of self-determination into a legal right for non-self governing peoples' and called for an end of colonialism 'in all its forms and manifestations'.[7] Article 1 provided that 'subjection of peoples to alien subjugation and domination constitutes a denial of fundamental human rights...'; Article 2 that '[a]ll peoples have the right to self-determination'.[8]

[5] Frontier Dispute, (*Burkina Faso/Republic of Mali*), I.C.J. Reports 1986, p. 554, 652-3 (22 December) (Separate Opinion of Judge Luchaire).
[6] Frontier Dispute (*Burkina Faso/ Republic of Mali*), I.C.J. Reports, 1986, pars 13, 17 (22 December) (Separate Opinion of Judge Georges Abi-Saab); Note that the Parties who brought this case to the International Court did not mention *uti possidetis* but requested the Court to resolve their dispute on the basis of the 'principle of the of the intangibility of frontiers inherited from colonization'.
[7] CASSESE, A *Self-determination of peoples: a legal reappraisal,* Cambridge University Press, 1995, p. 70.
[8] TOMASCHAT, C ed. *Modern law of self-determination,* Martinus Nijhoff Publishers, 1993, p. vii.

Indonesia claimed that Article 6 of Resolution 1514 (XV) entitled it to 'reintegrate' West Papua, citing 'any attempt to disrupt the national unity or territorial integrity of a country as incompatible with the purposes and principles of the Charter of the United Nations'. As West Papua was a Non-Self-Governing Territory this right applies to West Papua and not to Indonesia. In the *Western Sahara Case*, the International Court of Justice concluded it was unlikely that Article 6 could over-ride the right of people of non-self governing territories to self-determination. Judge Nagendra Singh, in his Declaration in the I.C.J. *Western Sahara Case* of 1975 stated:

> [t]he consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method ... is integration or association or independence ... thus even if integration of a territory was demanded by an interested State ... it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization.[9]

Some years earlier in the *Namibia Case* the Court provided the following as part of its Advisory Opinion:

> [f]urthermore, the subsequent development of international law in regard to non-self-governing territories, enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them [all of the territories]. A further important stage in the development was *Declaration on the granting of independence to colonial countries and peoples* (General Assembly Res. 1514 (XV) 14 December 1960) which embraces all peoples and territories that 'have not yet attained independence.[10]

The Court went on to state:

> ....the Court must take into consideration 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.

[9] Western Sahara, Advisory Opinion, I.C.J. Reports, 1975, pp. 12, 81 (declaration of Judge Nagendra Singh).
[10] Legal consequences for States of the continued presence of South Africa in Namibia (*South West Africa*) notwithstanding Security Council Res. 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, par. 52.

The Court then concluded:

> In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination of the people concerned.[11]

The I.C.J. Court in the *East Timor Case* added the right of self-determination of peoples to the list of *jus cogens* (norms that cannot be disobeyed), saying 'that 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 irreproachable'.[12]

By 1952 the United Nations General Assembly had produced Resolution 648 (VII), a prior resolution to 742 (VIII) 1953 and 1541 (XV) 1960, and containing similar criteria in its Annex for a territory that chooses 'union on a footing of equal status with other component parts of the metropolitan or other country'. There were stringent conditions for this choice in all three documents. These were instruments used to assess when a territory ceased to be non-self-governing. They also provided criteria such as geographical, racial and cultural distinctiveness in order for the General Assembly to decide whether or not a territory fulfilled the criteria as a non-self-governing unit and was therefore entitled to a genuine and free act of self-determination. Article 73 of the UN Charter calls on members with responsibility for territories that have not yet attained a full measure of self-government to accept as a sacred trust the responsibility to promote the well being of the inhabitants. Article 73(e) requires these Members to transmit to the Secretary-General such information 'relating to the economic, social and educational conditions in the territories for which they are respectively responsible.'

---

[11] Legal consequences for States of the continued presence of South Africa in Namibia (*South West Africa*) notwithstanding Security Council Res. 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, par. 53.
[12] East Timor (*Portugal v. Australia*) Judgement, I.C.J. Reports, 1995. p. 90, par. 29.

