WEST PAPUA

(Real-Politik v International Law)

This paper sets out the facts and the principles of International Law relating to the process of decolonisation of the former territory of Netherlands New Guinea during the period between May 1960 and 1969 culminating in a resolution (passed by a vote of 84 to nil with 30 States abstaining) formally "noting" but not formally rejecting the result of the July/August masquerade of an "Act of Free Choice" stage managed and shrouded in a web of intrigue, bribery, duress by threat, and coercion by propaganda and fraudulent promises in which a mere 1025 carefully selected, indoctrinated and controlled members of its indigenous population of almost 800,000, under the close scrutiny of armed Indonesian security personnel agreed unanimously to commit their peoples to integration of their homeland with the State of Indonesia.

It asserts that by supporting that Resolution, 84 UN Member States with full knowledge of the relevant facts, and without consulting their own peoples, breached their obligations under international law with full knowledge of the determination of the State of Indonesia to annex the territory of West Papua by force of arms if it could not be achieved by other means, and thus compounded the problem by indefinitely depriving the peoples of West Papua of their right to their entitlement as beneficiaries of the "Sacred Trust" created by Chapter 11 of the United Nations Charter and reinforced by General Assembly Resolutions 1514 (XV) 1960 and 1541 (XV) 1960; condemning them to domination and exploitation by a totalitarian neo-colonising regime.

The purpose of the paper is to expose to the peoples of the world, whose Charter it is, and who were not consulted by their Governments involved in that decision, the Real-Politik involved in the subversion of the Purposes and Principles of the United Nations Charter and, in particular, its provisions relating to Self-Determination for peoples of non-self-governing territories, and its prohibition against the use by states of armed force against other States or Territories and, notably, UN GA Res. 1541 (XV), 1960, designed to ensure that the indigenous inhabitants of West Papua, as citizens of a non-self-governing territory, were enabled to exercise a valid choice in accord with their freely expressed will to achieve complete independence and freedom, or free association with an independent state or integration with an independent state.

Resolution 1541 (XV) expressly declares: "integration should be the result of the freely expressed wishes of the territories 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. The United Nations could, where it deems necessary, supervise these processes." Ethnically and culturally, the vast majority of the peoples of the colony of Netherlands New Guinea, being of Melanesian, Micronesian and Polynesian origin and with Christianity the major religion cultivated since the Dutch East India Company gained control of most of the territory in 1600, have little in common with the vast majority of their Indonesian neighbours.

A Summary of relevant events preceding the Ballot

Indonesia, which had been under Japanese occupation for almost 4 years (although Dutch New Guinea had remained largely under Netherlands administration with little communication with the other colonies comprising the Netherlands East Indies during that period), proclaimed its independence on 17 August 1945.
During decolonisation negotiations with Indonesia in 1949, following a four year armed struggle for independence by the Indonesian people, at a Round Table Conference between the Parties, the Netherlands transferred sovereignty over its former colonies in the Dutch East Indies to Indonesia, but with a significant reservation relating to Netherlands New Guinea, under the terms of the "Charter of Transfer of Sovereignty", a treaty which Indonesia later unilaterally rescinded.

Article 2 of that Charter stated:

"In view of the fact that it has not yet been possible to reconcile the views of the parties on New Guinea, which remains in dispute...

"In view of the limited research that has been undertaken and completed with respect to the problems involved in the question of New Guinea.

"It is decided that the status quo of the residency of New Guinea shall be maintained with the stipulation that within a year from the transfer of sovereignty to the Republic of the United States of Indonesia the question of the political status of New Guinea be determined through negotiations between the Republic of the United States of Indonesia and the Kingdom of the Netherlands."

"In an exchange of letters between the parties, dated 2 November 1949, it was laid down that:
"The clause in article 2 of the Draft Charter of Transfer of Sovereignty reading: the status quo of the residency of New Guinea shall be maintained, means: through continuing under the Government of the Netherlands."

“In the minutes of the Round Table Conference it is stated that it was agreed that the proviso that the status quo of New Guinea was to be maintained meant that the Territory would remain “under Netherlands sovereignty”. That sovereignty over West New Guinea was not transferred to Indonesia, and that it was not even taken for granted that it would be transferred to Indonesia appears from a note to one of the other agreements signed at the Round Table Conference, which reads as follows: “None of the provisions in this agreement shall apply to the nationality of the inhabitants of the residency of New Guinea in case sovereignty is not transferred to the Republic of the United States of Indonesia”.

(The Doctrine of Estoppel would seem to operate in those circumstances as a bar to Indonesia's capability of

sustaining its claim to hold lawful sovereignty over the territory of West Papua unless The Netherlands were to subsequently agree to transfer its sovereignty over West Papua to Indonesia and subsequently pursuant to an exercise of a valid act of self-determination, the peoples of the territory chose integration with Indonesia).

“In keeping with the agreement that had been made at the Round Table Conference, the Netherlands negotiated with Indonesia, not for one, but for two years. It negotiated about a settlement to the problem of New Guinea. All our Netherlands proposals were rejected and Indonesia insisted that we should transfer sovereignty over West Guinea to Indonesia. It was only at the end of 1951, two years later, that Indonesia suddenly took up a new position, namely, that sovereignty had already been transferred to it. On the new interpretation of the Agreements, we offered to ask for, and abide by, the decision of the International Court of Justice. Indonesia refused to do so and has since steadfastly adhered to this refusal”. (i)

In view of that stalemate, and further having regard to the recent adoption of the UN Declaration on the Granting of Independence to Colonial countries and peoples [Resolution 1514 (XV)] the matter was referred to the General Assembly for debate upon a number of alternative draft resolutions at its 1055th Plenary Meeting on 15 November 1961.

In a spirited debate, in which a number of options were canvassed, no resolution was arrived at, other than to refer the matter back to the Parties involved to continue negotiations in an effort to reach an agreement. Speaking to the draft resolution submitted by Nigeria, which advocated that the Parties should be asked to resume negotiations, and if they should be unavailing, a Commission should be appointed at that session to study the political, economic and social situation in New Guinea and report to the General Assembly at its subsequent (Seventeenth) Plenary Session, so that the Organisation would be able to decide, in full knowledge of the facts, whether to entrust the future of the indigenous peoples of New Guinea to any particular international organization, on the clear understanding that those people will at any time be free to decide on the type of national and international status which in their opinion would best satisfy their aspirations, their delegate, at Paragraphs 76-78 and 80 of the record, noted:

"The parties to this question have been negotiating for almost 12 years in order to find a solution to their dispute, but so far, to the best of our knowledge, no new element has emerged that might lead to an understanding. The Netherlands, a colonial country, claims sovereignty over New Guinea and is prepared to appeal to the United Nations, by means of a draft resolution, to have the sovereignty transferred to our organisation so that New Guinea might, in this way be brought to self-determination. Indonesia, however, considers New Guinea to be an integral part of its territory and is asking that its sovereignty over the territory should be recognized. This is the crux of the controversy on which we shall have to make a decision before going any further.

"What has greatly surprised us in this dispute is that one of the parties is not asking for the opinion of the

people of New Guinea, although that would have been a good starting point in order to remove any possible misunderstanding. It is for the people of New Guinea themselves to say, in the present circumstances, who is entitled to claim sovereignty over their territory until they themselves, by referendum or by some other means, decide their own fate. It should be agreed in this dispute that the voice of the people of New Guinea ought in no case to go unheard." (ii)

However Indonesia continued to demand that the Netherlands transfer sovereignty over the territory citing two grounds:
(i) That it seceded to Dutch sovereignty over the whole of the Netherlands East Indies;
(ii) That there were historical ties between the rest of Indonesia and West Papua before the colonial era".

It subsequently argued as well that the ongoing Netherlands programme for development of institutions and political awareness in New Guinea leading up to an act of self-determination in 1970, promised in 1945, to enable its peoples to achieve independence to West Papua, would partially disrupt the national unity and the territorial integrity of the State of Indonesia and so be incompatible with the Purposes and Principles of the Charter (paragraph 6 of the UN Resolution 1514 (XV), 1960).

An 'historical ties' argument, based upon the extent of the territories controlled by the Srivijaya and Majapahit Kingdoms, geographical proximity and alleged ethnical kinship was presented to the Security Council in 1976 in support of its claim to have annexed East Timor and was rejected. Similar claims by competing parties- Morocco and Mauritania- were considered by the ICJ in the Western Sahara Case (1975 ICJ 12). The Court concluded that evidence short of establishing ties of territorial sovereignty was insufficient to support historical claims.

The dispute between the Parties in relation to the political status of West Papua and its peoples prior to the debate in the General Assembly in 1961, must thus be seen as involving competing claims to sovereignty over the non-self-governing territory of West Papua.

On the one hand The Netherlands, relying upon its Status as the Colonial Administering Power and adhering to its obligations under Chapter 11 of the United Nations Charter by the implementation of the programmes referred to in that Chapter designed to lead to the attainment by the peoples of a full measure of self-government; and subsequently recognising the `separate status' of the territory of West Papua created by GA Resolution 1514 (XV), 1960.

On the other hand Indonesia, notwithstanding that West Papua was not included in the territory of the Republic when it gained membership of the United Nations based its claim upon pre-colonial and existing ties; an inherent right to sovereignty over the whole of the territory comprised in the former Netherlands East Indies; a right reliant upon its own interpretation of the provisions of the bilateral treaty which it repudiated;

and, ultimately, a submission that to deny its claim to sovereignty over West Papua would, contrary to Paragraph 6 of GA Resolution 1514(XV), 1960, disrupt the territorial integrity of the Republic of Indonesia.

In hindsight, since the Member States represented at the Sixteenth Session were unable to reach any consensus upon the facts in dispute, the resolutions presented, or the legal merits of the competing claims, the situation clearly called for a debate upon a Resolution requesting the International Court of Justice to furnish an advisory opinion to the General Assembly upon legal questions designed to secure the Court's opinion on the key issue- which of the States of The Netherlands or Indonesia holds lawful sovereignty over the territory of West Papua?

As that option was not considered it left the way open for the USA's ambassador's to the United Nations, Elsworth Bunker, appointed by the Secretary-General, U Thant, to enter the arena as a mediator and broker the adoption, on 15 November 1962 of an Agreement between the States Parties to the dispute that was in accord with the USA agenda of accommodating Indonesia.

There is a strong body of evidence from which an inference must inevitably be drawn that Indonesia's repudiation of the bi-lateral Treaty and the Netherlands entry into the New York Agreement were motivated by Indonesia's intention to annex West Papua by the use of armed force- (para 130 - GA 1813'th Plenary Meeting, 19/11/69)

It had attempted in 1964 to annex Malaysian territory in Borneo by force of arms.

"Since its commitment to integration in the 1960's, the Indonesian intelligence service had built up a widespread network (BAKIN), which represented the views of a highly influential grouping within the military, whose hallmarks were its concern for national security (and hence territorial expansion to ensure this security), a strong state and a corporate society..."

(BAKIN was active in East Timor in the support of the pro-Indonesian party APODETI in 1974 which sought an autonomous integration into the Republic of Indonesia.

"Its spokesmen were:
*Major-General Ali Murtopo, also head of OPSUS, the special operations unit which had masterminded Suharto's most successful operations (to overthrow President Sukarno in the 1965 Coup; to manipulate political parties and the "Act of Free Choice in West Papua in 1969);

Major-General Leonardus Benjamin Murdani, head of both military intelligence operations and the special-tasks intelligence unit of KOPKAMTIB (the Operational Command for the Restoration of Security and Order). He was the military man with the closest CIA contacts in Indonesia unit.

"OPSUS was originally a special intelligence unit of the army's Strategic Reserve Command (KOSTRAD), of which Suharto was commander before the 1965 coup. It played a behind-the-scenes role in settling the dispute with Malaysia in 1964, and after the coup became a special operations unit for President Suharto. it has been involved in the rigging of elections, the organising of protests and mobilising of mass movements. Most notably it masterminded the `Act of Free Choice' in West Papua New Guinea (West Irian) under the auspices of the UN" (iii)

That the Netherlands acquiesced in the “New York Agreement” brokered by Bunker, in response to Indonesian threats of (and actual) armed invasion of West Papua early in 1962 is further confirmed by the Indonesian Foreign Affairs Department admission in terms somewhat less than frank in a document “The History of the Return of Irian Jaya to the Republic of Indonesia” which is annexed to this paper.

The parties to the Agreement agreed to a UN administration of the territory until May 1, 1963 and thereafter transfer of its control and responsibility to Indonesia.

"Indonesian sovereignty over West Papua was to be tentative because, under Article XVIII of the agreement, Indonesia undertook to ascertain the wishes of its people through a consultation process to establish whether they wanted to remain part of Indonesia or to sever their ties with Indonesia and, pending the holding of the plebiscite, to safeguard the rights of the people of the territory, including their rights of free speech and freedom of movement and assembly.

"The consultation, `the Act of Free Choice', took place in July 1969.

"Under the terms of the New York Agreement a traditional form of consultation was to be used initially to determine the appropriate methods to be followed for the Act of Free Choice; the consultation had to involve the participation of all adults (male and female); and the method used to ascertain the wishes of the West Papuans had to be `in accordance with international practice.'

"When the time came for a decision on the method to be used, the representative of the UN Secretary General in West Papua suggested that the `democratic, orthodox and universally accepted `one man, one vote' method would be most appropriate. However, he qualified this by saying `the geographical and human realities in some parts of the territory required the application of a realistic criterion'. Consequently, he proposed a normal adult suffrage for the urban areas and a form of tribal consultation for the rural areas. Indonesia rejected the suggestion and adopted instead the `tribal musyawarah' system throughout the territory.

"That system involved consultations with tribal council representatives who, in turn, were presumed to have consultations with their tribesmen. Indonesia itself admitted that system fell short of the UN requirement, but

justified its use with the argument that `in West Papua there exists... one of the most primitive and underdeveloped communities in the world', and that it was unrealistic to apply normal democratic methods to ascertain their wishes.

"South African states that opposed the Indonesian method summed up the general sentiment at the time with the observation that `no society could be so primitive... in the modern world that the vital exercise of democratic government could be indefinitely denied to its peoples.' "Some UN Members also held the view that if the West Papuans were that primitive, the way to ensure their right to self-determination was not through the 'musyawarah' system but through an accelerated economic development of the territory under the auspices of the UN to bring them up to a level that could enable them to exercise their right to self-determination meaningfully.

"These criticisms were ignored, but they underscored the anomalies associated with West Papua's integration.

"Before the Act of Free Choice, Indonesian authorities had made it quite clear that the consultations were only to be a formality. Indonesia indeed indicated that it was `going through the motions of the Act of Free Choice because of [its] obligations under the New York Agreement... But West Papua is Indonesian and must remain Indonesian.. Indonesia can not accept any alternative'.

