International Law, Statehood and Self-Determination in the 21st century: The West Papua claim (2012)

Raf Manji[1]

"Self-determination is merely the statement of a problem and not the solution of it"[2]

I. Introduction

Self-determination has become an increasingly disputed area of political and legal discourse. At its root is the concept that peoples may decide for themselves, both how they are constituted into a nation state and under what principles. It has its foundations in democratic principles, freedom and expression of the will of the people. Yet, what once seemed a visionary claim has become bogged down in a political process suffocated by realist tendency and an international legal framework struggling for clarity. Perhaps this is a result of self-determination being birthed from twin mothers, the US and Europe, or as Toynbee notes above, perhaps it is actually a statement rather than a solution. Whichever is the case, the principle is now embedded within the international legal framework and continues to evolve, though not always in predictable fashion.

In 2008, the members of the Assembly of Kosovo, acting as the "democratically elected leaders of our people", declared "Kosovo to be an independent and sovereign state".[3] This was a most unusual step, given the clear recognition of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia by

[1] Director of the Sustento Institute raf@sustento.org.nz
[2] Arnold Toynbee "Self-Determination" (1925) 484 The Quarterly Review 319 as cited in Michla Pomerance "Self-Determination Today: The Metamorphosis of An Ideal" (1984) 19 Isr L Rev. 310 at 310-311
[3] Full text of Kosovo Declaration of Independence <www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf>

the United Nations, as set out in Security Council Resolution 1244.[4] This unilateral declaration was outside recognised norms and was challenged by Serbia, who requested that the issue be referred to the International Court of Justice (ICJ).[5] The ICJ judgment, known as the Kosovo Opinion, surprised many when it gave its opinion that "the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law".[6]

Whilst the Kosovo Declaration of Independence has been presented as a "unique case that demands a unique situation", the *sui generis* aspect of the case is much disputed. Following the Kosovo opinion, many questions have been raised about the implications for self-determination and the issue of secession. Regardless of how the case has been presented, it may have consequences for other similar situations, or as noted by Tim Garton Ash, "Kosovo is unique, and there will be more Kosovos". [7] One such case concerns the people of West Papua, who have been fighting for independence since the 1962 New York Agreement, which transferred sovereignty to Indonesia without taking into account the wishes of the people of West Papua.[8]

This paper is primarily concerned with understanding the current status of self-determination in international law in the 21st Century. Its ultimate purpose is to examine, understand and clarify whether the secessionist movement of West Papua, which is currently a province of Indonesia, is supported by recent developments in international law and what the options are for moving forward. The second part of the paper will look at the development of self-determination

---

[4] SC Res 1244 (1999)
[5] GA Res A/63/L.2 (2008) See also
[6] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion*) [2010] ICJ rep 141 at 44 (hereinafter the Kosovo Opinion)
[7] Quoted in James Ker-Lindsay "Not such a 'sui generis' case after all: assessing the ICJ opinion on Kosovo" (2011) 39 Nationalities Papers 1 at 3
[8] Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian) (1962) (hereinafter known as the New York Agreement) <www.indonesiaseoul.org/archives/papua/Agreement%20between%20RI%20and%20Netherland.pdf>

as a principle of international law in the 20th century. It will then examine the outcomes of recent secessionist claims in Quebec, East Timor, Kosovo, and Gibraltar and see if there is a clear legal roadmap and framework for new and current claimants. Part four will look at the case of West Papua, its post-colonial history and how the international community has dealt with its claim for secession. Part five will attempt to construct a legal position for West Papuan secession based on the previous evidence and conclude with a path forward for secessionist claims in the 21st Century.

II. Self-Determination in the 20th Century: Political Principle or Legal Norm?

As noted above, self-determination, as a political principle, developed from two contrasting sources. Both were concerned with the rights of man, freedom and democracy but there were slight differences in their approach. The seeding point of the 20th century principle of self-determination can be seen to have originated in the American and French Revolutions of the late 18th century. Whilst the US took a more individualistic approach to the creation of formal constitutional rights, the French fashioned a more cohesive identity between citizen and state. Thus, American and European conceptions of the state and the citizen within, took slightly different shapes, and this had consequences for how self-determination came to be formally codified as an international legal norm.[9]

Koskenniemi describes this tension as a conflict between a Hobbesian, or classical, position of the state being the best framework for promoting the will of

[9] See Matthews Craven "Statehood, Self-Determination, and Recognition" in MD Evans (ed) *International Law* (3rd ed, Oxford, OUP, 2010) at 230-236. Also, Antonio Cassese "*Self-determination of peoples: a legal reappraisal*" (CUP, Cambridge, 1995) at 11-27 and Joshua Castellino "*International Law and Self-determination*" (Martinus Nijhoof, The Hague, 2000) at 7-19.

the people, and a more romanticized view where "nationhood is primary".[10] Lenin and Wilson aptly expressed this difference during the clean up after World War I. Wilson, in his Fourteen Points address to the US Congress in 1918, stated a desire for "a free, open-minded and absolutely impartial adjustment of all colonial claims" whilst also noting that these claims had to be balanced "with the equitable claims for the government whose title is to be determined".[11] It is important to recognise the context of this statement and that Wilson's goal was to establish peace, as well as some clarity around how nations, territories and claims could co-exist. This was no simple task, as Wilson's own Secretary of State, Robert Lansing, asked:[12]

> When the President talks about 'self-determination', what has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit, which is practical, application of this principle is dangerous to peace and stability.