Thomas Musgrave stated that the ballot in West Papua was inappropriate as the question asked was whether West Papuans wished to stay with Indonesia or to separate. At that time West Papua was not a part of Indonesia so the only real choice was one of whether they wished to integrate with Indonesia. Very stringent conditions apply when a territory makes this particular choice, with conditions outlined in Resolution 648 (VII), Resolution 742 (VIII) 1953 and Resolution 1541 (XV) 1960. These conditions derogate from and are much more stringent that those in Paragraph 3 of Resolution 1514 (XV) that applies only to the attainment of independence. Musgrave also concludes that the conditions set out in Resolution 1541 (XV) 'were egregiously violated by Indonesia'.[13] Principle IX (a) of Resolution 1541 (XV) requires that for integration to have come about 'the integrating territory should have attained an advanced stage of self-government with free political institutions so that its peoples would have the capacity to make a responsible choice through informed and democratic processes.' Principle IX (b) requires that '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'. (Emphasis added). Principle VIII requires integration to occur only 'on the basis of complete equality'. Therefore what took place in West Papua in 1969 should not have taken place as the people had not 'attained an advanced stage of self-government with free political institutions' as outlined in Principle IX (a).

There was always evidence that Indonesia never intended to treat West Papua as a self-determination unit. It can be assumed that the political situation in Indonesia itself was such that the West was more than aware of the so-called dangers of communism taking root and that a placating act would be necessary to reduce the influence of the Soviet bloc. Sukarno craved the glory of winning new territory, driving him to threaten and use force against the Non-

[13] MUSGRAVE, T 'An analysis of the 1969 Act of Free Choice in West Papua'. In CHINKIN C, BAETENS F *Sovereignty, Statehood and State responsibility: essays in honour of James Crawford*. Cambridge University Press, 2015, Chapter 12 [unpaginated]. Accessed online 21 June 2016.

Self-Governing Territory of West New Guinea. Also the lure of Papua's wealth was, for more than one actor, a driving force behind the eventual outcome that denied the people of their right to self-determination.

Ralph Wilde commented that '...the transfer of control from the Netherlands to Indonesia via a short period of UN administration treated the situation as if the people of West Irian did not enjoy a right to "external" self-determination'.[14] He argues that 'the Agreement of 1962 articulated a right of external self-determination on the part of the West Irianese **but at a time** when administrative arrangements clearly not based on such a right were adopted.' (Emphasis added). The West Papuans:

> enjoyed a right of external self-determination when UNTEA administered the territory, not because of separate treatment during the Dutch administration of the East Indies colony (but without prejudice to this as an alternative base), but because the colonial power and the other State aspiring with respect to the territory had **agreed that this would be the case.** This echoes the historical practice of external self-determination based on specific ad hoc agreements rather than the post-war entitlements arising out of the status of the territory.

He continues:

> [i]f colonial title in the era of self-determination could be extinguished, if territorial control by the colonial State was brought to an end, then West Irian ceased to be Dutch territory on the transfer of administrative authority to the United Nations. Thus for the duration of the UN administration project the territory was a non-state territory with a special international legal status, a self-determination unit.[15]

So what of the future for West Papua? That there are gross injustices in their story is to put it mildly; dispossessed of their tribal land, the destruction of fauna and flora, illegal logging and mining, the pollution of rivers, senseless

[14] WILDE, R *International territorial administration: how trusteeship and the civilizing mission never went away* Oxford University Press, 2008, pp. 169-170.
[15] WILDE, R 2008, p. 169-170.

brutality by the security forces on a daily basis. All cry out for redress. What does international law say about this?

Self-determination has been connected with decolonization or alien domination and subjugation but there has been a growing movement towards the upholding of sovereignty and territorial integrity on a *conditional* basis. This was first expounded in the *Aaland Islands Case* of 1920—1921. The Rapporteurs of 1921 wrote that '[t]he separation of a minority from the State of which it forms part and its incorporation into another State can only be considered as an altogether exceptional solution, a last resort when the State **lacks either the will or the power to enact and apply just and effective guarantees'.**[16] Their finding was expounded in the United Nations 'Friendly Relations Declaration' 2625 (XXV) 1970, an important declaration divided into seven principles.[17] The fifth principle *The principle of equal rights and self-determination of peoples* lists eight rights and duties of States:

> [t]he territory of a colony or other Non-Self-Governing Territory, has, under the Charter, a status separate and distinct from the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter (Rights and Duties, No. 6).