"From the Indonesian point of view, the outcome of any consultation was irrelevant- integration was a foregone conclusion." (iv)

"Even before the United Nations Temporary Executive Authority, (UNTAET) withdrew in 1963 Indonesian armed forces, commanded by the then General Suharto, entered the territory and were killing Papuans in pursuance of a campaign to secure the territory and brutally suppress the resistance of its peoples (90 percent Papuan) to Indonesian annexation of their homeland. Questions were being asked in the Australian parliament how the proposed `Act of Free Choice', set for 1969, could proceed." (v)

During its term, UNTAET sponsored Muslim troops from Pakistan- when it should have been a multinational force- to supervise the transfer of tentative administrative power and responsibility for the conduct of the Act of Free Choice to Indonesia.

Bernard Mawen, now one of the leaders of the OPM (Free Papua Movement) was a pupil at a mission school on Frederick Hendrix Island, close to Merauke on the south coast of West Papua. He was interviewed by Ben Bohane for an article for the Sydney Morning Herald in 1999:

" `On the August 15 in 1963, I remember hundreds of paratroopers began landing around Merauke. But many of them died: they got dropped out at sea and many died, and many others landed in the swamp and were

eaten by crocodiles, others landed in trees and were shot by the Dutch... There were about 100 Pakistani troops in Merauke during this time, but they stayed in their own compound the whole time, They never went into the bush or talked to any of the Big Men in the villages about how we felt.'

"Mawen claims that in the lead up to the vote in 1969, nine traditional Big Men from his area were killed by the Indonesians and others imprisoned: `The Indonesians took one bush kanaka [uneducated villager] from my area and made him the official representative. Many of those who voted for integration were not traditional leaders. They were taken to Jakarta and given money and women and transistor radios and promised great wealth. We don't recognise the Act of Free Choice as having any legitimacy. it was not a free and fair election. It was not one man- one vote'." (vi)

Hugh Lunn, an Australian journalist who covered the `Act of Free Choice' in the territory as Reuters Foreign Correspondent in Jakarta, published a comprehensive account of the processes leading up to and accompanying the ballot in the territory in July- August, 1969:

"On arrival in West Irian, I took a room at the single story boomerang shaped timber hotel on the island of Biak and was surprised to find an envelope addressed to me in the wardrobe. As I opened the envelope my tennis racket fell to the floor. The letter was soaked in blood. It said Indonesia was killing Papuans who dissented.

"There was a knock on the door and, guiltily, I hid the blood. Two Papuans in overalls came in and pretended to repair a light. They made desperate hand signals: hands held as if in handcuffs, one shot himself in the back of the head with a forefinger.

"The foreign editor of a Dutch newspaper De Telegraaf, Otto Kuyk, and I were the only foreign reporters in West Irian. Two months before many correspondents... had come there from all over Asia to preview the Act of Free Choice in this former Dutch colony. But they weren't there now.

"They weren't there because US President Richard Nixon had decided to tour Asia—including Bangkok, Manilla and Jakarta—at the same time the vote was to be held. Correspondents were told to stay at their posts. I ignored the instruction.

"It seemed to me that the US was deliberately distracting attention from this vote. In 1963 the Americans had brokered peace between The Netherlands and Indonesia with the New York Agreement which promised `self-determination in 1969... having in mind the interests and welfare of the people of West New Guinea'. Indonesia would meanwhile administer the territory while guaranteeing `rights of free speech, movement and assembly'.

"On Biak, Kuyk and myself were followed everywhere by two Indonesians. A nice villager gave me a large

shell. When I got back to my room, I found a letter inside crying for help.

"Typing my first report on the hotel veranda, I became annoyed by a tune whistled over and over again. I looked up: 70m away a Papuan waved, dropped an envelope on the ground and retreated. It contained the Free Papua Movement flag drawn in crayon.

"Kuyk and I found the only way to make contact with the OPM was to go for a walk at midnight. The local OPM leader, tall and handsome, spoke perfect Dutch and English. He said demonstrations could not be held because 20,000 Indonesian soldiers under General Sarwo Edhie were in West Irian for the ballot. He despaired at the voting system the UN had adopted. And no wonder. The Indonesian system of musjawarah (consensus) meant only a selected 1025 individuals out of the 800,000 people living in the territory would vote.

"Kuyk and I walked next day to the village of Bosnik to see how six of these delegates were selected. All four UN representatives were present in front of 500 sullen villagers huddled in a field. A group of Indonesians walked into the crowd `to ask who they want' and emerged with six men who stood and looked grimly at the ground. Then there was a huge cheer. From out of the bush came two men and a boy carrying a sign saying the candidates were `not representative of the will of the people and that a new wave of arrests was under way. One sign said it all.. `One Man One Vote.'

"The three sat in front of the crowd and stuck their little signs in the ground, catching unawares the Indonesian soldiers in civilian clothes. I rushed forward to get the names of the three—Dolfinus Warpur, 29; Simson Barius, 30; and schoolboy Rahabeam Runkorem,15—before they were marched off by men with guns, `to protect them from the local people who are very angry' Warpur told me: `We could only afford to sacrifice three.'

"Kuyk appealed to the UN Secretary-General's representative, Dr Fernando Ortiz, a Bolivian, but he said the UN was there only as an observer.' Kuyk and I sent our stories out as usual in morse code. His report on the three protesters began: `I call them heroes.'

"In the next three days all three UN observers under Ortiz Sanz came to me individually distraught. They said there would be no free choice. They had received a constant stream of pleading letters. I asked for an on the record interview. If a UN official spoke out the world would listen. Jim, an elderly American, said he would lose his pension. Michel, a young Frenchman, said he earned three times as much with the UN as back home and Peter, a young Indonesian speaking American, said Üj his future was tied to Indonesia.

“And so, during the next four weeks, about 100 selected delegates voted in each of the eight regency (provincial) capitals. Not a secret ballot, mind you but a public viewing in front of Indonesian authority, with

armoured cars or paratroopers with grenades and A-K.47’s around the corner. There were no press photographers, so I took pictures. There was no television either.

"To get to Merauke for the first ballot, I sat in a bus inside a Hercules as we flew over permanently ice-capped mountains. A couple more correspondents including Peter Hastings of the Australian, turned up at the voting hall, which was enclosed by high barbed wire fence with police with batons outside. Later. we arrived by ship in Nabire. A delegate stole on board and asked us if I could guarantee nothing would happen if 100 spoke out. I couldn't.

"Next day, columns of delegates marched in wearing new uniforms and hats. One slipped me a hastily written note: `We have been bribed'. Another tried to pass a note to the UN team, but it wouldn't accept it. After another unanimous vote for Indonesia I accidentally ended up alone in a lifeboat in Cenderawasih Bay with some Papuans and taught them Pete Seeger's song `We shall overcome..'

"As our ship prepared to leave, a Papuan youth appeared in my cabin. He held my left hand tightly with both hands and begged me to say I did not believe the day's result. When I told him to forget the UN, that he was about to become an Indonesian, he cried on my shoulder.

"By the time we reached Fak by ship, Kuyk and I were again the only foreign journalists. Indonesia had already claimed a majority, but Papuans believed the UN—and their protest letters—would save them.

"In Manokwari, no less than eight security agents in sunglasses and pointy-toed shoes followed me. When I told them eight was ridiculous, one said: `We were expecting 17 foreign journalists but you are the only one who came. Outside the voting hall young Papuans yelled `sendiri, sendiri' (alone, alone) and Indonesians threw them into the back of trucks and took them away. As I snapped a photo a plain-clothes man ripped open his jacket to show me his revolver. I ran into the hall and told Ortiz Sanz. But he said: `Our job is to see what happens inside.'

"Later, Ortiz Sanz told me he would love to see a US Base in Manokwari Harbour. Like the Americans he feared a communist takeover: `West Irian is like a cancerous growth on the side of the UN and my job is to surgically remove it. In the end, while the world was distracted by Nixon, Woodstock and the moon landing, the Papuans become Indonesian. The 1025 voted unanimously for Indonesia though often displaying a different vote with their posture and facial expression. And when it came to the UN not one country voted against the result." (vii)

It appears clear from that report that the Act of Free Choice was conducted contrary to the provisions of the UN Charter and, arguably without the consent, informed or otherwise, of the West Papuans, and if that be so, in failing to reject it, the UN breached the "sacred trust", a shield designed to guarantee the inalienable right of

the West Papuans to a genuine act of self- determination. It has been used as a sword to condemn them indefinitely to alien domination and bondage as a sacrifice to the demons of real-politic.

"Under the UN regulations, consultations for integration must not only be by adult suffrage, but must also be conducted impartially, and where the UN deems it necessary, under its own supervision. However, in line with Indonesia's position that West Papua belonged to it in any case and that consultations were only a formality to rubber-stamp its claims, Indonesia maintained tight controls over all aspects of the consultations. In fact Indonesia allowed a token UN supervision in only 195 of the 1,000 consultative assemblies.

"The required impartiality and the appropriate explanations to West Papuans as to other options for self-determination available to them, were absent in the consultations. The UN representative to West Papua further attested to the unsatisfactory state of affairs in his observation that: `the act of free choice was obviously stage-managed from start to finish... [Indonesia] exercised at all times a tight control over the population.'" (viii)

"The official report written by Dr Ortiz Sanz, the UN representative at the time, reads: `I regret to have to express my reservation regarding the implementation of Article XXII of the Agreement relating to the rights, including the rights of free speech, freedom of movement and assembly, of the inhabitants of the area. In spite of my constant efforts, this provision was not fully implemented and the administration exercised at all times a tight political control over the population.' " (ix)

"In the frenzy of decolonisation in the 1960's, third world states at the UN were eager to terminate Dutch colonisation in West Papua, and Indonesia enjoyed considerable support at the UN in its claims against the Netherlands. Quite apart from its diplomatic advantage, Indonesia had also been preparing a military invasion of West Papua. In face of these difficulties, the Netherlands signed the New York Agreement. It was a face-saving measure that enabled the Netherlands to withdraw `honorably'. For Indonesia, the Agreement had been a great diplomatic victory. After the signing, West Papua became a de facto integral part of Indonesia.

"Despite the requirement of the so-called Act of Free Choice, at the UN the incorporation seemed a fait accompli.

"Secret documents recently released by the Australian Department of Foreign Affairs and Trade easily indicate that Australia and the United States actively assisted Indonesia at the UN to secure its control over West Papua, even where it was clear that there were serious defects with the procedure. Australia also helped discourage petitions and debate on the merits of the integration at the UN" (x)

Relevant provisions of the New York Agreement

Preamble

The Republic of Indonesia and the Kingdom of the Netherlands, Having in mind the interests and Welfare of the people of the territory of West New Guinea (West Irian) hereinafter referred to as "the territory", Desirous of settling their dispute regarding the territory, Now, therefore, agree as follows.

Ratification of Agreement and Resolution of The UN General Assembly

Article 1

After the present Agreement between Indonesia and the Netherlands has been signed and ratified by both Contracting Parties, Indonesia and the Netherlands will jointly sponsor a draft resolution in the United Nations under the terms of which the General Assembly of the United Nations takes note of the present Agreement, acknowledges the role conferred upon the Secretary-General of the United Nations therein, and authorizes him to carry out the tasks entrusted to him therein.

Article 11

After the adoption of the resolution referred to in Article 1, the Netherlands will transfer administration of the territory to a United Nations Temporary Executive Authority (UNTEA) established by and under the jurisdiction of the Secretary-General upon the arrival of the United Nations Administrator appointed in accordance with Article IV. The UNTAE will in turn transfer the administration to Indonesia in accordance with Article XII.

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United Nations Administration

Article 111

In order to facilitate the transfer of administration to the UNTEA after the adoption of the resolution by the General Assembly, the Netherlands will invite the Secretary-General to send a representative to consult briefly with the Netherlands Governor of the territory prior to the latter's departure. The Netherlands Governor will depart prior to the arrival of the United Nations Administrator.

Article 1V

A United Nations Administrator, acceptable to Indonesia and the Netherlands, will be appointed by the Secretary-General.

Article V

The United Nations Administrator, as chief executive officer of the UNTEA, will have full authority under the

direction of the Secretary-General to administer the territory for the period of the UNTEA administration in accordance with the terms of the present Agreement.

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Article V11

1. The Secretary-General will provide the UNTEA with such security forces as the United Nations Administrator deems necessary; such forces will primarily supplement existing Papuan (West Irianese) police in the task of maintaining law and order. The Papuan Volunteer Corps, which on the arrival of the United Nations Administrator will cease being part of the Netherlands armed forces, and the Indonesian armed forces in the territory will be under the authority of, and at the disposal of the Secretary-General for the same purpose. The United Nations Administrator will, to the extent feasible, use the Papuan (West Irian) police as a United Nations security force to maintain law and order and, at his discretion, use Indonesian armed forces. The Netherlands armed forces will be repatriated as rapidly as possible and while still in the territory will be under the authority of the UNTEA.

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First Phase of the UNTEA Administration

Article 1X

The United Nations Administrator will replace as rapidly as possible top Netherlands officials as defined in annex A with non-Netherlands, non-Indonesian officials during the first phase of the UNTEA administration which will be completed on 1 May 1963. The United Nations administrator will be authorized to employ on a temporary basis all Netherlands officials other than top Netherlands officials defined in annex A, who wish to serve the UNTEA, in accordance with such terms and conditions as the Secretary-General may specify. As many Papuans (West Irianese) as possible will be brought into administrative and technical positions. To fill the remaining required posts, the UNTEA will have authority to employ personnel provided by Indonesia. Salary rates prevailing in the territory will be maintained.

Article X

Immediately after the transfer of administration to UNTEA, the UNTEA will widely publicize and explain the terms of the present Agreement, and will inform the population concerning the transfer of administration to Indonesia and the provisions for the act of self-determination as set out in the present Agreement.

Article X1

To the extent that they are consistent with the letter and spirit of the present Agreement, existing laws and regulations will remain in effect. The UNTEA will have power to promulgate new laws and regulations or amend them within the spirit and framework of the present Agreement. The representative councils will be consulted prior to the issuance of new laws and regulations or the amendment of existing laws.

Second Phase

Article X11

The United Nations Administrator will have the discretion to transfer all or part of the administration to Indonesia at any time after the first phase of the UNTEA administration. The UNTEA's authority will cease at the moment of transfer of full administrative authority to Indonesia.

Article X111

United Nations security forces will be replaced by Indonesian security forces after the first phase of the UNTEA administration. All United Nations security forces will be withdrawn upon the transfer of administration to Indonesia.

Indonesian Administration and Self-Determination

Article X1V

After the transfer of full administrative responsibility to Indonesia, Indonesian national laws and regulations will in principle be applicable to the territory, it being understood that they be consistent with the rights and freedoms guaranteed to the inhabitants under the terms of the present Agreement. New laws and regulations or amendments to the existing ones can be enacted within the spirit of the present Agreement. The representative councils will be consulted as appropriate.

Article XV

After the transfer of full administrative responsibility to Indonesia, the primary task of Indonesia will be further intensification of the education of the people, of the combating of illiteracy, and of the advancement of their social, cultural and economic development. Efforts also will be made, in accordance with present Indonesian practice, to accelerate the participation of the people in local government through periodic elections. Any aspects relating to the act of free choice will be governed by the terns of this Agreement.