As Pomerance notes "this dilemma is basic and inescapable".[13] Wilson addressed this by advocating for the protection of minority rights within the confines of an existing state, laying the way for potential self-governing autonomy. Whilst, the difficulties of this balancing act were hard to manage, it can be argued that this was a starting point for the development of a new norm. As Thomas Franck noted:[14]

> Self-determination is the historic root from which the democratic entitlement grew. Its deep-rootedness continues to confer important elements of legitimacy on self-determination, as well as on the

[10] Martti Koskenniemi "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 Int'l & Comp. L.Q. 241 at 250
[11] Point V, "Fourteen Points" Address (1918) <www.ourdocuments.gov/doc.php?doc=62&page=transcript>
[12] Anthony Whelan "Wilsonian Self-Determination and the Versailles Settlement" (1994) 43 ICLQ 99 at 102
[13] Michla Pomerance "The United States and Self-Determination: Perspectives on the Wilsonian Conception" (1976) 70 AJIL 1 at 22
[14] Thomas Franck "The Emerging Right to Democractic Governance" (1992) 86 AJIL 46 at 52

> entitlement's two newer branches, freedom of expression and the electoral right.

Whilst the Wilsonian conception of self-determination was a carefully nuanced balance between sovereignty and individual expression, Lenin's view was more robust. For him, self-determination was more about freedom from oppression and imperialism. He saw the issue as political rather than territorial, being convinced that the forming of separate states was not the way forward. As he stated:[15]

> The right of nations to self-determination means only the right to independence in a political sense, the right to free, political secession from the oppressing nation…Consequently, this demand is by no means identical with the demand for secession, for partition, for the formation of small states.

As Raic notes, Lenin was very clear on the distinction between "a right to secession and the resort to secession", the latter taking place only "when national oppression and national friction make joint life absolutely intolerable".[16] Lenin's perspective was vastly different to Wilson's. He was not specifically concerned with the individual but of the whole. His purpose was not to develop the rights of man and the freedom of the individual but to support the fight against the imperialist bourgeoisie. Restating his opposition to the splitting of states, he noted:[17]

> The various demands of democracy, including self-determination, are not absolute, they are a particle of the general democratic (at present general socialist) world movement. In individual concrete cases the particle may contradict the whole; if it does then it must be rejected.

---

[15] Lenin "The Socialist Revolution and the Right of Nations to Self-Determination" (1916) 2 Vorbote 143 at 146
[16] D Raic "*Statehood and the Law of Self-Determination*" (Martinus Nijhoff, The Hague, 2002) at 185-187
[17] Ibid at 186-187

Cassese frames Lenin's construct of self-determination as having three components: a right to secession internally from specific ethnic groups, a process of allocating territories post-conflict and a process of anti-colonialism.[18] Although the promotion of socialism was at the heart of Lenin's vision for self-determination, its promotion as an "anti-colonial postulate" would be his long-term legacy.[19] These two contradictory but supportive conceptions of self-determination had an early test when in 1920 the Council of the League of Nations was asked to adjudicate on the secession claim of the Aaland Islands. The case was simple enough: the Aaland Islanders, via a plebiscite, wished to secede from Finland and join with Sweden.

The position of the League of Nations appointed International Committee of Jurists on self-determination was that, although clearly part of "modern political thought", it could "not be considered as sufficient to put it upon the same footing as a positive rule of the Law on Nations".[20] The Commission of Rapporteurs, the second commission appointed by the Council, reinforced this, stating "this principle is not, properly speaking a rule of international law and the League of Nations has not entered it in its Covenant".[21] It was also important to note that, although the judgment of the International Committee of Jurists supported the Finnish position on their sovereignty over the Aaland Island, jurisdiction was granted to the League of Nations because Finland did itself not have the "character of a definitively constituted state".[22]

This, however, was not a rebuke to the idea of self-determination as a legal norm and as Cassese notes, the committees made two points worth acknowledging: the first was that, as Wilson had promulgated, the protection of minorities was of importance when self-determination in the form of independent statehood or

[18] Cassese, above n 9, at 16
[19] Ibid.
[20] Ibid at 28.
[21] Report Presented to the Council of the League of Nations by the Commission of Rapporteurs [1921] LN Council Doc. B7 21/68/106 at [3]
[22] Cassese at 29

joining to another was not possible. The second was that there may be cases, in which the former is not possible, and that states have abused minorities and their protection, within that state construct, is no longer possible. The Rapporteurs noted in this case:[23]

> The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will of the power to enact and apply just and effective guarantees.