Crawford, in reference to the above, wrote:

> It seems clear from this and other formulations of the principle of self-determination that where the principle applies, it does so as a right of the people concerned; it is not a matter simply of rights and obligations as between existing States. Another State may well be **interested in the result of an act of self-determination**, in that it may stand to gain or regain territory. But to treat self-

[16] Report presented to the Council of the League of Nations by the Commission of Rapporteurs. LN Council Doc. B7 21/68/106 (1921), p. 4.

[17] Resolution 2625 (XXV) 1970 is an elaboration of the Charter and is the result of the *Special Committee on principles of international law governing friendly relations and co-operation among States* that met in Geneva from 31 March to 1 May 1970 [http://www.un-documents.net/a25r2625.htm].

determination as a right of that State would be to deny the reality of the alternative options open to the people concerned'.[18] (Emphasis added).

The 7th Rights and Duties of States in Resolution 2625 (XXV) provides:

> [n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part the territorial integrity or political unity of sovereign and independent States **conducting themselves in compliance with the principle of equal rights and self- determination of peoples** ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour (Principle 5, Rights and Duties, No. 7). (Emphasis added).

The 3rd Rights and Duties of States in Resolution 2625 (XXV) states:

> [e]very State has a duty to promote through joint and separate action universal respect for and observance of human rights and fundamental protections in accordance with the Charter (Principle 5, Rights and Duties, No. 3).

Judge Dillard, in the *Western Sahara Case* reminded us that:

> [i]t 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.[19]

In an I.C.J. case concerning the Philippines' claim of historic title over North Borneo, Judge Franck in a separate opinion stated that:

> [t]he point of law is quite simple but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot—except in the most extraordinary circumstances—prevail in law over the rights of non-self-governing

[18] CRAWFORD, J *The creation of States in international law*, 2nd ed, Oxford University Press, 2006, pp. 617- 618.
[19] Western Sahara, Advisory Opinion, I.C.J. Reports, 1975, pp. 12 116, 122 (16 October) (Separate Opinion of Judge Dillard).

people to claim independence and establish their sovereignty through the exercise of *bona fide* self-determination. [20]

Self-determination post decolonization

Self-determination is a universal right and the obligations arising from it are *erga omnes*, thus applying to the whole international community.[21] To assign self-determination to some but not all peoples would result in discrimination.[22] Finland spoke of the precedence in international law created by the *Aaland Islands Case.* That territorial integrity may be overridden in exceptional cases was affirmed expressly, and with particular relevance in the situation in the area of former Yugoslavia, in the early *locus classicus* by the Commission of Jurists on the *Aaland Islands* question in 1920:

> [f]rom the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law [...]. Under such circumstances, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may come to the surface and produce effects which must be taken into account in the interests in the internal and external peace of nations.[23]

The Finland submission in the *Kosovo Case* (2010) refers to the fact that self-determination was not abolished at the end of the decolonisation process, since

---

[20] Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia/Malaysia*). Application for permission by the Philippines to intervene, I.C.J. Reports, 2001, p. 575, par. 2 (October 23) (Separate Opinion, Judge Franck).

[21] GUDELEVICIUTE, V *Does the principle of self-determination prevail over the principle of territorial integrity?* International Journal of Baltic Law, vol. 2, no. 2, April 2005, p. 52.

[22] GUDELEVICIUTE, V 2005, p. 53.

[23] Report of the International Committee of Jurists entrusted by the Council of the League of Nations to give an advisory opinion upon the legal aspects of the Aaland Island question (League of Nations Official Journal, October 1920, p. 6). This was the first case where self-determination was linked to the rights of minorities. It concerned a Swedish population inhabiting islands in the Gulf of Bothnia between Sweden and Finland. These islands are a part of Finland but their Swedish inhabitants wished to secede to Sweden. The League of Nations Commission of Rapporteurs held that they had the right to separate **if** their culture was subject to disrespect, but as this was found not to be the case no separation occurred (Emphasis added).

it would create 'an arbitrary distinction between entities seeking self-determination and the various "situations of fact" in which claims are made. It also misunderstands the rationale of the principle itself, as expressed in the *Aaland Islands Case* and later'.[24]

General Assembly Resolution 2625 (XXV) on Friendly Relations provides:

> [e]very State has a duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:
>
> a. To promote friendly relations and co-operation among States; and
> b. To bring a speedy end to colonialism, having due regard to the freely expressed will of the people concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principles, as well as a denial of fundamental human rights, and is contrary to the Charter (Principle 5, Right and Duties No. 3).