Article XV1

At the time of the transfer of full administrative responsibility to Indonesia a number of United Nations experts, as deemed adequate by the Secretary-General after consultation with Indonesia, will be designated to remain wherever their duties require their presence. Their duties will, prior to the arrival of the United Nations Representative, who will participate at the appropriate time in the arrangements for self-determination, be limited to advising on, and assisting in preparations for carrying out the provisions for self-determination except insofar as Indonesia and the Secretary-General may agree upon their performing other expert functions. They will be responsible to the Secretary-General for the carrying out of their duties.

Article XV11

Indonesia will invite the Secretary-General to appoint a Representative who, together with a staff made, inter alia, of experts referred to in Article XV1 will carry out the Secretary-General's responsibilities to advise, assist and participate in arrangements which are the responsibility of Indonesia for the act of free choice. The Secretary-General will, at the proper time, appoint the United Nations Representative in order that he and his staff may assume their duties in the territory one year prior to the date of self-determination. Such additional staff as the United Nations Representative might feel necessary will be determined by the Secretary-General after consultation with Indonesia. The United Nations Representative and his staff will have the same freedom of movement as provided for the personnel referred to in Article XVI.

Article XV111

Indonesia will make arrangements, with the assistance and participation of the United Nations Representative and his staff, to give to 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 to be followed for ascertaining the freely expressed will of the population.

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) whether they wish to sever their ties with Indonesia;

d. The eligibility of all adults, male and female, not foreign nationals, to participate in the act of self-determination 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 residents who departed after 1945 and who return to the territory to resume residence after the termination of the Netherlands administration.

Article X1X

The United Nations representative will report to the Secretary General on the arrangements arrived at for freedom of choice.

Article XX

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

Article XXI

1. After the exercise of the right of self-determination, Indonesia and the United Nations Representative will submit final reports to the Secretary-General who will report to the General Assembly on the conduct of the act of self-determination and the results thereof.

2. The parties to the present Agreement will recognize and abide by the results of the act of self-determination.

Rights of the Inhabitants

Article XX11

1. The UNTEA and Indonesia will guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly, of the inhabitants of the area. Those rights will include the existing rights of the inhabitants of the territory at the time of the transfer of administration to UNTEA.

2. The UNTEA will take over existing Netherlands commitments in respect of concessions and property rights.

3. After Indonesia has taken over the administration it will honour those commitments which are not inconsistent with the interests and economic development of the people of the territory. A joint Indonesian-Netherlands commission will be set up after the transfer of administration to Indonesia to study the nature of the above-mentioned concessions and property rights.

4. During the period of the UNTEA administration there will be freedom of movement for civilians of Indonesian and Netherlands nationalities to and from the territory.

Article XX111

Vacancies in the representative councils caused by the departure of Netherlands nationals, or for other reasons, will be filled as appropriate consistent with existing legislation by elections, or by appointment by the UNTEA. The representative councils will be consulted prior to the appointment of new representatives.

Financial Matters

Previous Treaties and Agreements

Article XXV1

The present Agreement will take precedence over any previous agreement on the territory. Previous treaties and agreements regarding the territory may therefore be terminated or adjusted as necessary to conform to the terms of the present Agreement.

Ratification

Article XXV11

.....

Entry into Force

Article XXV111

1. The present Agreement will enter into force upon the date of the adoption by the General Assembly of the resolution referred to in Article 1 of the present Agreement.

2. Upon the entry into force of the present Agreement, the Secretary-General of the United Nations will register it in accordance with Article 102 of the Charter."

The General Assembly, at its 1127th plenary meeting on 21 September 1962 adopted Resolution 1752 (XV11) in the following terms:

"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 the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian).

1. Takes note of the Agreement;
2. Acknowledges the role conferred upon the Secretary-General in the Agreement;
3. Authorizes the Secretary General to carry out the tasks entrusted to him in the Agreement."

The terms of this Agreement and its effect must be construed having regard to the provisions of Articles 102 and 104 of Chapter 16 of the UN Charter, the purposes and principles of that Charter and the principles of international law.

Article 102

1."Every treaty and every international agreement entered into by any member of the United Nations after the present Chapter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. (not relevant to the issues)

3. In the event of a conflict between the obligation of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The text of the Agreement was published, at least to UN Member States who participated in the debates in the General Assembly at its 1127th plenary meeting on 21 September 1962 and its 1813th plenary meeting on 19 November 1969, at which it was adopted to the extent of authorising the Secretary-General to carry out the tasks entrusted to him under the Agreement.

There are, however, inconsistencies in the obligations of the Member States parties under the New York Agreement and the obligations imposed upon them by the "Declaration Regarding Non-Self-Governing Territories" (Chapter 11 of the Charter).

Under that Chapter, Members of the United Nations, which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government are obligated to recognise the principle that the interests of the inhabitants of these territories are paramount, and to 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, and to comply with a range of conditions set out in the Article.

That Chapter applied to both Member State parties to the Agreement, the terms of which make no, or scant reference to the following conditions in Chapter 11 of the Charter:

"(a) to ensure with due respect for the culture of the peoples concerned, their political ... advancement, their just treatment, and their protection against abuses.

"(b) to develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

"(d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, where appropriate with specialized international bodies with a view to the practical achievement of the social, economic and scientific purposes set forth in this Article; and

"(e) to transmit regularly to the Secretary-General for information, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to the economic, social, and educational conditions in the territories for which they are respectively responsible ...."

The provisions of GA Resolution 1514 (XV), 1960, "Declaration on the Granting of Independence to Colonial Peoples and Countries", and GA Resolution 1541 (XV), 1960, the texts of which are set out at pages 30 and 31 herein, were also very relevant to a consideration of whether Member States which voted in favour of the Resolutions of the General Assembly, relating to the New York Agreement complied with the obligations assumed by them under the terms of Article 2.(2) of the Charter to act `in good faith'.

The implementation of G.A.Res.1514 (XV) was debated and approved at the 16th Session of the General Assembly in November 1961. The reference by the Netherlands of the Western Papuan question was debated at that Session, and Res.1514 (XV) was widely referred to in that debate, but only once in the 1962 debate resulting in GA Resolution 1752 (XV11) of 21 September `taking note' of the New York Agreement and authorising the Secretary-General to carry out the tasks entrusted to him under the bilateral Agreement. GA Res. 1541 (XV), 1960, not referred to in either debate, added a whole new dimension to the scope of the principle of self-determination.

Having regard to the terms of the bilateral Agreement between the Parties, in relation to which the people of West Papua were apparently not consulted before its ratification, and were not permitted to be represented in the debates in the General Assembly, it seems fair comment to suggest that they reflect a gross imbalance between the opportunity of the respective parties to act either bona fide or mala fide in relation to their obligations under Chapter 12 of the UN Charter:

a. to accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the UN Charter, the well-being of the inhabitants of West Papua.

b. to publicise and explain the terms of the Agreement to, and inform the population concerning the transfer of administration to Indonesia.

c. to ensure, with due respect to the culture of the peoples concerned, their political, social, and educational advancement, their just treatment and their protection against abuses.

d. to develop self-government, take due account of the political aspirations of the peoples and assist them in the progressive development of their free political institutions.

e. to promote constructive measures of development, to encourage research.

The agreement provides for:

1. the transfer of the administration of West Papua to UNTEA immediately upon the arrival of the United Nations Administrator appointed by the Secretary General under Article 4; the rapid replacement of top

Netherlands officials; the introduction of West Papuans and Indonesian personnel into administrative and technical positions; and the discretion to transfer all or part of the administration to Indonesia at any time after the first phase of the UNTEA administration, with full administrative responsibility passing to Indonesia and Indonesian law and regulations, with the power to enact new laws and regulations or amendments to existing ones within the `spirit' of the Agreement, consistent with the rights and freedoms guaranteed to the inhabitants under the terms of the agreement, after consultation with the representative councils `as appropriate'; and, at the time of the transfer of full administrative responsibility to Indonesia, the introduction of a number of United Nations experts, whose duties, prior to the arrival of the UN Representative, to advising on, and assisting in preparations for carrying out the provisions of the Agreement for self-determination, which was to be concluded before the end of 1969- seven years after the treaty's ratification!

Further, United Nations Security forces were to be replaced by Indonesian security forces after the first phase of UNTEA administration, and all United Nations security forces were to be withdrawn upon the transfer of administration to Indonesia.

Article V11 confirms the presence of Indonesian armed forces in West Papua at the time the agreement was drafted, supporting the claim by the Netherlands that it was coerced to enter into the Agreement by an Indonesian threat and clear intent of a further armed invasion of the territory that the Netherlands was powerless to resist and having regard to the consequences that conduct would inflict upon the peace in the region, and the well-being of the West Papuan peoples.

Article XV111 places drastic limitations upon the function of the United Nations Representative if it were interpreted as vesting the power to choose the method and processes to be adopted for the conduct of the `act of free choice' solely in the Indonesian administration. However, the words "with the assistance and participation" in combination imply that Indonesia was obliged to "share" with the United Nations Representative and his staff the making of relevant arrangements referred to in the Article.

It prescribes a method (Musjawarah) which, even if it were in fact the Indonesian model in use in plebiscites relating to self-determination, which it was not, was incompatible with the provisions for the exercise of self-determination provided in Chapter 11 of the UN Charter and the UN Declaration then in force and incompatible with "Universal suffrage" and "international practice". Furthermore, it formulates "questions" designed to exclude the peoples of West Papua from choosing the options of "Independence" or "Free association with an independent State" provided under G.A.Res.1541 (XV).

Article XXI (2) of the Agreement purports to bind the parties to it to recognize and abide the results of the act of self-determination, notwithstanding that the peoples of the territory were not parties to it, were not consulted prior to its ratification by the parties, and many of them were never made aware of the processes available and the options open to them in the exercise of their act of self-determination.

It would be difficult to envisage an agreement more favourable to the aspirations of Indonesia to annex the territory than the New York Agreement. Major-General Ali Murtopo, the head of OPSUS would have regarded it as handing West Papua to Indonesia on a platter. With OPSUS, the Special Operations unit that masterminded Suharto's overthrow of Sukarno in the 1965 coup and specialised in rigging elections, in charge of ensuring the desired outcome of the Act of Free Choice in West Papua, the result was a foregone conclusion.

But the validity in law of the Act of Free Choice and its outcome is the major issue with which this paper is concerned, and it appears reasonably clear from a review of the purposes and principles of the UN Charter; relevant Resolutions of the General Assembly; and the jurisprudence of the International Court of Justice that the Act and its outcome was so tainted by the actual use of armed force followed by an imminent threat of and intent to resume armed force; fraud; coercion; duplicity and breach of fundamental obligations under the Agreement by Indonesia; and so incompatible with the principles and provisions of the UN Charter and Resolutions and the principles of international law developed through custom and the pronouncements of the International Court to that time as to render the 1969 Act of Free Choice in West Papua void in law.

Neither of the States parties to the New York Agreement had the right, either unilaterally or bi-laterally, to deprive the indigenous peoples of West Papua of a free choice of all of the options available to them in law in their exercise of a genuine act of self-determination based on universal suffrage.

The General Assembly has the power under the provisions of the Charter to dispense with an act of free choice in appropriate circumstances. It did not consider exercising its discretion in that way in the case of West Papua. It limited its involvement to an advisory and supervisory role under the provisions of the New York Agreement with deference to the limited co-operation offered and tolerance of fundamental breaches of the Agreement committed, by Indonesia, with the inevitable outcome, which it refrained from approving.

As a prelude to reviewing the debates in the General Assembly relating to the New York Agreement, it is helpful to set out the development of international law relating to the principle of self-determination through its various sources to the dates of those debates, and subsequently to the present time.

Relevant Provisions of the United Nations Charter

The Preamble

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote

social progress and better standards of life in larger freedom,

AND FOR THESE ENDS, to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS. Accordingly, our Respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations."

Chapter 1
Purposes and Principles

The purposes of the United Nations are:

1. To maintain international peace and security, and to that end take effective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with the fundamental principles of justice and international law, adjustment or settlement of disputes or situations which might lead to a breach of peace.
2. To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace.

3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and its fundamental freedoms for all without distinction as to race, sex, language or religion.
4. To be a centre for harmonising the actions of nations in the attainment of these common ends.

Article 2

The Organisation and its Members, in pursuance of the purposes stated in Article 1, shall act in accordance with the following Principles:

1. The organisation is based on the principle of sovereign equality of all its members.
2. All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present charter.
3. All members shall settle their international disputes by peaceful means in such a manner that international

peace and security and justice, are not endangered

4. 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 manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventative or enforcement action.

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CHAPTER 4

The General Assembly

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulations of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the state or states concerned or to the Security Council or both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly, either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

CHAPTER 5

The Security Council

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.
3. The Security Council shall submit annual and, where necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the (six) permanent members, provided that, in decisions under Chapter 6, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

(Paragraph 3 of Article 52 provides that: "The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the state concerned or by reference from the Security Council").

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a Member of the Security Council or any state which is not a Member of the United Nations, if it is a party to the dispute under consideration by the Security Council, shall

be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down conditions it deems for the participation of a state which is not a Member of the United Nations.

CHAPTER 6
Pacific Settlement of Disputes

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuation of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of peaceful settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its notice under this Article will be subject to the provisions of Articles 11 and 12.

CHAPTER XI
Declaration Regarding Non-Self-Governing Territories

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of those territories are paramount, and accept, as a sacred trust, the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well being of the inhabitants of those territories, and, to this end:

(a) 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.

(b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and its varying stages of advancement.

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Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighbourliness, due account being taken of the interests and well being of the rest of the world, in social, economic and commercial matters.

CHAPTER 16
Miscellaneous Provisions

Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.
3. In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Powers and Responsibilities of The Security Council
Chapter 7

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the

recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the right, claims or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations, and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace or security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations.

Article 43

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call, and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

Relevant Resolutions of the General Assembly

GA Resolution 1514 (XV), 1960

Declaration on the Granting of Independence to Colonial Countries and Peoples

The General Assembly ...declares that:

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;

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

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

4. All armed action or repressive measures of any kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

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

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

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non interference in the internal affairs of states, and respect for the sovereign rights of all peoples and their territorial integrity.

General Assembly Resolution 1541 (XV), 1960

This Resolution contemplates more than one outcome of self-determination:

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

It declares that integration should be the result of the freely expressed wishes of the territories 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 suffrage. The United Nations could, when it deems it necessary, supervise these processes.

1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations- Resolution 2625 (XXV)

The General Assembly...
1. Solemnly proclaims the following Principles:
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 manner inconsistent with the purposes of

the United Nations.

Such a threat or use of force constitutes a violation of international law and the United Nations Charter. A war of aggression constitutes a crime against the peace for which there is responsibility under international law. States have the duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of the right to self-determination and freedom and independence.

.....

The territory of a state shall not be the object of military occupation resulting from the use of force in contravention 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 resulting from the threat or use of force shall be recognised as legal …

The Principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right to freely 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.

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, 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 regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.

Every State has the duty to promote through joint and separate action universal respect for the observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an

independent State or the emergence into any other political status freely determined by the people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of their exercise of self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter of the United Nations.

The territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, a status separately 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 other non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

(The above paragraph, establishes an international status for the territories of colonies and other non-self-governing territories, in recognition of the rights of their peoples to self-determination under the aegis of the United Nations Organisation, which status is separate and distinct from the status of the States administering them, and continues until their peoples as beneficiaries of the "Sacred Trust" enshrined in Chapter 11 of the Charter and Declared in the subsequent Resolutions and Declarations of the General Assembly, have validly exercised their rights under the "Sacred Trust" in accordance with the provisions of the Charter.)

Nothing in the foregoing paragraph 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 and independent States conducting themselves in compliance with the principle 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.

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law ...

Resolution on the Definition of Aggression, 3314 (XXIX), 1974

The General Assembly adopts the following definition of Aggression:

Article I

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations as set

out in this definition...

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following Acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State against the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or an annexation by the use of force of the territory of another State or part thereof.

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State...(c),(d),(e),(f),(g).

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification for an act of aggression.
2. An act of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful.

Article 6

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

States, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of such peoples to struggle to that end and to seek and receive support, in accordance with the Principles of the Charter and in conformity with the above-mentioned Declaration.

The International Court of Justice; its Powers and Limitations and its Jurisprudence relevant to the Rights of the Peoples of Non-Self-Governing Territories to exercise a valid Act of Self- Determination.

CHAPTER 14 THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may request advisory opinions of the Court on legal questions arising within the scope of their activities.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.
2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.
2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by the national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes.

Article 30

1. The Court shall frame its own rules for carrying out its functions. In particular, it shall lay down rules of procedure.

Chapter 2 COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.

Article 35

1. The Court shall be open to the states parties to the present Statute.
2. The conditions on which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.
3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other states accepting the same obligation, the

jurisdiction of the Court in all legal matters concerning:
(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.b(This fundamental limitation to the Court's jurisdiction enables unscrupulous States Members of the Organisation, which may wish to act in breach of their obligation under Article 2 of the Charter "to fulfill in good faith the obligation assumed by them in accordance with the UN Charter", to act to the detriment of the peoples of another Member State or its non-self governing territory in contravention of the Charter and avoid the consequences of a determination of the International Court of Justice).

Article 38

1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that case.

Article 62

1. Should a state consider that it has an interest of a legal nature which may be affected by the Court's decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide the request.
(Nicaragua was granted leave by the Court to intervene under Article 62 in respect of the issue in the "Land, Island and Maritime Frontier Dispute Case (El Salvador v Honduras) ICJ Rep. p.92 at p.121, finding that it had an interest of a legal nature in that issue.
An intervening state does not become a party to the case and is not bound by the judgment of the Court. [Article 59])

Chapter 4 ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.
2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1.The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.
2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organisation considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statement relating to the question.
3.....
4. States and organisations having presented written or oral statement or both shall be permitted to comment on the statements made by other states or organisations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organisations having submitted any similar statements.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises them to be applicable.
There are other provisions of the Charter which provide for a range of sanctions to be imposed upon unscrupulous Member States which may act in bad faith and breach the obligations assumed by them under the Charter, including a procedure for expulsion from the Organisation. History suggests however, that the efficacy of such provisions depends entirely upon the majority of Member States acting in good faith in debate on the issues in both the other Principle Organs in support of those provisions, and that phenomena can not always be taken for granted—Real-Politik being what it is and the power of veto in the Permanent Member States of the Security Council still as crucial a factor as it has always been over the past 55 years.

The Court has been called upon by the United Nations principal organs to exercise its advisory jurisdiction in cases involving self-determination.

The South West Africa (Namibia) Case, (ICJ Rep. 1971, p.16)

Between 1950 and 1971, the UN General Assembly and Security Council were engaged in proceedings under the Charter relating to South West Africa.

In 1920, acting under Article 22 of its covenant, the League of Nations conferred a mandate for the former German South West Africa which had ceased to be under the sovereignty of the defeated state, and "was inhabited by peoples not yet able by themselves under the strenuous conditions of the modern world", upon His Britannic Majesty to be exercised by the Union of South Africa, which undertook to exercise the mandate on behalf of the League of Nations. It is of interest that Article 22 referred to "the principle that the well being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this should be embodied in this Covenant."

While South Africa complied with its obligation to submit reports to the Permanent Mandates Commission until it ceased to function in 1939, the Commission noted that South Africa asserted sovereignty over the territory and the right to annex it as a province. In 1947 it submitted its only report to the United Nations and subsequently asserted that the mandate had expired with the dissolution of the League of Nations upon the establishment of the United Nations Organisation on 26 June 1945, when the UN replaced the League's System of Mandates with a Trusteeship System with the same administering States for most of the former mandated territories. South West Africa was one of the exceptions and the UN contended that it remained a mandated territory under South African administration as South Africa refused to place it under the UN Trustee System when requested by the General Assembly to do so.

On 6 December 1949, the General Assembly requested the Court to furnish an advisory opinion upon the legal issues concerning the international status of South West Africa and the international obligations of South Africa in relation to the territory. South Africa appeared before the Court and contended that the former mandate expired with the dissolution of the League of Nations.

In rejecting that argument, the Court held, unanimously:

"The mandate was created in the interests of the inhabitants of the territory and of humanity in general, as an international institution with an international object—a sacred trust of civilisation ... If the mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the mandate and to deny the obligations thereunder could not be justified."

It ruled that the necessity for international supervision over the mandate continues despite the dissolution of the League of Nations Council, as it is an essential element of the Mandate System and the United Nations has an international organ performing supervisory functions similar to those performed by the League.

It advised that "South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it" and further that South Africa has no competence to modify unilaterally the international status of the territory or any of the international rules respecting the rights, powers and obligations relating to the administration of the territory and the supervision of the administration."

The Court also advised that the UN Charter did not require South Africa to place the territory under the Trusteeship system. South Africa refused to accept or act upon that advisory opinion or to negotiate with the General Assembly, maintaining its stance that the mandate had lapsed.

Proceedings instituted in the Court by African States in 1960, seeking its adjudication upon issues in dispute between their States and South Africa with a view to seeking a favourable judgment in respect of which the Security Council could take enforcement proceedings, were ultimately struck out in July 1966 on the grounds that the applicant States had no legal right or interest in the subject matter of their claims.

Pending the outcome of those proceedings, the General Assembly, while passing annual resolutions on the issue and noting the continuing non-co-operative stance of South Africa and its escalation of human rights abuses in the territory, stayed its hand.

However, following the Court's judgment in 1966 it passed, on 27 October 1966, GA Res.2145:

Resolution on Termination of the South West Africa Mandate.

Reaffirming the inalienable right of the people of South West Africa to freedom and independence in accordance with the Charter of the United Nations General Assembly resolution 1514(XV) of 14 December 1960 [the Declaration on the granting of Independence to Colonial Countries and Peoples] and earlier Assembly resolutions...,

Convinced that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights,

Considering that all the efforts of the United Nations to induce the Government of South Africa to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the well-being and security of the indigenous inhabitants have been of no avail,

Affirming its right to take appropriate action in the matter, including the right to revert to itself the administration of the Mandated Territory,

1. Reaffirms that the provisions of General Assembly resolution 1514(XV) are fully applicable to the people of South West Africa and that, therefore, the people of South West Africa have the inalienable right to self-

determination, freedom and independence in accordance with the Charter of the United Nations;
2. Reaffirms that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;
3. Declares that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;
4. Decides that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the territory and that henceforth South West Africa comes under the direct responsibility of the United Nations...

The South African Government responded by objecting that the General Assembly lacked the power to terminate the Mandate. The General Assembly countered with resolutions calling upon South Africa to comply with Resolution 2145, and establishing the United Nations Council for South West Africa to administer the territory until it achieved independence.

On 30 January 1970, the Security Council adopted SC Res. 278:

RESOLUTION ON ILLEGALITY OF SOUTH AFRICAN PRESENCE IN NAMIBIA

The Security Council,
Reaffirming the inalienable right of the people of Namibia to freedom and independence recognised in General Assembly resolution 1514(XV) of 14 December 1960,
Reaffirming General Assembly resolution 2145(XXI) of 27 October 1996, by which the United nations decided that the Mandate for South West Africa was terminated and assumed direct responsibility for the territory until its independence,
Reaffirming Security Council resolution 264 (1969) of 20 March 1969 in which the Council recognised the termination of the Mandate and called upon the Government of South Africa to withdraw immediately its administration from the Territory,
Reaffirming that the extension and enforcement of South African laws in the Territory together with the continued detentions, trials and sentencing of Namibians by the Government of South Africa constitutes illegal acts and flagrant violations of the rights of the Namibians concerned, the Universal Declaration of Human Rights and the international status of the Territory, now under direct United Nations responsibility.
Recalling Security Council Resolution 269 (1969) of 12 August 1969,
1. Strongly condemns the refusal of the Government of South Africa to comply with the resolutions of the General Assembly and Security Council pertaining to Namibia;
2. Declares that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the

termination of the Mandate are illegal and invalid..;
5. Calls all states, particularly those with economic and other interests in Namibia, to refrain from dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution.

By its Resolution 284 (1970), the Security Council sought an advisory opinion from the International Court of Justice on the following legal issue:
What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)?.

The Court delivered the advisory opinion on that question:
"1. that the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;
"2. that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts, and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration:
"3. that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph 2 above, in the action which has been taken by the United Nations with regard to Namibia."

The Court's written advisory opinion, [1971] I.C.J.16, covered a wide range of important issues, including the scope of the powers of the Security Council, the General Assembly and the Court, the obligations of UN States Members, and the development of `norms' of international law.

For the purposes of this paper the more relevant issues arising from its published reasons upon which its advisory opinion is based are its interpretation of the scope of its powers to furnish advisory opinions to and review Resolutions of the other Principle Organs of the UN Organisation and its jurisprudence relating to the obligations of Member States and the rights of peoples of non-self-governing territories to exercise an act of self-determination.

" 20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requests the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by the President to have been so passed, must be presumed to have been validly adopted."
" 23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the

Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

" 24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

" 26. The Question of Namibia was placed on the agenda of the Security Council as a "situation" and not as a "dispute". No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question on the Security Council's agenda under the Title "Situation in Namibia". Had the Government of South Africa considered that the question should have been treated in the Security Council as a dispute, it should have drawn the Council's attention to that aspect of the matter. Having failed to raise the question at the appropriate time in the proper forum, it is not open to it to raise it before the Court at this stage.

" 27. In the alternative, the Government of South Africa has contended that even if the Court has competence to give the opinion requested, it should nevertheless, as a matter of judicial propriety, refuse to exercise its competence."

" 40. The Government of South Africa has also expressed doubts as to whether the Court is competent to, or should, give an opinion, if, in order to do so, it should have to make findings as to extensive factual issues. In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged by Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account, and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

" 41. The Court could, of course, acting on its own, exercise the discretion vested in it by Article 65, paragraph 1, of the Statute and decline to accede to the request for an advisory opinion. In considering this possibility the Court must bear in mind that: "A reply to a request for and Opinion should not, in principle, be refused." (ICJ Reports 1951, p.19). The Court has considered whether there are any "compelling reasons", as referred to in the past practice of the Court, which would justify such a refusal. It has found no such reasons. Moreover, it feels that by replying to the request it not only "remains faithful to the requirements of its judicial character (ICJ Reports 1960, p.153), but also discharge its functions as "the principle judicial organ of the United Nations" (Art.92 of the Charter.)

" 87. The Government of France in its written statement and the Government of South Africa throughout the present proceeding have raised the objection that the General Assembly, in adopting Resolution 2145 (XXI), acted ultra vires.

" 88. Before considering this question, it is necessary for the Court to examine the observations made and the contentions advanced as to whether the Court should go into this question... It was argued that the Court

should not assume powers of judicial review of the action taken by the other principal organs of the United Nations without specific request to that effect, nor act as a court of appeal from their decisions.
" 89. Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from these resolutions.

[The Court found the relevant resolutions to have been validly adopted by the Security Council acting, as it is bound to act under Article 24 (2), "in accordance with the purposes and principles of the Charter", and consequently binding on all States Members of the United Nations, which are thus under an obligation to accept and carry them out. The competence of the Court to decide whether the Security Council has exceeded the limits of its powers under Article 24 was also considered in the "Tehyran" Case (ICJ Rep. 1980, p.3) and the "Lockerbie Provisional Measures" (Libya v UK) Case, (ICJ Rep. 1992, p.3)]

Referring to the relevant provisions of the UN Charter then in force the Court observed: "... 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 them all. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples, which embraces all peoples and territories which have not yet attained independence... 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 the law through the Charter of the United Nations and by way of customary law.

" In the domain to which the present proceedings relate, the last 50 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 and independence of the peoples concerned. In this domain, as elsewhere, the `corpus juris gentium' has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore."

The Western Sahara Case (ICJ Rep. 1975, p.12)

The General Assembly indicated in 1966 that the de-colonisation of the Western Sahara, which had been colonised by Spain in 1884, should proceed on the basis of the exercise of a right of self-determination in accordance with Resolution 1514 (XV). It then invited Spain, in consultation with the States bordering the colony, to determine the earliest date possible for the holding of a referendum under UN auspices, with the object of enabling the indigenous population of the territory to exercise freely their right to self-determination.

Spain eventually agreed to hold a referendum in 1975, and this provoked competing claims by the States of both Morocco and Mauritania over the territory based on historic ties with its peoples prior to its colonisation by Spain. Morocco had sought the agreement of Spain to jointly refer the matter of their disputing claims to the Court for its determination as a contentious proceeding, but Spain did not agree to do so.
The General Assembly considered the dispute between those states, but concluding that the matter was basically an issue of de-colonisation and self-determination for the peoples of the territory, requested the Court's advisory opinion on the following legal questions.
1. Was Western Sahara (Rio de Oro and Sakiet Al Hamra) at the time of colonisation by Spain a territory belonging to no one (terra nullius)?
2. What was the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

Spain contended that the Court should not respond to the request because of the disputation between the States, and argued that important questions of fact were involved.
On those issues the Court determined that it was an appropriate exercise of its function to furnish the advisory opinion as the Judicial organ of the United Nations upon the legal issues referred to it as the General Assembly had deemed the Court's opinion of assistance to it for the proper exercise of its functions concerning the de-colonisation of the territory, and that Spain, Morocco and Mauritania had produced extensive documentary evidence of the relevant facts.
The Court advised the General Assembly:
" 1. That the territory was not "terra nullius" at the time of the Spanish colonisation; and
" 2. The materials and information presented to the Court show the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some tribes living in the territory of Western Sahara. They show existence of rights, including rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court and territory of Western Sahara.

" On the other hand the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the King of Morocco or the Mauritanian entity.
" Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory."