Another notable point made by the Rapporteurs was as to the viability of the Aaland Islands as an independent State, when the issue of complete independence was considered. They noted:[24]

> Even if we suppose that prominent citizens of the Island possess the necessary experience and impartiality for government amid the difficulties of their geographical and political position, the Archipelago has not the certain resources, which would enable it to bear all the expenses both of internal administration and communications with abroad.

Thus, it can be seen that the Aaland Islands case dealt with a number of important issues with relation to self-determination. The two reports commissioned by the League of Nations provided a simple framework for analysing the claims for self-determination: sovereignty is primary but minority rights must be both heard and respected, to the point of clear guarantees being provided; in the case these rights cannot be protected, the right to secede or join another State should exist but the costs of forming an independent state should not be underestimated. The case is still regarded as an important starting point for the international norm of self-determination. As Patricia O'Brien, Under-Secretary-general for Legal Affairs, noted at a recent United Nations exhibition

[23] Above n 21, at 4
[24] Ibid at 10

on the Aaland Islands "it was established that if the rights of minorities are being respected and its cultural identity is fully protected in situations such as the one in question, a demand for secession does not seem to be justified".[25]

By the end of the Second World War, this political principle had developed into a clear international legal norm, with the 1941 Atlantic Charter setting out a framework for how the US and UK wished to proceed.[26] The first four articles (of eight) focused on the preservation of territorial boundaries and the ability of "all peoples to choose the form of Government under which they will live". Article 2 specifically stated a "desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned". Just as Lenin's view of self-determination was driven by a vision of global socialism, the proclamation by Churchill and Roosevelt was very much a response to Nazi Germany. So much so, that Churchill clarified his position on self-determination, stating to the House of Commons that the principle was about "the sovereignty, self-government and national life of the States and nations of Europe under the Nazi yoke" and not for the colonies of the British Empire.[27]

At the end of the war in 1945, even as the United Nations Charter was being negotiated and drafted, there was no doubt as to the primacy of State interests. The desire to codify self-determination into the Charter exacerbated the general confusion and conflict over exactly what the principle actually meant in practice. As the Aaland Islands case had demonstrated, the main issues were between the right to self-government as opposed to secession itself. This statement from Colombia encapsulates the concerns:[28]

---

[25] Patricia O'Brien "The Aaland Islands Solution: A Precedent for Successful International Disputes Settlement" (16 January 2012) <http://untreaty.un.org/ola/media/info_from_lc/POB%20Aalands%20Islands%20Exhibition%20opening.pdf>

[26] "The Atlantic Charter" (14 August 1941) <www.nato.int/cps/en/natolive/official_texts_16912.htm>

[27] Cassese at 37

[28] Ibid at 39

> If it means self-government, the right of a country to provide its own government, yes, we would certainly like it to be included; but if it were to be interpreted, on the other hand, a connoting a withdrawal, the right of withdrawal of secession, then we should regard that as tantamount to international anarchy, and we should not desire that it should be included in the text of the Charter.

The conflict between promoting democracy whilst preserving state's current interests was a constant friction during the drafting debates and contributed to a somewhat softer implementation of self-determination within the UN Charter.[29] However, this was the first time the principle had been formally acknowledged and implemented in a multi-lateral treaty and this, in itself, would provide a foundation for the development of self-determination as a legal norm over the latter half of the 20th Century.

III. From Theory to Practice: Self-Determination in International Law

In the 20 years following on the UN Charter, several key UN agreements came into being. In 1960, there was the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514). In 1966, the two Covenants on Civil and Political Rights and Economic, Social and Cultural Rights were adopted. All three documents contained the same article on self-determination, which stated:[30]

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

---

[29] Charter of the United Nations, art 1(2)

[30] *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, XV (1960) art 2 *International Covenant on Civil and political Rights* GA Res 2200A, XXI (1966) art 1 *International Covenant on Economic, Social and Cultural Rights* GA Res 2200A, XXI (1966) art 1

In essence, the drafters of these groundbreaking global agreements were attempting to unravel several centuries of colonialisation, whilst at the same time maintaining stability amongst sovereign states. There is no doubt that this was a herculean task and fraught with unintended and unforeseen consequences. The attempt to meld the views of the socialist States and their preference for external self-determination only, with the Western nations desire for internal self-determination was difficult to resolve. An attempt was made in the 1970 Declaration on Friendly Relations,[31] where the focus was on the external approach. As Cassese notes:[32]

> The initial Western proposal commenced with the principle of self-determination; the final text starts with the principle of territorial integrity and the political unity of sovereign States.

It's clear that even 25 years after the UN Charter, the principle of self-determination was still slanted towards the anti-colonialism postulate as promoted initially by Lenin and then by the socialist States led by the USSR. However, the possibility of secession, in exceptional circumstances was still considered a possibility.[33] In practice, the complexity of claims, interests and situations has resulted in a somewhat ambiguous legal position. There are numerous examples to consider but for the purposes of this paper, four recent claims will be examined, in order to shine light on the West Papua claim.