West Papua is still a Non-Self-Governing Territory, whether a Trust territory or not. The claim that the peoples of the territory are 'separatists' or 'secessionists' cannot be upheld in the light of the history of the western half of New Guinea. Secessionist literature does however shine some light on the issue as many nations attempting secession have experienced similar problems.

The proclamation of independence (of Kosovo) does not contradict international law 'since it cannot be attributed to a subject of international law capable of acting with international effect. International law is silent with regards to declarations of independence, thus no prohibition of the Declaration

[24] Accordance with International Law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. I.C.J. Reports, 2010, par. 8 (22 July) (written statement of Finland); Report to Council of the League of Nations by the Commission of Rapporteurs. LN Council Doc. B7 21/68/106.

can be derived from international law'.[25] Secession does not violate the territorial integrity of States since the situation developed within the frontiers of the original State.[26] International law is silent when it comes to secession because no international breach has occurred.

Changes that have taken place in international law have impacted on the principle of self-determination as a norm of *jus cogens* as validated in the *East Timor Case*. 'In the Court's view, 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 irreproachable'; and '[t]he principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ... it is one of the essential principles of contemporary international law'.[27]

Writers on the subject of secession have divided the rights involved as Primary Rights or Remedial Rights. A Primary Right does not involve an injustice but a group that forms intentions and acts upon a set of constitutive beliefs is entitled to Primary Rights secession. Remedial Rights on the other hand will involve some injustice. There is a consensus that certain criteria must apply before a peoples constitute a unit that may qualify for remedial rights secession. A group with a common identity linked to a defined territory has the right to decide its political future in a democratic fashion, and the claimant State may be assessed using the following criteria:[28]

[25] Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Statement of the Government of Austria. I.C.J. Reports, 2010. par. 24, pp. 14-15.
[26] Yearbook of the International Law Commission**.** Draft Declaration on the Rights and Duties of States. Summary records and documents of the 1st session including the report of the Commission to the General Assembly, 14th Meeting. 3 May 1949. A/CN.4/SR.14, p. 112, par. 127.
[27] East Timor (*Portugal v. Australia*) Judgement, I.C.J. Reports, 1995. p. 90, par. 29.
[28] STERIO, M *On the right to external self-determination: "Selfistans," Secession, and the Great Powers' Rule* Minnesota Journal of International Law, vol. 19, no. 1, 2010, p. 142.

Does the claimant group qualify as a 'people'? That is, does it 'share a common racial background, ethnicity, language, religion, history and cultural heritage' as well as the territorial integrity of the area the group is claiming'?[29]

Dietrich Murswick proposes that the right of self-determination exists if a group shares common characteristics and experiences the following injustices:

a) a brutal government policy of suppression throughout the country;
b) imprisonment and execution of leaders;
c) installing members of the dominant national group on the territory in order to outnumber the people concerned;
d) suppression of the group's cultural life.[30]

Murswick refers to an 'offensive right of self-determination of a people that can be distinguished from other people by objective ethnic criteria particularly culture, language, birth or history'. The peoples who are claiming this right must live on and be linked to a discrete territory and this link to the territory must be of a substantial nature. Self-determination means independence from the State and the opportunity to live under the political, social and cultural conditions that mark them out as a separate peoples. A people need to 'protect and develop its own identity'.[31] If a people are deprived of their right to self-determination and recognize that they have a duty to respect the State in which they live then territorial integrity must give way to the right of self-determination. 'A state that infringes this obligation cannot pit the principle of sovereignty or of territorial integrity against the people's right to secession'.[32] 'The preservation of the existence of peoples is by no means in contradiction to

[29] SCHARF, MP *Earned sovereignty : juridical underpinnings* Denver Journal of International Law and Policy, vol. 31, No, 3, 2004, p. 380.
[30] MURSWICK, D 'The issue of a right of secession—reconsidered', in TOMUSCHAT, C (ed.) *Modern law of self-determination* 1993, p. 27.
[31] MURSWICK, D 1993, p. 37.
[32] MURSWICK, D 1993, p. 39.