In its reasons, the Court reviewed the development of the law concerning the rights of peoples of non-self-governing territories to self-determination, citing the provisions of Article 1, paragraph 2; Articles 55 and 56 and Chapter X1 of the Charter; GA Resolutions 1514 (XV), 1541 (XV) and 2625 (XXV) then in force and citing with approval the jurisprudence on that issue in the Namibia case.
It noted (para.58) that "GA Resolution 2625 (XXV) mentions other possibilities besides independence, association or integration, but in so doing reiterates the basic need to take account of the wishes of the people

concerned... and, at para 59, states:
"The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on a consideration that a certain population did not constitute a `people entitled to the right of self-determination or on the conviction that a consultation was totally unnecessary in view of special circumstances."

Judge Dillard, in delivering a separate opinion, reviewed the body of jurisprudence to that date concerning the status in international law of the right of self-determination of peoples of non-self-governing territories, identifying and considering the conflicting views of jurists.
" At one extreme is the contention that even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general `opinio juris' and thus constitute a norm of customary international law. According to this view, this is the precise situation manifested by the long list of resolutions which, following in the wake of resolution 1514 (XV), have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self-governing territories.
"At the opposite pole are those who, resisting generally the law creating powers of the General Assembly, deny that the principle has developed into a `right' with corresponding obligations or that the practice of decolonization has been more than an example of a usage dictated by political expediency and one which, in addition, has been neither constant nor uniform.
" I shall not dwell on the theoretical aspects of the broad problem which, as everyone knows, commands an immense literature. Suffice it to call attention to the fact that the present Opinion is forthright in proclaiming the existence of the `right' in so far as the present case is concerned.
"This is made explicit in para 56 and is fortified by calling into play two dicta in the Namibia case to which are added the numerous resolutions of the General Assembly dealing in general terms with its decolonization policy.
"The pronouncement of the Court thus indicates, in my view, that a norm of international law has emerged applicable to the decolonization of those non-self-governing territories that are under the aegis of the United Nations.
"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. Viewed in that perspective it becomes self-evident that the existence of the ancient `legal ties' of the kind expressed in the opinion, while they may influence some of the procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people..."

That determination added strength to the universality of the principle of self-determination.
"Regrettably, the aftermath of the Western Sahara Opinion arguably weakened the principle. One day after the opinion was announced, King Hassan 11 of Morocco called for a peaceful invasion of Western Sahara to

compel Spain to surrender the territory to the Moroccans. When the Security Council failed to take decisive action, Spain entered into the Madrid `Agreement', ceding the territory to Morocco and Mauritania.

"The agreement resulted from secret negotiations between Morocco, Mauritania and Spain, conducted in Madrid. The existence of the secret agreement was disclosed in a joint communique issued on November 14, 1975. The Agreement provided for the partitioning of Western Sahara between Morocco and Mauritania and permitted Spain to retain a 35 per cent interest in a Saharan phosphate company valued at $ 700 million. The Agreement also provided for establishing an interim regime that a Spanish governor would administer with the assistance of Moroccan and Mauritanian deputy governors.

"In response to this flagrant violation of the principle of self-determination, the General Assembly tried to have it all ways. It reaffirmed the right of the Western Sahara population to self-determination. It `noted' the Madrid Agreement, and it called on the Secretary-General to arrange for a supervised consultation to ascertain the wishes of the population. (GA Res 3458A, 1975).

"The Moroccans staged an "act of free choice" in February 1976 but the United Nations never approved it. As a result, the people of Western Sahara still possess their right to self-determination.

" Resolution 3458A, (1975) reaffirmed the right of the Saharwi people to self-determination in accordance with the GA Resolution 1514 (XV)... and it mentioned both GA Resolutions 1514 (XV) and 1541 (XV) in its preamble. Res. 1541 (XV), unlike Res. 1514 (XV), refers to the possibility of integration with an independent state. It then proceeded to take note of the tripartite agreement and piously to `request the parties to the tripartite agreement to ensure respect for the freely expressed aspirations of the Saharan population."

"For a time it appeared that the basic principle of the Court's opinion had been submerged in a expedient acquiescence by the United Nations in the Moroccan and Mauritanian actions. Because, however, the Frente POLISARIO had significant success in its military against Morocco and Mauritania (which was forced to withdraw from the part of Western Sahara that it had claimed), GA Res. 46/49.(1991) reaffirmed the right of the Saharwi people to "self-determination and independence" and welcomed a decision by the Security Council to establish a United Nations Mission for the Referendum in Western Sahara.

"The failure of the United Nations to take unambiguous and effective action against Morocco struck a blow to the validity of self-determination as a legal principle. Both the Moroccan invasion and the Madrid Agreement flagrantly violated self-determination and the General Assembly should have denounced them. In the interest of preserving self-determination as more than an empty aspiration to the peoples to whom the right is attached, the General Assembly's 'notice' of the Madrid Agreement should be considered an aberration without precedential value. If the General Assembly's `notice' of the Madrid Agreement does carry some precedential weight, it lies in the General Assembly's simultaneous affirmation of the right of the people of Western Sahara to be consulted on their future status. Consistently with this position the General Assembly directed the interim government to permit a consultation. One should thus interpret Resolution 3458 (XXX) as recognising the legitimacy of an interim regime in Western Sahara established and administered by Spain along with two neighbouring states. It should, moreover, be read to require the termination of that regime upon

the exercise of the peoples right to self-determination." (xi)

The jurisprudence of the Court on self-determination emanating from those two advisory opinions was reinforced by the Court in its reasons for it determination in the:

Case Concerning East Timor- Portugal v Australia (ICJ Rep. 1995)

On 22 February 1991, Portugal instituted proceedings against Australia in the International Court of Justice concerning "certain activities of Australia with respect to East Timor" namely the negotiating, entering into and concluding a Treaty with Indonesia on 11 December 1989 creating a "Zone of Co-operation in an area between East Timor and Northern Australia, and enacting legislating in 1990, which came into force in 1991 implementing the Treaty. Portugal filed its Memorial in due time. Australia in its Counter memorial raised questions concerning the jurisdiction of the Court and the admissibility of the Application. In the course of a meeting held by the President of the Court with the Agents of both parties, the agents agreed that these questions were inextricably linked with to the merits and that they should be heard and determined within the framework of the merits.
As Indonesia has never accepted the compulsory jurisdiction of the Court, it could not be made a party to the proceedings, and even its most ardent detractors must, given the circumstances in which it entered into East Timor and of its then continuing occupation of the Territory, admire its prudence in deciding, weighing up the risks against the possibility that it might gain an unimpeachable endorsement of its claim to sovereignty over East Timor, to give the option of applying to the Court under the provisions of its Statute for leave to intervene in the proceedings a miss.

The Court first considered and dismissed an objection by Australia that: "there is in reality no dispute between itself and Portugal as both recognize the right of the people of East Timor to self-determination, the status of East Timor as a non-self-governing territory, and the fact that Portugal has been named by the United Nations as the administering Power of East Timor; that the arguments of Portugal as well as its submissions, demonstrate that Portugal does not challenge the capacity of Australia to conclude the 1989 Treaty and that it does not contest the validity of the Treaty."

Portugal maintained that its Application defines the real and only dispute submitted to the Court.
" 22. The Court recalls that, in the sense accepted in its jurisprudence and that of a predecessor, a dispute is a disagreement on a point of law or fact."

(After citing a number of precedents, including the South West Africa, Preliminary Objections, Judgment. ICJ Reports, 1962, p.328), the Court continued:
"For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the `real dispute' is between Portugal and Indonesia rather than Portugal v Australia. Portugal has, rightly or

wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.
"On the record before this Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question of whether the conduct of Australia in negotiating, concluding and initiating performance of the 1979 Treaty was in breach of an obligation due to Portugal under international law.

After hearing the evidence furnished by the parties and their arguments on the merits the Court found (at paragraph 34) that:
" In this case the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject matter of such a judgment in the absence of that State's consent, Such a judgment would run counter to the "well established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent: (Monetary Gold Removed from Rome in 1943, Judgment ICJ Reports 1954, p.32)"

Accordingly, it determined that it lacked the jurisdiction conferred on it by the Parties under Article 36, paragraph 2 of its Statute to adjudicate upon the dispute referred to it by the Portuguese application in the absence of Indonesia as a party to the proceedings.

In the course of its reasons for that determination the Court canvassed the issues and the competing contentions between the parties:
" 19. In these proceedings Portugal maintains that Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council Resolutions 384 and 389. Australia raised objections to the jurisdiction of the Court and to the admissability of the Application. It took the position, however, that these objections were inextricably linked to the merits and should be determined within the framework of the merits. The Court heard the parties both on the objections and on the merits. While Australia concentrated its main arguments and submissions on the objections, it also submitted that Portugal's case on the merits should be dismissed, maintaining, in particular, that its actions did not in any way disregard the rights of Portugal.

" 20 According to one of the objections put forward by Australia, there exists in reality no dispute between itself and Portugal. In another objection, it argued that Portugal's Application would require the Court to rule on the rights and obligations of a State which is not a Party to the proceedings, namely Indonesia. According to further objections of Australia, Portugal lacks standing to bring the case, the argument being that it does not

have sufficient interest of its own to institute the proceedings, notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor, and that it cannot, furthermore, claim any right to represent the people of East Timor; its claims are remote in reality, and the judgment the Court is asked to give would be without useful effect; and finally, its claims concern matters which are essentially not legal in nature which should be resolved by negotiation within the ongoing framework of ongoing procedures before the political organs of the United Nations.
Portugal requested the Court to dismiss all these objections.

The Court referred to a contention by Portugal challenging the applicability of the present case of the Court's jurisprudence in the Monetary Gold Case:
"that the principal matters on which its claim is based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering power of the Territory, have already been decided by the General Assembly and the Security Council, acting within the their proper spheres of competence; that in order to decide on Portugal's claim, the Court might well need to interpret those decisions but would not have to decide de novo on their content and must accordingly take them as "givens"; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia or upon the lawfulness of its presence in the territory" (para 30)

It noted that:
"Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms."

" 31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded that the relevant resolutions went so far.
" For the two parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in Resolution 384 (1975) and 389 (1976) expressly called for the "territorial integrity of East Timor and the inalienable right of its people to self-determination in accordance with GA Res. 1514 (XV).
"Nor is it in issue between the parties that the General Assembly has expressly referred to Portugal as the

"administering power" of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and the Security Council has done so in its resolution 384 (1975). The parties do not agree, however, on the legal implications that flow from the reference to Portugal as that administering power in these texts.

" 32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes furthermore that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes, that by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty of 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled "Question of East Timor, and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.
" 33. It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering power, East Timor's status as a non-self-governing territory and the right of the people of the territory to self-determination and to permanent sovereignty over its wealth and natural resources."

Those findings were crucial in that they brought the dispute squarely within the limitation on the Court's jurisdiction confirmed by the decision in the Monetary Gold Case. Having regard to the facts:
(a) that the Security Council's resolution 384 (1975): "called upon the Government of Indonesia to withdraw without delay all its forces from the Territory and called upon all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination";
(b) that Security Council Resolution 389 (1976): "called upon the Government of Indonesia to withdraw without further delay all its forces from the Territory; and called upon all States and other parties concerned to co-operate fully with the United Nations to achieve a peaceful solution to the existing situation."

The Security Council's failure to declare Indonesia's invasion of East Timor to be an unlawful act of aggression in this resolution so as to invoke its powers to resolve to take affirmative action to bring that State's military

occupation of the territory to and end was a blatant exercise in Real-Politic. A deal had been struck in discussions between President Suharto and US President, Gerald Ford, and Secretary of State, Henry Kissinger, in Jakarta on December 7 1975, the date fixed by Suharto for the invasion and, ironically, the eve of the anniversary of Pearl Harbour. In exchange for a guarantee of free access for its nuclear submarines through the Ombai Wetar straits to the Indian Ocean in which Russia was establishing a naval presence, the USA would give, what the US State Department dubbed `the big wink' (immunity against sanctions under Chapter 7 of the Charter for its war of aggression, an "international crime") to Indonesia's invasion of East Timor, which was then postponed until the following day to allow Ford and Kissinger to fly out of Jakarta.

Daniel Patrick Moynihan, then US Representative to the United Nations revealed the conspiracy: "China backed Fretilin in Timor and lost. In Spanish Sahara, Russia just as completely backed Algeria, and its front and lost. In both instances the United States wished things to turn out as they did, and worked to bring this about. The Department of State desired that the United Nations prove utterly ineffective in whatever measures it undertook. The task was given to me, and I carried it forward with no inconsiderable success" (xii)

In April 1976, the USA abstained from voting on Security Council Resolution 389, which reiterated the operative paragraphs of SC Resolution 384 of December 1975.

(c) that the General Assembly resolution 3485 (XXX) of 12 December 1975 referred to Portugal as "the administering Power" and called upon it "to continue to make every effort to find a solution by peaceful means" and " strongly deplored the military intervention of the armed forces of Indonesia in Portuguese Timor.

(d) that in both resolutions 31/53 of I December 1976 and 32/34 of 1 December 1977, the Security Council "rejected the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence."

(e) that while Security Council Resolutions 31/35 of 1 December 1976) and General Assembly Resolutions 31/55 of 1 December 1976, 32/34 of 28 November 1977 and 33/39 of 13 December 1978 made no reference to Portugal as the administering Power, Portugal is so described in Security Council resolution 384 (1975) of 22 December 1975 and in other resolutions of the General Assembly. Also those resolutions not referring specifically to Portugal as the administering Power recalled another resolution(s) which so referred to it.

(f) While no further resolutions had been passed by the Security Council since 1976 or by the General Assembly since 1982, the Assembly had maintained the item on its agenda since 1982, while deciding at each session, on the recommendation of its General Committee to defer consideration of it until the following session, and the Secretary General had been engaged since 1982 in negotiations with the disputing parties.

(g) that the Status of Portugal as administering Power of East Timor had never been revoked expressly by any competent organ of the United Nations, nor had any such organ conferred the status of administering power upon Indonesia.

(h) that on 15 December 1978 the Australian Minister for Foreign Affairs declared that negotiations which were about to begin between Australia and Indonesia for the definition of the continental shelf between Australia and East Timor, "when they start, will signify de jure recognition by Australia of the Indonesian incorporation of

East Timor"; he added: "The acceptance of this situation does not alter the opposition which the Government regarding the manner of incorporation." The negotiations in question began in February 1979.
(i) that the USA, the UK, France and Australia provided armaments, including attack aircraft and naval vessels, weapons, napalm, chemical defoliants to the Indonesian armed forces to enable them to continue its war of aggression against the peoples of East Timor.
(j) that no principal organ of the United Nations had appointed Indonesia as an administering Power of East Timor, the GA Resolution 37/30 of 1982 simply requesting the Secretary-General "to initiate consultations with `all parties directly concerned' with a view to exploring avenues for a comprehensive settlement of the problem."

The Court's finding on that argument of significance to the issue of the application of the Monetary Gold Case, while consistent with the law and its Statute, may be considered by a lay person to be manifestly unjust and inconsistent with the Purposes and Principles of the UN Charter and properly attribute that outcome to the exercise of Real-Politik in the Security Council and the fetters imposed upon the jurisdiction of the International Court of Justice by the provisions of Article 36 of its Statute.