A. Quebec

Three questions were posed in this case: first, under the Constitution of Canada, could Quebec secede unilaterally; second, was there a right under international law to do this and thirdly, if there was a conflict between domestic and

---

[31] *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations* GA Res 2625, XXV (1970)
[32] Cassese at 112
[33] Ibid at 119-140.

international law, which would take preference.[34] In answering the first question, the Supreme Court acknowledged that self-determination "has acquired a status beyond "convention" and is considered a general principle of international law".[35] They also noted "international law contains neither a right of unilateral secession nor the explicit denial of such a right". It did put forward the proposition that because secession may be permitted in exceptional circumstances, it would suggest that it is not permitted in general ones.[36]

The court did put forward three examples of what these exceptional circumstances might be: they stated "the right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial power" is now undisputed"[37], then, sourcing the Declaration on Friendly Relations, they said "the other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context".[38] Finally, they noted "when a people is blocked from the meaningful exercise of its rights to self-determination internally, it is entitled, as a last resort, to exercise it by secession".[39] It went on to note "such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions".[40] It concluded that there was no right "under international law, to secede unilaterally from Canada".[41]

Two further points of interest were raised in the Court's summary. Firstly, it defined neatly the position of the State with respect to self-determination, stating:[42]

---

[34] Reference re Secession of Quebec [1998] 2 SCR 217 (hereinafter the Quebec decision)
[35] Ibid at para 114
[36] Ibid at para 112
[37] Ibid at para 132
[38] Ibid at para 133
[39] Ibid at para 134
[40] Ibid at para 138
[41] Ibid
[42] Ibid at para 154

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.

In other words, as long as States treated their citizens appropriately, there should be no reason for secession to occur. In the case of Quebec that was quite clear. The second point of interest was in the Court's final paragraph, where they noted even though there was no right to unilateral secession under domestic or international law, that, in itself, did not "rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession".[43] This point refers to the constitutive theory of the State, implying that a secession, constitutional or not, followed by international recognition may confer an aspect of statehood.[44] It further recognised the "effectivity principle" in this respect, stating "it necessarily means that legality follows and does not precede the successful revolution".[45] The case immediately drew comparisons with the situation in Kosovo at that time, as well as East Timor.[46] These cases will be looked at below.

B. Kosovo

The situation in Kosovo, around the turn of the century, was regarded as "an example of those extreme circumstances giving rise to the right to unilateral secession enunciated by the Supreme Court of Canada". Epps also predicted, "The fact that secession will no doubt eventually take place will provide one more case of state practice moving the secession principle towards

---

[43] Ibid at para 155
[44] Ibid at paras 142-143
[45] Ibid at para 144
[46] See Valerie Epps "Self-Determination after Kosovo and East Timor" (1999-2000) 6 ILSA J Int'l & Comp L 445

crystallization of the norm".[47] Her foresight was quite correct. On the 17th February 2008, Kosovo did indeed crystallize this norm when it made a unilateral declaration of independence.[48]

There were several points of note in the Declaration itself. Firstly, it stated that Kosovo was "a special case arising from Yugoslavia's non-consensual break up and is not a precedent for any other situation".[49] Secondly, they noted, "no mutually accepted status outcome was possible, in spite of the good-faith engagement or our leaders".[50] Thirdly, they made it clear that they would "protect and promote the rights of all communities in Kosovo.[51] Fourthly, they made the declaration as "the democratically elected leaders of our people", as opposed to the Assembly of Kosovo itself.[52] These four points of note are crucial in considering the unilateral declaration. They were at pains to stress the *sui generis* nature of the declaration, hoping that this would help its acceptance by the international community, given the clear breach of sovereignty.[53] At the same time, they laid out a case for "remedial" secession, which had some support from the Quebec decision and legal philosophers.[54]

The Kosovo declaration was referred to the International Court of Justice (ICJ) by the General Assembly, in order to "determine whether or not the declaration was

---

[47] Ibid at 452
[48] See full text of Declaration http://news.bbc.co.uk/2/hi/europe/7249677.stm

[49] Ibid
[50] Ibid
[51] Ibid at para 2
[52] Ibid at para 1
[53] See S.C. Res 1244 (1999)
[54] For detailed examination of this see Allen Buchanan *Justice, Legitimacy, and Self-Determination: Moral foundations for International Law* (OUP, New York, 2004) at ch 8.

adopted in violation of international law".[55] The court was at pains to stress that the question asked was "narrow and specific". It went on to note:[56]

> It asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those states, which have recognized it as an independent state

Having stressed the importance of the way the question was framed, the court delivered the opinion, by ten votes to four, that "the adoption of the declaration of 17 February 2008 did not violate general international law"[57]. For many legal commentators, this was seen as a carefully crafted outcome, designed not to address the underlying question, which was whether it was legal for Kosovo to secede from Serbia, but to answer a technical question as to whether it was unlawful to actually make the declaration.[58] In his dissenting opinion, Judge Koroma called the declaration "unlawful and invalid" and went as far to say of the ICJ:[59]

> Never before has it reformulated a question to such an extent that a completely new questions results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it. This is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the provisional Institutions of elf-

---

[55] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* of 22 July 2010, ICJ Rep 2010 at 2 (hereinafter the Kosovo Opinion)

[56] Ibid at para 51
[57] Ibid at para 122
[58] See Peter Hilpold "The ICJ Advisory Opinion on Kosovo: different perspectives of a delicate question" (2011) Available at SSRN: http://ssrn.com/abstract=1734443
[59] ICJ Report 2010 at para 2-3 (Judge Koroma dissenting)

> Government of Kosovo and that the answer to the question should therefore be developed on this presumption.