the principle of sovereignty or territorial integrity. Thus this fundamental condition of self-determination must be respected by all States'.[33]

Buchanan states that International law should, however, support a right of secession for groups that have been given autonomy. Where violations of this right occur then these should be recognized as a violation of international law. 'The terms of the autonomy arrangement are to be upheld and the State may not unilaterally revoke the arrangement or substantially modify its terms'. This should be so, particularly 'when the group's reason for seeking the autonomy arrangement in the first place was because it had suffered serious human rights violations'.[34]

Lea Brilmayer has pointed out that secession is not just the formation of a new political group but the secessionist must have an independent territorial claim and self-determination must be tied to this claim. That the secessionist group constitutes a distinct people does not give the right to secede; this claim has more chance of success if it is presented with a territorial claim. It is a relationship between peoples, states and territory and '[s]ecession typically represents a remedy for past injustices'.[35] A group has a right to sovereignty in that they should not be subject to domination by an alien culture and a claim should include territorial arguments.[36] This territorial argument is essential to a claim and should be made explicit and this relevance should be recognized under international law. A claim that has an historical basis is the most appealing, says Brilmayer. 'The land properly belongs to the secessionist group, ... and only came under the domination of the existing state by way of some unjustifiable historic event'.[37] An important feature is the close

[33] MURSWICK, D 1993, p. 27.
[34] BUCHANAN, A 'Uncoupling secession from nationalism and intrastate autonomy from secession', in Hanum, H & Babbitt, E (eds) *Negotiating self-determination,* Lexington, 2008, p. 93.
[35] BRILMAYER, L *Secession and self-determination: a territorial interpretation* Yale Journal of International law, vol. 16, no.177, 1991, pp. 179, 189, 199.
[36] BRILMAYER, L 1991, p. 169.
[37] BRILMAYER, L 1991, p. 189.

connection between historical grievance and the current secessionist demand. Brilmayer refers to acquisition by conquest or by interference by a third state that acted for its own convenience, but other irregular methods may be brought into the argument.

A State has a moral obligation to provide protection and justice to those who live within its jurisdiction and can lose entitlement to its territory if it fails to provide these basic rights.[38]

James Crawford speaks of secession of a self-determination unit, where self-determination is forcibly prevented by the metropolitan State. Secession in this case will be reinforced by the principle of self-determination and the precondition to recognition will be much less extensive.[39]

It is appropriate to give the United Nations the last word: The United Nations *'Considers* that the validity of any form of association between a Non-Self-Governing Territory and a metropolitan **or any other country** essentially depends **on the freely expressed will of the people at the time of the taking of the decision'.**[40] (Emphasis added).

[38] BRILMAYER, L 1991, p. 185.
[39] CRAWFORD, J *The creation of States in international law,* 2nd ed., Oxford University Press, 2006, pp. 383-384.
[40] United Nations General Assembly Resolution 742 (VIII) 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. 459th Plenary meeting, 27 November 1953.

Annette Culley has written a most informative treatise on the legalities of West Papua's struggle for independence. Given she is not a lawyer, her treatment of difficult principles of public international law is remarkable. I am glad to admit I learned much from it. Especially informative is her re-counting of the politics and speeches at international fora.

I have come to conclude that individuals are often more virtuous than nations. Indonesia's bullying and brinkmanship and the UN's weakness did combine to create a quite unjust neo-colonial imperialism in West Papua out of step with international norms and exploitative of the local population.

Community awareness of West Papua's plight is deplorably low and books such as this can only help to correct that. Before one makes a judgment or even ventures an opinion, knowledge of the facts is essential. I encourage all thinking international citizens to read this book to further remove ignorance on the subject.

GLENN McGOWAN QC
Chair in Victoria, International Commission of Jurists

Congratulations Annette. Yours is the first comprehensive analysis of the legal processes used and abused by the international community to take possession of my homeland in the 1960s.

Your willingness to retrieve the facts, and your dedication to putting them all into readable order will certainly help us to get our country back.

JACOB RUMBIAK
Minister for Foreign Affairs Immigration & Trade
Federal Republic of West Papua