However, the Court's pronouncements on the issue of self-determination in its reasons, albeit obiter dicta, have added considerably to the body of the jurisprudence of the International Court of Justice relating to the issue of self-determination for peoples of non-self-governing territories.

The development of customary norms of international law and the influence of the United Nations Charter on that process was considered by the Court in the Nicaragua Case:

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)

In 1981, the United States ceased economic aid to Nicaragua alleging that it had aided guerillas fighting against the El Salvador Government, with which the United States had good relations, by allowing the passage of Russian arms through its ports and territory to El Salvador.

Nicaragua alleged that, contrary to customary international law, and in breach of a bi-lateral treaty between the two States, the United States had used armed force against it by laying mines in its territorial and internal waters which damaged Nicaraguan and foreign vessels, and had attacked and damaged Nicaraguan ports, oil installations and a naval base and had aided the `contras', a Nicaraguan guerilla force who were waging a civil war against the Sandinista Government.

At a preliminary hearing "Nicaragua Case (Jurisdiction and Admissibility) ICJ Reports 1984, p.392, Nicaragua

argued that the Court had jurisdiction to hear the case under the Optional Clause in its Statute, relying on its 1929 Declaration made under the Permanent Court of International Justice Statute, the 1956 US- Nicaraguan Treaty of Friendship, and the US 1946 Declaration accepting the compulsory jurisdiction of the ICJ. However, while it was a signatory to the PCIJ Statute Nicaragua had never completed the ratification process.

The US argued that although Article 36.(5) of the ICJ provides for optional clause declarations made under the PCIJ Statute "which are still in force" to remain in force, giving the IJC compulsory jurisdiction under them, the Nicaraguan Declaration, not having been in force, could not be still in force, so that it did not come within Article 36.(5).

The Court, by a substantial majority, found that it had jurisdiction to entertain the application filed by Nicaragua under Article 36(2) and 36.(5) and that it had jurisdiction to entertain the application in so far as it relates to a dispute concerning the interpretation or application of the 1956 Treaty of Friendship between the Parties.

In the course of its reasons, the Court unanimously rejected objections by the USA that the dispute concerned a matter that should be resolved by the political organs of the United Nations rather than the Court and that the Court should not involve itself in a situation that concerned an ongoing armed conflict.

The subsequent hearing: "Nicaragua Case (Merits)- Nicaragua v United States is reported at ICJ Reports 1986, p.14.

The Court first had to consider whether it had jurisdiction to determine claims by Nicaragua based on customary rules that paralleled rules in the United Nations Charter as the United States had, in 1985, made a reservation to its acceptance of jurisdiction under Article 36.(2) of the Court's Statute excluding "disputes arising under a multilateral treaty," and having done so, did not present evidence or arguments on the merits.

The Court found that it had jurisdiction and proceeded to consider whether the United States had infringed customary international law.

The Court found itself unable to decide whether the United States had infringed Article 2(4) of the UN Charter, or any other multilateral treaty provisions because of the United States reservation.

In its written reasons the Court found (at pp. 48 to 51) that the mining was effected not by the contras but by persons, probably "Unilaterally Controlled Latino Assets" in the CIA vocabulary, in the pay and acting on the instructions of the CIA and under the supervision and with the logistical support of United States agents" and that the attacks on the ports, etc. were similarly executed by UCLA's, while United States nationals participated in the planning, direction and support.

In its formal judgment, in each case by a large majority, the Court:

2. Rejected the justification of collective self-defence maintained by the USS in connection with the military and paramilitary activities in and against Nicaragua, and Decided:

3. That the USA, by training, arming, equipping, financing and aiding military and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua, in breach of its obligation under customary law not to intervene in the affairs of another State.

4. That the USA, by certain attacks in Nicaraguan territory in 1983 and 1984... and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State.

5. That the USA, by directing or authorising overflights of Nicaraguan territory, and by the acts imputable to the USA referred to in subparagraph (4) hereof, has acted in breach of its obligation under customary international law not to violate the sovereignty of another State.

6. That in laying mines in the internal and territorial waters of the Republic of Nicaragua during the first months of 1984, the USA has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law, not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce.

7. That, by the acts referred to in subparagraph (6) hereof, the USA has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the 1956 Treaty of Friendship, Commerce and navigation...

8. That the USA, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph 6 hereof, has acted in breach of its obligations under customary law in this respect.

9. That the USA, by producing in 1983 a manual entitled "Operaciones sicologicus en guerra de guerillas" and disseminating it to contra forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America.

10. That the USA, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the 1956 Treaty of Friendship, Commerce and Navigation....

11. That the USA, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the 1956 Treaty of Friendship, Commerce and Navigation.

In its reasons for judgment, the Court reviewed the development of norms of customary international law through evidence of a general practice of principles adopted by States based on international custom and accepted as law, and an "opinio juris" as to the binding character of those principles, with particular reference to the non-use of force against and non intervention in the affairs of other States.

In so doing, it compared, and considered the relationship between the customary rules relating to the same subject matters arising under Treaties, including the UN Charter, and the influence upon the development of customary law of the provisions of the UN Charter and other treaties:

"175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties, which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty law rule which had caused the reservation to become effective.

"As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of "armed attack" which, if found to exist authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law...

"183... the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and opinio juris of States; as the Court recently observed.

"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. (Continental Shelf (Libyan Arab Jamahiriya Malta. ICJ Reports 1985, pp 29©30, para 27)"

After reviewing the practice and opinio juris of the two States, parties to the proceedings, the Court continued):

188. The Court thus finds that both Parties [in their pleadings] take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law... The Court has however to be satisfied that there exists in customary international law an opinio juris [as to the binding character of those principles]... This opinio juris may, though with all due caution, be deducted from, inter alia, the attitude of the Parties and that attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV). The effect of consent to the text of such resolutions...may be understood as an acceptance of the validity of the rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an opinio juris separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty law plane of the Charter.

"190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.... Nicaragua in its Memorial on the Merits submitted in the present case that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as jus cogens."

The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and "a principle of jus cogens."

(The UN Information Centre London `Newsletter' of November 6, 1986, reported that, in 1986, the US vetoed a draft Security Council resolution calling for "full and immediate compliance" with the Nicaragua case judgment.")

The Sources of Rules of International Law

The rules of international law evolve from one or more law-creating processes; treaties, international customary law or the decisions of the International Court of Justice, in the formulation of which the Court is entitled under Article 38 of its Statute to apply the general principles of law recognised by civilised nations, and, with limitations, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Custom

In the Asylum Case, (Columbia v Peru), ICJ Rep. 1950, p.266, the Court, holding that: "The Party which relies on a custom of this kind must prove that the custom is established in such a manner that it has become binding on the other party. The Columbian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage, practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of (the Court's) Statute, which refers to international custom "as evidence of a general practice adopted as law."

In the South West Africa Cases (Second Phase), ICJ Rep. 1966,6. the Court found that the `actio popularis' was known only to certain legal systems and hence was not a general principle, a finding of some relevance to the validity of the subsequent dubious `Act of Free Choice' in West Papua.

"In 1946. South Africa intended to incorporate Namibia, and consequently organised consultations with the resident population, a mixture of tribal processes for the Blacks and normal adult suffrage for Whites. Like Indonesia, South Africa justified tribal consultations on the basis that such methods are most appropriate in less advanced communities. The consultations indicated that the people of Namibia wished to be integrated with South Africa. South Africa later sought United Nations endorsement for the integration. The General Assembly [Res.65(1)] rejected South Africa's application, arguing that the African inhabitants of South West Africa had not as yet secured political autonomy or reached a state of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory." (xiii)

That precedent may explain the unease expressed on behalf of the African States in the debates on the New York Agreement in the General Assembly and the General Assembly's withholding its formal endorsement of the validity of the outcome of the `musjawarah' Act of Free Choice in West Papua.

Treaties

"The notion of jus cogens, ie. peremptory norms, was formally introduced into international law for the first time in the Vienna Convention on the Law of Treaties (adopted on May 22, 1969).

"Article 53 of the Convention stipulates:
Treaties conflicting with a peremptory norm of general international law (jus cogens)
"a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

"Even though the Vienna Convention on the Law of Treaties has only a limited number of ratifications (75 by October 1994) the definition of jus cogens in the sentence of Article 53 appears to have been accepted as the general legal definition of international jus cogens by the international community of states as a whole. A similar definition was embodied in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

"The notion of jus cogens was formally introduced into international law as recently as 1969. However, it is evident that there was some earlier development of individual peremptory norms, that is norms which fulfilled the criteria now spelled out in Article 53 of the two Vienna Conventions.

"In the years after the conclusion of the 1969 Vienna Convention on the Law of Treaties, the notion of jus cogens has been clarified and developed in international practice in the work of the International Law Commission and in doctrine. It appears that jus cogens now constitutes a formal and distinct category of norms in international law.

"International jus cogens appears to contain following characteristics and effects:
* The manifest purpose of jus cogens is to protect the overriding interests and values of the international community. This purpose can be realized only if peremptory norms are universally obligatory. The principal source of peremptory norms are conventions and international custom, often together.
* Peremptory norms permit no derogations. They can be modified by new peremptory norms only. Consequently, peremptory norms are absolute in character. They permit no acts derogating from them and no rules endeavouring to exist alongside them. They permit no treaties or titles conflicting with them.

* According to the two Vienna Conventions, treaties conflicting with peremptory norms are void. The invalidity is extended even to such bi-lateral treaties inter partes which do not as such infringe the rights or direct legal

interests of any third states. Since the states are prohibited in a treaty inter partes to agree to something derogating from peremptory obligations, logically no state can validly give its consent to any violation of peremptory norms.

* According to Article 53, peremptory norms are established through the acceptance and recognition of the international community of states as a whole. The prevailing interpretation of this provision is that an overwhelming majority of states, composing all the major elements of the international community of states, can impose a peremptory norm on one or a few dissenting states.

* Since peremptory norms are protecting the overriding interests and values of the international community, states and other subjects of international law owe their peremptory obligations to the international community of states as a whole, not to some individual states. The International Court of Justice admitted in the Barcelona Traction case (ICJ Rep. 1970, p.3) that there exists obligations of states towards the international community, these obligations are the concern of all states and in their protection all states can be held to have a legal interest (actio popularis). However, unfortunately, the two Vienna Conventions and draft texts of the International Law Commission do not provide for actio popularis.

* The effect of invalidity is not limited to treaties but is extended to cover any such instruments which, even though they are in conflict with peremptory norms, endeavour to exist beside them. Thus, invalidity extends to titles to territories acquired in violation of a peremptory norm. The invalidity is incurable in character. A treaty or title does not become valid in the course of time but its invalidity can be invoked at any time, even decades later, This is what the Baltic nations claimed to have the right to do; to invoke fifty years later the invalidity of the titles acquired by the Soviet Union to three Baltic nations through a successful threat of aggressive war. The so-called Molotov-Ribbentrop Pact of 1939 and its secret protocols have been declared void even by the parties, the Soviet Union and Germany, some 50 years later.

* Since peremptory norms cause the invalidity of rules, treaties and titles which are in conflict with them, and the invalidity is incurable in character, third states must be under obligation not to recognise such a rule, treaty or title as valid and legal. If they recognise, their recognition is without legal effect....

"The following three groups of peremptory norms are of interest...
1. prohibition of the use of aggressive armed force by states in the international sphere.
2. obligation not to obstruct the right of peoples to self-determination.
3. prohibition of the gravest violation of human rights." (xiv)

The 1969 Vienna Convention on the Law of Treaties was concluded and adopted on May 2 1969 by the UN Conference on the Law of Treaties, without a dissenting vote. It entered into force in 1980. Some of its provisions relevant to the issue of West Papua include:

"Article 1- the present Convention applies to treaties between States."
"Article 2. para.1(a) - "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
Article 2. para.1(f) - "contracting party means a State which has consented to be bound by the treaty whether or not the treaty has entered into force.
Article 2. para.1(g) - "party" means a State which has consented to be bound by the treaty and for which the treaty is in force."
"Article 4 - Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."
"Article 31. para.1 - A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
Para.3 - There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
(c) Any relevant rules of international law applicable in the relations between the parties."
"Article 32 - Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."
"Article 49 - If a State has been induced to conclude a treaty by the fraudulent conduct of a negotiating State, the State may invoke fraud as invalidating its consent to be bound by the treaty."
"Article 52 - A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

(In the Fisheries Jurisdiction Case [UK v Iceland, ICJ Rep. 1973, p.14], the Court stated: "There can be little doubt, as simplified in the Charter of the United Nations and recognised in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void. It is equally clear that a court cannot make an accusation of this serious nature on the basis of a general charge unfortified by evidence in its support).

“Article 53 - A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law

is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law. having the same character."
"Article 54 - If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."
"Article 60 (1) - A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."
"Article 60 (3) - A material breach of the treaty, for the purposes of this article, consists in:
(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."
"Article 69. 1. A treaty, the invalidity of which is established under the present Convention is void. The provisions of a void treaty has no legal force.
2. if acts have been performed in reliance on such a treaty;
(a) Each party may require the other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
(b) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.
3. In cases falling under Articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable".

"Consent obtained contrary to Article 52 is of no legal effect. The state whose representative has been coerced cannot regard it otherwise. "The International Law Commission considered in drafting the provisions of the Treaty that a treaty procured by a threat or use of force in violation of the principles must be characterised as void, rather than voidable at the instance of the injured party. Even if it were conceivable that after being liberated from the influence of a threat or use of force a state might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded as void ab initio. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full equality with the other state. If, therefore the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not recognition of the validity of the treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations." (xv)

While the conclusion of the New York Treaty preceded the adoption of the 1969 Vienna Convention on Treaties, the Convention was adopted prior to the implementation of the so called Act of Free Choice in West Papua. And although the Convention did not enter into force until 1980, the member States were aware of its terms prior to the "noting" of that Act in the General Assembly in November 1969.

They were also well aware of the threat by Indonesia to use armed force to procure annexation of West Papua that tainted the New York Agreement ab initio, prior to the debate in the General Assembly in 1962 which led

to the adoption of the Resolution which noted the Agreement and recognised and sanctioned the role of the Secretary-General in the implementation of the Agreement.
Moreover, the Member States participating in that debate and the Secretary-General all ought to have been well aware of:
* Article 2 (4) of the UN Charter;
* Chapter 11 of the UN Charter;
* GA Resolution 1541 (XV); and
* The opinions expressed by the International Court of Justice in the 1950 Advisory Opinion to the General Assembly and the 1962 Judgments in the series of cases concerning South West Africa (Namibia).

The 1950 Opinion ruled:
1. That the Mandate granted in favour of South Africa over South West Africa was created in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization under the League of Nations Covenant and the necessity for international supervision over the Mandate continued to exist despite the disappearance of the League of Nations Council and that the supervisory functions formerly performed by the League were assumed by the United Nations Organ performing similar functions.

The Court further held, unanimously, that South Africa had no competence to modify unilaterally the international status of the territory, or any of the international rules respecting the rights, powers and obligations relating to the administration of the territory and the supervision of that administration.