Therein lies the subtlety of this decision. The ICJ was able to answer a question, without really answering the real question or as has been asked was "the Kosovo Opinion actually a Non-Opinion"?[60] Vidmar outlines the somewhat bizarre picture of the Court trying "to ride on two horses":[61]

> So here the Court silently derived the capacity to act on behalf of the people of Kosovo from the institutions of self-government. But in the next step it separated the post-holders from the institutions and treated them as individuals.

This narrow and hair-splitting reasoning disappointed many who were waiting for a clear and unmistakable ruling on the legality, or not, of the right to secede. As Judge Simma noted in his declaration, "a broader approach would have better addressed the argument…relating the right to self-determination of peoples and the issue of "remedial session".[62] Nevertheless, the Kosovo Opinion, for all the comment and analysis it has garnered, has not prevented Kosovo from being recognised by 91 States, as well as recently applying to join the Organisation of Islamic Cooperation (OIC).[63] FIFA, the global football authority has recently moved to allow Kosovo to play friendly matches with FIFA member associations, though that decision has caused inevitable protest from Serbia.[64] It would seem, to paraphrase the Canadian Supreme Court, "facts can make the law" and, with

---

[6060] Jude Vidmar "The Kosovo Opinion and General International Law: How Far-reaching and Controversial is the ICJ's Reasoning?" Available at SSRN: http://ssrn.com/abstract=2060605

[61] Ibid at 5

[62] ICJ Report 2010 at 4 (Judge Simma declaration)

[63] Press Release, 18th June 2012 www.menafn.com/menafn/1093524002/Saudi-Kosovo-set-to-join-OIC

[64] www.balkaninsight.com/en/article/vokrri-fifa-modalities-in-june

the support of a good portion of the international community, Kosovo is faking it 'till it makes it.[65]

C. East Timor

East Timor is a somewhat different case to Quebec and Kosovo, as it represents a post- and neo-colonial situation.[66] Having been a Portuguese colony since the sixteenth century, there was little in the way of political infrastructure within the country. When Portugal prepared for a transition to independence in 1975, several groups put forward claims as to whether East Timor should become fully independent or integrate with Indonesia, who by that time controlled West Timor. Sadly, the outcome was a military invasion by Indonesia and a vote by unelected officials to incorporate into Indonesia.[67] The UN issued a statement in which it "*strongly deplores* the military intervention of the armed forces of Indonesia in Portuguese Timor" and stressed the "inalienable right of the people of Portuguese Timor to self-determination, freedom and independence", as guaranteed by the UN Charter and Declarations.[68] The General Assembly also asked Indonesia to withdraw and "desist from further violation of the territorial integrity of Portuguese Timor". The statement was full, firm and explicit in its condemnation of Indonesia.

Indonesia argued that the people of East Timor had "exercised their right to self-determination" and that joining with Indonesia was "logical because of three factors: political stability, territorial integrity and unity, and the economic viability of the territory".[69] It is interesting that Indonesia did not use the term lawful but instead saw the integration as "logical" and ignored all requests from the UN to comply with further resolutions. It is also clear that the UN did not see economic viability as an objection to self-determination, clearly stating,

---

[65] See Colin Warbrick "Kosovo: The Declaration of Independence" (2008) 57 ICLQ 675 at 690
[66] See Paul Elliott "The East Timor Dispute" (1978) 27 ICLQ 238 for detailed examination of the shift from post-colonial situation to neo-colonial.
[67] See also Cassese at 223-230
[68] See *Question of Timor* GA Res 3485 (XXX) (1975)
[69] Elliott, above n 66, at 242

"Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence".[70] Yet the UN did not actually take any action against Indonesia and, as in the case of Western Sahara,[71] simply acknowledged the "realities of the situation".[72] Ironically, this is reflective of the situation in Kosovo. Perhaps "possession is nine-tenths of the law" is a real truism.

Still, international law, though glacial in pace, moves forward and finally the case reached the ICJ, after Portugal, fulfilling its duty as the former colonizing power, instituted proceedings against Australia and set off a chain of events, which would see East Timor finally achieve independence, some 27 years after the initial Indonesian military invasion. Although, the East Timor Case was specifically around the issue of jurisdiction, it raised the issue of Portugal's relationship to East Timor, as well as revisiting the issue of self-determination.[73] As noted in the original filing of 22nd February 1991, Portugal asserted that Australia had:[74]

> Failed to observe…the obligation to respect the duties and powers of [Portugal as} the administering Power [of East Timor]…and…the right of the people of East Timor to self-determination and the related rights.