That statement of contemporary international law by the UN's Principal Judicial Organ considered in the context of the New York Agreement and the circumstances in which that Agreement was concluded and the UN's involvement in its conclusion and implementation raises some interesting issues.

* The Netherlands was not competent to unilaterally modify the status of the territory or its powers and obligations relating to its administration of the territory and the supervision of its administration in any manner conflicting with the international rules then in force.

* Nor was The Netherlands competent to conclude a bilateral treaty with the State of Indonesia - a State which on the notorious facts and its own admissions had recently resorted to the use of armed force in West Papua and was threatening to, and had the firm intention to resume its military campaign with the object of annexing the territory by the use of armed force in preparation for which it had, as is evidenced by the materials, been provided with the necessary armaments—ironically by Communist States holding Permanent Member Status on the U.N. Security Council—for the purpose of effecting such modifications to the status of the territory or its powers and obligations relating to its administration of West Papua or the supervision of its administration.

* It was in those circumstances of an imminent armed invasion of West Papua by the State of Indonesia, with all of the dire consequences that would inflict upon the peoples of West Papua and the Netherlands, that the Netherlands was coerced into concluding the New York Agreement, with terms providing for the involvement of the UN Organ responsible for the supervision of its administration of West Papua. Real-Politik prevailed over the purposes and principles of the UN Charter and its "Sacred Trust" for the West Papuan peoples. Its legacy is an ongoing and escalating threat to the peace in the region.

In its judgment in the final case in the series, "The Legal Consequences" case, the Court stated, at para.94, in dealing with an objection by South Africa that the General Assembly acted ultra vires in adopting a resolution 2145 (XXXI) terminating the South African Mandate, the Court, at para.94, stated:

"In examining this action of the General Assembly it is appropriate to have regard to the general principles of international law regulating termination of a treaty relationship on account of breach. For even if the mandate is viewed as having the character of an institution, as is maintained, it depends upon the international agreements which created the system and regulated its application. As the Court indicated in 1962 "this Mandate, like practically all other similar Mandates" was "a special type of instrument composite in nature and instituting a novel international regime. It incorporates a definite agreement ... (ICJ Reports 1962, p.331). The Court stated conclusively in that Judgment that the Mandate... in fact and in law, is an international agreement, having the character of a treaty or convention (at p.330). The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. in the light of those rules, only a material breach of a treaty justifies termination...

"95. General Assembly resolution 2145 (XXI) determines that both forms of material breach had occurred in this case. By stressing that South Africa "has, in fact disavowed the Mandate", the resolution in question is therefore to be viewed as the exercise of the right to terminate the relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship."

"96. It has been contended that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a Mandate and that no such power could therefore be exercised by the United Nations, since it could not derive from the League greater powers than the latter itself had. For this objection to prevail it would be necessary to show that the mandates system, as established under the League, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Article 60, para.5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is

dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded."

The International Court of Justice

"For the common lawyer, the most striking feature of the role of international courts and tribunals ... is that cases do not make laws. Article 59 of the Statute of the International Court of Justice, for example, provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. In taking this approach, international law follows the civil law tradition. Yet although judgments do not constitute a formal source of law, those in the World Court at least play a larger part in the development of international law than theory might suggest. State practice seldom points so clearly in one direction as to leave the Court no discretion in formulation of a custom. Quite often it is non-existent, sparse or contradictory so that the Court is thrust into the speculative realm of general principles and analogy to decide a case. In other words, the World Court, as any other international court or tribunal, is by no means the mechanical recorder of law that might be supposed, a fact which becomes important in assessing the contribution of the Court because of the undoubted influence that its pronouncements have on subsequent state practice.

"Note Judge Azevedo's view in the Asylum case:

`It should be remembered ... that the decision in a particular case has deep repercussions, particularly in international law, because views that have been confirmed by that decision acquire quasi-legislative value, in spite of the legal principle to the effect that the decision has no binding force except between the parties and in respect of that particular case.'

" International courts and tribunals not only do not make law, they are also not bound by previous decisions as to the law which they apply. But despite this absence of a doctrine of binding precedent, the World Court, as Schwarzenberger makes clear, does tend to follow or feel the need to distinguish its own jurisprudence. It relies very heavily upon this jurisprudence and only occasionally refers to that of other courts and tribunals. Often, the Court will cite only its own case law for a proposition and not bother to state practice supporting it... Although there is no hierarchy of courts, the World Court is indisputably pre-eminent and its judgments and advisory opinions are highly persuasive for other international courts and tribunals." (xvi)

Rule making powers and processes of Organs of the United Nations

"The International Law Commission, created by the General Assembly pursuant to Article 13(1) of the Charter and consisting of 34 eminent international lawyers from as many nations, is the UN body expressly charged with the duty of formulating rules of international law. Its charge covers both the progressive development and codification of international law ... but it does not have any express legislative power of its own. It simply

reports the fruits of its labor to the General Assembly, sometimes in the form of a draft resolution to be adopted by the Assembly, sometimes in the form of a draft treaty to be approved by the Assembly and then submitted to an international conference for eventual adoption by interested states... It is traditional to view the International Law Commission as a body that consolidates and proposes rules, rather than a body that creates them.

"If a "rule" is defined as a specific, incontestably binding legal norm, the traditional view is clearly correct. If, on the other hand, we think in terms of legal norms in a broader sense, the traditional view may not fully describe the situation. A leading British scholar (Higgins) has defined a norm as `an authoritative provision of law that continues to command significant community expectation as to its contemporary validity and which may be appropriately invoked and applied in the particular factual context'.

"The formulations of the International Law Commission have had at least some normative effect, even before the General Assembly or an international conference has acted upon them. For example, the Commission's draft articles on the Law of Treaties—a combination of codified pre-existing customary rules and progressively-developed new ones—established the prevailing standards for the law of treaties even before the Vienna Convention on the Law of Treaties, to which they gave birth, had been signed."

"The Security Council has the power under the UN Charter to make legislative decisions concerning international peace and security. Article 25 of the UN Charter binds its member states to carry out such decisions."

" The most significant of these have come in the context of attempts to induce compliance by all UN members with organizational norms, stemming either from the Charter itself or from resolutions adopted under the Charter. Consequently they raise problems more closely related to the concerns...of enforcement mechanisms than the general rule making power." (xvii)

While the General Assembly has unlimited power to discuss and recommend under the UN Charter's provisions, it was not vested with the power to create or amend international law. However:

"The General Assembly has on several occasions acted as a facilitator for the creation of international legislative rules through the traditional process of treaty-making. It has done this primarily by convening conferences open to all UN members, and sometimes to others, on specific subjects considered ready for regulation by one or more broad, multilateral treaties.... The conferences have often worked from a draft treaty prepared by the International Law Commission, which typically is revised somewhat at the conference and then adopted in its revised form. It does not formally become law until ratified by the number of states specified in the treaty. Products of their traditional "legislative" process include the four Geneva Conferences on the Law of the Sea, the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations, and the

1969 Vienna Convention on the Law of Treaties.

" On a few occasions the General Assembly has simply adopted a draft convention prepared by the Commission, as in the case of GA Resolution 3166(XXV111) of 14 December 1973, adopting the Convention on the Prevention and Punishment of Crimes Against Protected Persons, including Diplomatic Agents"

"More interesting from a legislative perspective is the question of the possible normative effect of General Assembly resolutions that are not tied to the preparation of treaties... adopted pursuant to Charter articles 10-14..." (xviii)

"The juridical character of a practice or principle derives ultimately from activities carried out, or attitudes assumed, by the states, and depends upon the evaluation made and the meaning attributed by the international community to the activities or attitudes of its members. Therefore, a broadly representative organ, such as the General Assembly, is especially well qualified to examine and evaluate those activities and attitudes and to express, through declarative resolutions, the scope and meaning that the international community ascribes to them. These Assembly resolutions do not create law, but they may authoritatively prove its existence. "Inversely, an Assembly resolution can be proof that a customary rule is no longer one. If the majority of members of the international community express, through a resolution, their rejection of a customary rule, it is evident that rule lacks the element of `opinio juris'." (xix)

" As to whether the General Assembly's Declarations, as distinct from Resolutions, may create or change international law, expert opinion is sharply divided. At one pole are those who maintain that the distinction between recommendations and binding decisions are fundamental. The General Assembly has recommendatory powers. Its recommendations may embrace aspects of international law, but they remain recommendations, which states are legally free to accept and implement or oppose and disregard...

"Yet the other pole of this problem also has much to be said for it. It readily acknowledges that the UN Charter gives the General Assembly no legislative powers. But it maintains that, in practice, many of its resolutions have had effects in and on international law, and that this practice, this broad construction of the General Assembly's powers, is now accepted and established..." (xx)

" Eric Suy, the Legal Counsel of the United Nations, concluded (in 1978):
"The General Assembly's authority is limited to the adoption of resolutions. These are mere recommendations having no legally binding force for member states. Solemn declarations adopted either unanimously or by consensus have no different status, although their moral and political impact will be an important factor in guiding national policies. Declarations frequently contain reference to existing rules of international law. They do not create, but merely restate and endorse them. Other principles contained in such declarations may appear to be new statements of legal rules. But the mere fact that they are adopted does not confer on them

any specific and automatic authority. The most one could say is that overwhelming (or even unanimous) approval is an indication of an `opinio juris sive necessitatis'; but this does not create law without any concomitant practice, and that practice will not be brought about until states modify their national policies and legislation. It may also arise, however, through the mere repetition of principles in subsequent resolutions to which states give their approval. The General Assembly, through its solemn declarations, can therefore give an important impetus to the emergence of new rules despite the fact that the adoption of declarations per se does not give them the quality of binding norms." (xxi)

The evolution of norms of international law through this process, and in particular the norm entitling the peoples of non-self-governing territories who have not yet achieved self-government to exercise an act of self-determination and achieve independence has received the imprimatur of the International Court in the cases reviewed in this paper.

"Self-Determination" and "Territorial Integrity"

"The principle of self-determination is a controversial one. It has a long history in international relations as a reason for the cession of territory from one state to another and for the use of plebiscites to establish the wishes of the inhabitants in this connection. Under the United Nations Charter, it became the cornerstone of the General Assembly's decolonisation policy of the 1960s and 1970s. The controversy has concerned the principle's status in international law and its meaning. It was not a part of international law before the United Nations Charter... the point has been reached where the principle has generated a rule of international law by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of the inhabitants, within the limits of `uti possidetis'. It does not extend to claims for independence by minority groups in a non-colonial context...

"The 1966 International Covenants on Human Rights each restate the right to self-determination as a matter of treaty law, although the meaning of the Covenant provisions may differ from that in customary international law." (xxii)

"The key to the determination of post colonial boundary disputes is the concept of `uti possidetis juris', the meaning of which was discussed in the Frontier Dispute Case [Burkino Faso v Mali ª ICJ Rep.1986, p.554):

"23... The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. This is true both of the States which took shape in the regions of South America which were dependent on the Spanish Crown, and of the States Parties to the

present case, which took shape within the vast territories of French West Africa. Uti possidetis, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of colonization wherever it occurs.

24. The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula uti possideris...

26. Thus the principle of uti possideris has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms.

63... the parties have invoked in support of their respective contentions the "colonial effectivites". In other words, the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period...The role played in this case by such effectivites is complex. Where the act corresponds exactly to law, where effective administration is additional to the uti possidetis, the only role of effectivites is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the effectivite does not coexist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectivites can then play an essential role in showing how the title is interpreted in practice."

"The approach in the Frontier Dispute case to the uti possidetis was followed by another ICJ Chamber in the Land, Island and Maritime Frontier Dispute case [El Salvador v Honduras- ICJ Rep. 1992, p.351 at p.401], in which the Chamber also noted that the boundary at the date of independence of States may change as a result of adjudication or the conduct of the parties (treaties, administration, acquiescence)." (xxiii)

Indonesia based its claim for annexation of West Papua on paragraph 6 of GA Resolution 1514(XV), which prov1des:
"Any attempt aimed at the partial disruption of the national unity and territorial integrity of a country is incompatible with the purpose and principles of the Charter."
This provision was expanded in GA Declaration 2625 (XV) to prohibit 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 (of a

colony or other non-self-governing territory which has a status separate and distinct from the State administering it and retains that status until the people of the colony or territory have exercised their right to self-determination) and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour.

"The Indonesian representative during the debate on GA Declaration 1514 (XV) in the General Assembly persuaded the Guatemalan representative to withdraw a proposed amendment to para.6. The proposed amendment stated that "the principle of self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to the recovery of territory." [15 UN GAOR. (947th plen. mtg. 1960), 1271.

"The Indonesian representative argued that Paragraph 6 as written already protected the claims of nations to their pre-colonial territory:
"When drafting this document my delegation was one of the sponsors of paragraph 6, and in bringing it in to the draft resolution we had in mind that the continuance of Dutch colonialism in West Irian is a partial disruption of the national unity and territorial integrity of our country." (xxiv)

But Indonesia proclaimed its independence in 1945 and, at the latest, attained the status of an independent State pursuant to the 1949 Charter of Transfer of Sovereignty in 1949 and was admitted to membership of the United Nations Organisation in 1950. Under the terms of the 1949 Charter Western New Guinea remained under Netherlands sovereignty.

What the Indonesian representative was really concerned about was that the Netherlands policy of maintaining its administration and promoting a program in its colony of Western New Guinea, designed to lead to its decolonisation, was frustrating Indonesia's desire to annex that territory contrary to the purpose and principles of the United Nations.

"This interpretation has been infrequently but forcefully invoked to justify an historical claim to a neighbouring territory...

A right to reintegrate pre-colonial territory, however, is not the most favoured construction of Paragraph 6. Rather, states have more often invoked Paragraph 6 in order to deny one faction of the population of a non-self-governing territory or of an independent country the right to secession. It is this use of Paragraph 6 that most states contemplated when they approved the resolution.

"Most states voting for Resolution 1514's paragraph 6 probably did so in the belief that they were creating a sort of grandfather clause: setting out the right of self-determination for all colonies but not extending it to parts of decolonised states and seeking to ensure that the act of self-determination occurs within the established

boundaries of colonies, rather than within sub-regions. The UN debates and their juxtaposition with events in the former Belgian Congo make clear that the desire to prevent self-determination from becoming a justification for Katanga-type secessions was uppermost in the minds of most delegates. This approach to Paragraph 6 is consistent with the principle of uti possidetis, or respect for the boundaries at the time of decolonization recognized by the Chamber of the International Court in Case Concerning the Frontier dispute."(xxv)

It is also consistent with the term `apparent contradiction" used by the Chamber Court in that case.