Portugal further argued that Australia had breached rights, which were "*erga omnes*" and, therefore, must "respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner". The Court was very clear in its view that this argument was "irreproachable" and was "one of the

---

[70] GA Res 1514, above n 30, at para 3
[71] See also Castellino on the Western Sahara case, above n 9, at 173-259, Sidi Omar "The right to self-determination and the indigenous people of Western Sahara" (2008) 21 Cam Rev Int'l Aff 41, Pedro Pinto Leite "Western Sahara, East Timor and West Papua: Three Cases of Self-Determination and Their New Developments" (paper presented at the Uyghur Leadership Seminar: Self-Determination under International Law, Berlin, April 2008)
[72] Cassese at 230
[73] *Case Concerning East Timor (Portugal v. Australia)* ICJ Report, 1995 (hereinafter the East Timor Case)
[74] Ibid at para 1

essential principles of contemporary international law".[75] It added that "East Timor remains a non-self governing territory and its people has the right to self-determination". Finally, it restated previous Security Council resolutions that called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514".[76] Regardless of the ruling on jurisdiction, one could be left in no doubt as to the status of East Timor in international law. Legal status and reality are often two different sides of the same issue, or as Judge Skubiszewski noted, "the dichotomy between law and justice is perennial".[77] This perhaps reflects, better than anything else, the difficulty of implementing the principle of self-determination within State practice.

Nevertheless, following an agreement between Indonesia and Portugal in 1999,[78] East Timor eventually had a UN sponsored referendum and transitioned to an independent State in 2002.[79] Whilst, the road to independence was a long, arduous and painful process for the people of East Timor, eventually their claim was recognised and acted upon. The case demonstrated that the principle of self-determination is indeed a core pillar of international law, no matter how difficult it has been to implement it with State practice.

D. Gibraltar

Gibraltar is an altogether different case to that of East Timor and Kosovo but still has relevance for understanding all aspects of the principle of self-determination. There has been no occurrence of human rights abuses, military invasion or serious loss of life. The position here is more to do with technical

---

[75] Ibid at para 29
[76] Ibid at para 31
[77] ICJ Report 1995 at para 43 (Judge Skubiszewski dissenting)
[78] Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor (New York, 5 May 1999) www.un.int/portugal/acordos.htm
[79] See SC Res 1236, 1246, 1257, 1262 and 1272 (1999) Also, Michael Morison on the UN transition process "Democratisation and Timor Leste after UNTAET: Towards participatory intervention" (paper presented at the Understanding Timor Leste conference, Dili, 2-3 July 2009)

arguments over sovereignty than internal political rights. Gibraltar was ceded to Great Britain by Spain in the Treaty of Utrecht in 1713. Up until 1946, it was under British sovereignty, after which it was recgonised as a "non-governing territory" under the UN Charter.[80] Since then Spain has increased its demands for the recognition of its sovereignty, against the wishes of the people of Gibraltar. Spain asserts that this is a colonial situation, yet quite clearly Gibraltar was not colonised but ceded under Treaty. The population is localised and is not of a colonial nature.

The UN position, in this case, was to ask the UK and Spain to begin talks to resolve the situation.[81] Subsequent resolutions noted Gibraltar as a "decolonization" situation and that negotiations should continue, "taking into account the interests of the people of the Territory".[82] The negotiations were fractious at best and on 10th September 1966, a UK approved referendum was held in Gibraltar with a near unanimous desire by the population to continue their association with the UK. One would have thought that the UN would have welcomed the expression of the will of the people but in this case the General Assembly saw it differently:[83]

> Considering that any colonial situation which partially or complete destroys the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations, and specifically with paragraph 6 of the General Assembly resolution 1541 (XV)

The British response to this was forthright with the permanent representative, Lord Caradon, describing the decision as "unworthy of the UN and a disgrace to the [Fourth] Committee".[84] What the UN Special Committee was at pains to

---

[80] See Cassese at 207
[81] GA Res 2070 (XX) 1965
[82] GA Res 2231 (XXI) 1966
[83] GA Res 2353 (XXII) 1967
[84] See Peter Gold "Gibraltar at the United Nations: caught between a Treaty, the Charter and the 'fundamentalism' of the Special Committee" (2009) 20

ignore was the wish of the Gibraltarian people to express their self-determination in wishing to stay connected to the UK. The intractability of the Spanish to also recognise this fact led to another 30 years of fruitless negotiations. In fact, it is clear that no party has shifted its position in that time, yet the Gibraltarians have carried on their lives as normal. In 2002 a referendum on the possibility of the UK and Spain sharing sovereignty was clearly rejected by the people and in 2006 a new constitution was drafted and accepted by the people. If there was any further evidence needed that Gibraltar had been "de-colonized" and should no longer be a non-self governing territory, it is hard to see what that might be. As the Gibraltar Chief Minister noted in his statement to the Fourth Committee in 2008, the people "had been a victim of the Special Committee as it has presided like a fundamentalist watchdog over inflexible and outdated delisting criteria".[85]