"The committment to the maintenance of borders and territorial stability is native to the Charter system. Hence the ambivalence towards the principle of self-determination. The need to protect the integrity of states has proved a powerful counteracting force against the revolutionary and secessionist urges of individual groups. Whatever the moral or political claims of post-colonial self-determination movements, the law has been resolute in its rejection of them. The names make for a tragic and familiar litany to international lawyers working in this area: Kurdistan, Tibet, Aceh, Southern Sudan, Biafra...In the particular case of Biafra, the position of the international community was clarified in 1970 by the UN Secretary-General at the time, U Thant who warned:

"As far as the question of secession is ... concerned, the United Nations has never accepted and does not accept, and I believe it will never accept the principle of secession of a part of a Member State." (xxvi)

"The ICJ has constantly reaffirmed the normative pre-eminence of the right to territorial integrity most notably in the Nicaragua (Merits) decision. The relationship of territorial integrity to the principle of self-determination has also been explored. It is clear that the right to self-determination in the colonial context cannot be derogated from on the basis of a need to preserve territorial integrity, eg. it is absurd to suggest that Angola had no right to self-determination in, say, 1970 on the grounds that its exercise would fracture Portugal's territorial sovereignty." (xxvii)

The General Assembly Debates on the Issue of West Papua

The documents placed before the General Assembly and the records of its debates and resolutions on the issue of West Papua are annexed to this paper, with the exception of documents in a list transmitted by the Indonesian Government with its Report to the Secretary-General included in Agenda item 98 (ANNEXES) of the GA Twenty-Fourth Session.

It is helpful to a proper evaluation of the relevance and significance in international law of facts, comments and diplomatic rhetoric contained in these documents to have a knowledge of the history of the development of the Republic of Indonesia.

The first traders, scholars and priests came to the islands of Indonesia in the AD 100's and important Hindu-Indonesian kingdoms were established, such as the empire of Shrivijaya, in south eastern Sumatra, in the 800's, and the kingdom of Modjopahit, on Java in the 1200's. Islam received widespread support from Indonesian rulers after the first Portuguese traders came to the islands in the early 1500's. The island princes adopted Islam as a political weapon against the Christian traders, and Islam replaced Hinduism as the chief religion.

Dutch merchants came to and gained control of the Spice Islands, established the Dutch East India Company in 1602 and gradually overthrew the Indonesian traditional rulers. In 1799, the Dutch government took over the lands and other assets of the East India Company and proclaimed the colony of Netherlands East Indies. French, and the British forces, occupied Indonesia briefly during the Napoleonic Wars, but the Dutch regained control in 1815 and established a Volksraad (People's Council) in 1918 which gave Indonesians a limited control in their government.

During the Japanese occupation of the Netherlands East Indies the Indonesians were encouraged to set up local self-government under Japanese control. While some leaders resisted the Japanese, as they had the Dutch, many nationalist leaders joined the Japanese occupation government, notably Sukarno and Hatta, and in the closing stages of World War 11, the Japanese allowed them to set up a national government. Sukarno and Hatta proclaimed Indonesia's independence on August 17 1945, calling the area under its control the Republic of Indonesia. The Netherlands did not recognise that proclamation and, in two truce agreements during the Indonesian armed struggle for independence over the ensuing four years, agreed to set up an independent Indonesia at some later time through the formation of a United States of Indonesia, made up of the small Republic of Indonesia and 15 other states but excluding Western New Guinea.

As a result of the Conference at the Hague in August 1949, the Netherlands transferred its sovereignty over Indonesia (excluding Netherlands New Guinea) to "The United States of Indonesia" on December 27, 1949 and set up the Netherlands-Indonesian Union, comprising 16 states of which the Republic of Indonesia was the most important.

In the first six months of 1950, there was widespread unrest in the United States of Indonesia resulting in the abolition of the federal union and the 16 smaller states. A new central government was set up for all the islands, called the Republic of Indonesia. Under a provisional constitution adopted, the national government was made up of a president, a vice president, a parliament and a premier and his cabinet. President Sukarno was given considerable power. He appointed all members of the parliament, the governors of provinces and mayors. The Republic was admitted to membership of the United Nations in 1950.

Indonesia held its first general elections in 1955 with the Nationalist and Masjumi parties gaining the greatest number of votes and forming a government with the full support of the Communist party. The Netherlands and

Indonesia ended the Netherlands-Indonesian Union in 1956. The new government took away all Dutch financial and economic privileges and refused to pay the one billion dollars that the former government owed to the Netherlands.

A number of army officers opposed the communist influence in the national government and in December 1956, led a revolt against the central government in Sumatra. By March the following year, the revolt had spread until rebel forces controlled many of the islands and Sukarno proclaimed a state of war.

In December 1957 the central government ordered all Dutch nationals to leave the islands, and about 45,000 people of Dutch Ancestry left Indonesia for the Netherlands. In February 1958, the rebels proclaimed a "Revolutionary Indonesian Republic" in Sumatra and the Celebes. Fighting continued until September 1961, when the government offered them an amnesty if they surrendered and all rebel activity ceased.

In July 1959, Sukarno reintroduced the 1945 Constitution, which gave the President almost unlimited powers. Indonesia demanded "West Irian" from The Netherlands in 1960, and in the same year broke off diplomatic relations with The Netherlands.

At the formation of Malaysia in September 1963, Indonesia objected to the inclusion of Sarawak and Sabah (North Borneo) in Malaysia. Indonesia mounted an armed invasion of parts of Malaysia in 1964. British and Commonwealth troops went to the aid of Malaysia and the Indonesian forces were expelled from the territory they had occupied. In the following year, two years after the "Bunker Agreement", Indonesia withdrew from membership of the United Nations in protest against the admission of Malaysia to the United Nations. Indonesia was readmitted to the United Nations in time to support its standing to pursue its claim to sovereignty over West Papua.

Having regard to that use of armed force against Malaysia in an attempt to expand its territory, and its declared preparedness in 1962 to go to war to annex West Papua, the Indonesian regime could hardly be classified as a "supporter of the struggles for the implementation of the right of self-determination of peoples, for freedom and independence" as its representative asserted in paragraph 106 of the record of the debate in the GA 1813'th Plenary Session.

The significant documents placed before the GA at its 24th Session comprised:

* Document A/7723- Report of the Secretary-General with Annexures:

1. Report by the Representative of the Secretary-General in West Irian

2. Report of the Indonesian Government to the Secretary-General concerning the conduct and results of the act of free choice in West Irian.

* The New York Agreement.

The Secretary-General's Report simply noted the failures by Indonesia to comply with the letter and spirit of the obligations imposed upon it by the terms of the New York Agreement reported by his representative Ortiz Sanz and adopted the same accommodating attitude to Indonesia for those failures as Mr Sanz did in his report and as the Indonesian Government relied on in its report, ie. `special circumstances' prevailing in West New Guinea—the ruggedness of the population, the prevailing difficulties in communication, and the low level of development in the territory with the exception of a relatively small group of West Irianese living in the coastal towns.

Those were the circumstances, of course, which Indonesia was obliged under Article V of the New York Agreement to remedy over the six years of its administration of the territory leading up to act of free choice in 1969, with the assistance (as provided by Article V11 of the Agreement) of `a number of UN experts dedicated to remain wherever their duties require their presence for at least five of those six years with responsibilities to advise on and assist in preparations for the carrying out the provisions for self-determination, except in so far as Indonesia and the Secretary General may agree upon their performing other expert functions prior to the arrival of the United Nation's Representative.'

They were the same circumstances that led to the non-recognition by the UN of the so-called act of free choice in Namibia in 1946. (UN GA Resolution 65 (1).), and that was before the adoption of Resolutions 1514 (XV) and 1541 (XV).

The Secretary-General's report, at paragraph 5, refers to this breach of the New York Agreement:
"On 14 May and 2 July 1963, communications were addressed on my behalf to the Government of Indonesia informing it of the names of the persons I had designated as the `United Nations experts' called for in Article XVI of the Agreement. On several occasions I approached the Government which was in power in Indonesia at that time for the purpose of implementing the provisions of Article XVI but failed to obtain a favourable reply. On 7 January 1965, as is well known, Indonesia withdrew its co-operation with the United Nations and it therefore became impossible to send the United Nations experts to West New Guinea (West Irian)."

Any reasonable person might well consider that it would be difficult to contemplate a more fundamental breach of the New York Agreement than that, were it not for the fact the Secretary-General's Representative in the territory, provides in his report at paras. 49-51 and at paras 57-60 facts that might well be regarded as the real motivation factors for that breach:

"49. During my tours of the territory I noticed with concern that the people had not been given adequate information regarding the forthcoming act of free choice. Therefore in a letter to the Government dated 11 October 1968 I stressed the need to undertake an enlightenment campaign to provide the people with the necessary information.

"50. I suggested that the Government should prepare an information paper indicating its decision to implement the act of free choice and explaining, in brief and simple terms the provisions of the Agreement relating to it and the meaning of the decision the people would be asked to make. I said the document, which could serve as a starting point for an enlightenment campaign, should be widely distributed among the literate people and its contents conveyed orally by local officials, school teachers, tribal chiefs and missionaries to those who were illiterate. I indicated that my mission was ready to offer the Government any assistance in this regard.
"51. In its reply on 15 November, the Government stated that it also was concerned about the question of providing the people of West Irian with information on the Agreement, and particularly the act of free choice. However, in disseminating such information it had to proceed with care, for the act of free choice was not only a delicate political issue in Indonesia but had been a source of controversy and conflict among politically minded people in West Irian itself. To some extent, information about the act of free choice had been given for some time to the "politically literate few" in the cities of the territory. The Government would not fail to continue the dissemination of information, taking due account of the political and psychological situation, in a manner that would not disturb the normal working of the Provincial Government or hamper the peaceful development of the people of the region."

The outcome was, as Mr Sanz reported, at para 53 of his report, that after he had talks with Ambassador Tjondronegoro, a paper entitled `Explanation of the New York Agreement from the year 1962 to the year 1969' was published on 28 0ctober (a date which seems unusual in the context of the report) which was distributed among the members of the representative councils. That paper is not included in the list of papers transmitted by the Indonesian Government to the Secretary-General with the Government's report.

This Report lists (at para 186) the Indonesian top administrative and military brass in attendance at all of the sessions of consultation involving the eight "consultative assemblies" between 14 July and 2 August 1969, and note in particular Mr Ali Moertopo, head of "Opsus", then a "Special Operations Unit" for President Suharto, masquerading as "Groups Chairman for Logistics, Social and Political Affairs", and Brigadier-General Sarwo Edhie, Commander of the Indonesian military in the territory, assuming the title of "Chairman of `Muspida' Regional Leadership Consultative Body." It would be a bold West Papuan, I suggest, who would not stand up and say what he was told to say under the supervision of the Indonesian personnel on that list.

I suggest further that the whole content of Section VI of the Report of the Secretary-General's Representative Report covering the proceedings in the Consultative Assemblies reflects a high degree of stage management and orchestration and control by the Indonesian authorities similar to that employed in the charade of the procuring of a Petition to President Suharto from the "Peoples Representative Assembly" set up in East Timor in March 1976 by Indonesia for that purpose.

My notes of an interview with a person involved in that charade reads as follows:
"In March 1976, the Indonesians told me that all who had worked for the Portuguese administration can come

back to Dili and get a position until they decide whether they want to accept Indonesian citizenship. I was employed by the Indonesians. They told me they were working towards a process for the people to decide to ask for integration with Indonesia as a special province (Isti Newa).

"They listed people who could speak English, about 15 of us, into a group and about 30 to 40 other people, some of whom were taken from a mountain village to show they represent the people there, to come to the meeting which was to be held at the Sporting Club in Dili. General Benny Moerdani, Colonel Sinaga, Captain Martono (from the Red Berets) and Captain Sunarto from the KKO, were responsible for arranging the meeting.

"Over nearly two months they teach these people at the Sporting Club in Dili and they said if one of these people make any mistakes, and that if Indonesia can't prove that the East Timorese people want integration, all those people present would be executed.

"They call fifteen people by gun, including myself, to attend the foreign journalists, and we were taught to convince any foreign journalist assigned to us that the meeting was true and in accordance with Indonesian democracy, called "traditional democracy", and that the people at the meeting represent the East Timorese people—despite the fact that they were not elected but randomly selected at the point of a gun.

"The Indonesians told the group selected to meet the journalists that if we tell anything against this meeting our sentence is "mardi laut" (a shower on the beach), a death sentence where East Timorese are shot and thrown into the sea.

"We each had audio tapes under the seats of the Government cars we shared with the journalist to record all conversation and our drivers were Indonesian officers who could speak English. The Indonesians told us that if any bad news resulted when the journalists had returned to their countries, then the one attached to the journalist would be killed. They told us that Peter Monkton, an Australian journalist from Jakarta was the most dangerous journalist.

"I was assigned to a foreign journalist who, after looking at my face when I gave answers to his questions as I had been directed, said "This is bullshit" and did not ask me any further questions.

"During the meeting, along the roads behind the lines of East Timorese people from Dili and surrounding villages who had been assembled under penalty of having their food supplies cut off, and also at the Sporting Club, there were Indonesian soldiers in East Timorese dress."

That "Act of Integration" was peremptorily rejected by the UN and the international community.

The Report of the Secretary-General's Representative makes it clear that the Indonesian Administration strongly asserted the view that Article XV111 of the New York Agreement conferred the power to make arrangements to give the West Papuan people the opportunity to exercise freedom of choice between the two questions set out in the Article, exclusively to Indonesia, and its conduct throughout the course of the making of the arrangements for, and the processes involved in the act of free choice reflects that view.

The Report also makes it clear that Mr Ortiz Sanz, despite noting (para.14) that "the precise meaning and extent of the concept of `participation' in the arrangements were not defined in the Agreement, and despite the difficulty he was experiencing in persuading the Indonesian administration to accept his suggestions and advice throughout the course of the development of the "arrangements" ultimately adopted by Indonesia, does not appear to have requested the Secretary-General to procure expert advice on the proper interpretation and implication of that term in its context in Article.

He assumed bona fide that it should consist of two elements: First the UN presence in the territory and, secondly a consultative and advisory role.

In his report, he refers to his having carried out a number of investigations in various parts of the territory to ascertain the wishes of the West Papuan people prior to the Act of Free Choice, but he omits to reveal in the report what he ascertained as a result of those investigations.

The Records of the Debates on the Issue of West Papua in the Sixteenth and Eighteenth Plenary Sessions of the General Assembly clearly reflecting as they do a determination of the majority of the States represented to stifle debate upon the Purposes and Principles of the United Nations Charter and the Principles of International Law and to sacrifice the rights of the peoples of West Papua under the "Sacred Trust" on the altar of Real-Politic must be deemed by the ordinary peoples of the world as the most shameful betrayal yet perpetrated by the United Nations Organisation.

All UN Member States which formally recognise or support Indonesian Sovereignty over West Papua based on a contention that the 1969 Act of Free Choice conducted in the Territory should be condemned for endorsing that betrayal.

The time has come, I suggest, for the peoples of all countries not admitted to the United Nations and former colonies that are, but remain in bondage and poverty, to unite in a campaign to demand that the power-broker Member States that control its politics adhere strictly to the Purposes and Principles of the UN Charter and the Principles of international law.

That Unison could be developed if the countries not represented in the UNO joined the Unrepresented Nations and Peoples Organization and the former colonies that are Member States of the UNO aligned with and

supported the peoples of those countries.

GE Lambert
Mansfield, Queensland
November 2000