This feeling was endorsed by the Chairman of the Committee himself, who warned "they risked becoming irrelevant if they do not reconsider their methods, innovate and think outside the box".[86] This internal rebuke was a reflection of how the desire to favour the principle of territorial integrity over self-determination was having deleterious effects and was clearly contrary to the aims of Resolution 1514 (XV). Whilst the dispute continues to simmer,[87] the UK has made clear that regardless of claims to sovereignty "that the UK Government will never…enter into an agreement on sovereignty without the agreement of the Government of Gibraltar and their people".[88] Again, whilst the UN has fumbled, States have taken matters into their own hands, in good faith and according to

---

Diplomacy & Statecraft 697 at 704 See also Simon Lincoln "The Legal Status of Gibraltar: Whose Rock is it Anyway?" (1994) 18 Fordham Int'l LJ 285

[85] Ibid at 714

[86] Ibid.

[87] "Spain warns UN Decolonization Committee not to de-list Gibraltar" (19 June 2012) http://en.mercopress.com/2012/06/19/spain-warns-un-decolonization-committee-not-to-de-list-gibraltar

[88] "House of Commons, Foreign Affairs – Minutes of Evidence" (26 March 2008) at Q257 http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/147/8032602.htm

the principles of the UN, in order to allow people to determine their own future, in a peaceful and transparent manner. In this case self-determination has, in the end, triumphed over somewhat contrived and convoluted arguments over sovereignty and interpretation of ancient Treaties.

IV: West Papua: East Timor redux?

The claims above (Quebec, Kosovo, East Timor and Gibraltar) all provide different perspectives on self-determination both historically and currently. There is no doubt that out of all the above cases, the one most closely mirroring West Papua is that of East Timor. Not only are they both one-half of a larger island, they share marine ties, they both became part of Indonesia in the post-colonial era and they also share ethnic ties. West Papua is the eastern most part of Indonesia and shares no ethnic ties, being primarily Melanesian. It's other half, Papua New Guinea, became independent in 1975, in a relatively peaceful transition from Australian sovereignty. The story was not so simple for West Papua, which, under Dutch sovereignty, was known as West New Guinea.

As the dust of the Second World War settled, The Dutch found themselves embroiled in a post-colonial conflict with the newly formed Indonesia, finally signing successive agreements between 1946 and 1949. The Hague Agreement of 1949 saw the Dutch cede sovereignty of the Dutch East Indies to Indonesia, but this did not include West New Guinea, which was to remain under Dutch sovereignty. The next 10 years would see relations deteriorate between Indonesia and the Dutch, until it was clear that something had to give. It was the Dutch Foreign Minister Luns, who presented a plan that "would accept a transfer of West New Guinea to the UN providing that the principle of self-determination would be upheld". The Luns Plan had three key points: firstly, sovereignty would be transferred to the indigenous Papuan people. Secondly, the UN would assume

administrative control and thirdly, the UN was to guide the Papuan people towards political self-determination.[89]

This seemed entirely to fit within Resolution 1514 and met the requirements of the colonial power to set out a plan for transitioning to self-government and independence. The expectation for a process of decolonization was expected and "the people of West New Guinea considered its independence, as promised by the Netherlands, as an immutable right".[90] However, this did proceed as hoped for. On 15th August 1962, Indonesia and the Netherlands signed an agreement to transfer sovereignty of West New Guinea to the UN and then onto Indonesia.[91] West New Guinea was being passed from an old colonial master to a new one. The New York Agreement provided for the "people of the territory the opportunity to exercise freedom of choice", adding that "the act of self-determination will be completed before the end of 1969".[92] This seemed like a reasonable proposition but behind the scenes it was clear that a full plebiscite was not necessary with reports showing:[93]

> The Dutch and UN Under Secretary General Narasimhan have agreed that a Papuan act of self-determination need not involve any direct voting on the issue by the Papuan population. Instead, some form of representative assembly could decide on behalf of the people.

The Act of Free Choice ended up as a "farce" with "in a number of areas people were forced to comply with a gun".[94] In total, 1022 representatives took part in

---

[89] Christian Penders *The West New Guinea Debacle: Dutch Decolonisation and Indonesia, 1945-1962* (University of Hawaii Press, 2002) at 336
[90] Ibid at 429
[91] Agreement between the Republic of Indonesia and The Kingdom of the Netherlands Concerning West New Guinea (West Irian) (signed 15th August 1962)
[92] Ibid art XVIII to XXI
[93] John Saltford "UNTEA and UNWRI: United Nations Involvement in West New Guinea During the 1960s" (DPhil Thesis, University of Hull, 2000) at xx See also John Saltford *The United Nations and the Indonesian takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Routledge, London, 2003)
[94] Penders, above n 89, at 442

the Act, with the UN witnessing only 195 of them. Although passed unanimously by the various councils, the process was deeply flawed and set the tone for the next 50 years, as Chauvel and Bhakti note:[95]

> Although Jakarta secured the only result acceptable to it, the Act of Free Choice was conducted in such a way as to remain not only the focus of Papuan refusal to become part of Indonesia but the focus of international scrutiny as well.

Saltford also reports on how the UK FCO saw the process, as they briefed the UK mission to the UN in New York:[96]

> To steer clear of the West Irian issue but adds privately however, we recognise that the people of West Irian have no desire to be ruled by the Indonesians...and that the process of consultation did not allow a genuinely free choice to be made.

There is no doubt here that the Luns plan, if properly implemented would have fulfilled the requirements set out in Resolution 1514 (XV). A proper transition from a colonial situation to a self-governing one, as happened in Papua New Guinea, could have taken place. However, events conspired against the people of West Papua and they found themselves suddenly as Indonesians, with whom they shared no ethnic or cultural ties. As the behind the scenes maneuverings showed, the global politics of the time were not favourable to the West Papuans. Indonesian nationalism and empire building added to the desire for an expedient result. This outcome couldn't be further from the principles of self-determination as laid out by the UN. Like the people of East Timor, the wishes of the West Papuans were overlooked and they had to settle for imposed external sovereignty. Unlike the people of East Timor, West Papuans have not, as yet,

---

[95] Richard Chauvel and Ikrar Nusa Bhakti *The Papua Conflict: Jakarta's Perceptions and Policies* (Policy Studies 5, East-West Center, Washington, 2004) at viii

[96] Saltford, above n 93, at xxvii-xxviii

managed to gain their independence. However, the struggle has continued and at some point must be resolved. The next section looks at what the options might be, given recent developments in the self-determination space.

V: West Papua: Sovereign State or Autonomous Province

The Free Papua Movement (OPM) has been agitating for West Papuan independence for over 45 years. In that time, at least 100,000 people have died in the process of Indonesia enforcing its sovereignty.[97] Since 1998 and the fall of Suharto, the intensity of the situation has increased. Since then, there has been a constant desire and movement towards recognising the rights of Papuans to self-determination.[98] Three key milestones are worth mentioning: in February 2000, the 2nd Papuan Congress took place, where the desire for independence and self-determination were re-stated, along with a set of principles for administering the country along traditional Papuan principles. This vocalization of the people's wishes was met with violence, including the abduction and murder of the then Chairman of the Papuan Council Executive, Theys Hiyo Eluay, by the Indonesian military. Indonesia also responded by attempting to deflect attention from this new and organized drive towards the goal of self-determination by introducing measures aimed at increasing autonomy for Papuans.[99] This has largely been regarded as a failure and the desire for secession has not abated.[100]

---

[97] John Wing and Peter King "Genocide in West Papua: The role of the Indonesian state apparatus and a current needs assessment if the Papuan people" (Report prepared for the West Papua Project, Centre for Peace and Conflict Studies, University of Sydney, August 2005)

[98] For a detailed account of the West Papua situation, see Peter King, Jim Elmslie and Camellia Webb-Gannon (eds) *Comprehending West Papua* (Centre for Peace Studies, University of Sydney, 2011)

[99] Law of the Republic of Indonesia No. 21 2011, On Special Autonomy for the Papua Province [Indonesia] No.21/2001, 22 October 2011

[100] See Rodd McGibbon *Secessionist Challenges in Aceh and Papua: Is Special Autonomy the Solution?* (Policy Studies 10, East-West Center, Washington, 2005)

On October 19th, 2011, the Third Papuan Congress "declared the independence of Papua and announced a government for an independent Papuan republic, recalling previous declarations in October 1961 and June 2000" (at the 2nd Papuan Congress).[101] The inevitable violent response from the Indonesian authorities raised a negative response from the US, an ally, with the US Secretary of State, Hillary Clinton, calling for "dialog to meet the aspirations of the restive nation's people", further noting that the US has "very directly raised our concerns about the violence and the abuse of human rights in Papua".[102] President Yudhoyono responded by outlining the desire for dialogue based around three pillars: Indonesian sovereignty, special autonomy and accelerated development.[103]

Yudhoyono seemed not to have been listening because these three pillars were the exact cause of Papuan resentment. This seems like an acute sense of politically enhanced deafness because, for 50 years, the people of Papua have indicated, often with their lives, their wish to exercise their right to self-determination, a right that is ingrained in the constitutive documents of the United Nations and numerous declaration since 1945, Resolution 1514 (XV) being of key significance. As Rumakiek notes, had the proper UN procedures been followed, the people of Papua would have been able to vote on the following options: political independence, self-government in free association with Indonesia or integrating fully with Indonesia.[104]

At the heart of this issue is the conflict between sovereignty and self-determination. This conflict dates back to the drafting of the UN Charter, which promoted both principles, without any clear direction as to which was more important, leaving it to the passage of history to determine. As time has passed, sovereignty seems to have been given more weight but in recent years, human

[101] Peter King "Self-determination and Papua: The Indonesian dimension", in above n 98, at 151
[102] "US Voices Concern on Papua Rights" *The Jakarta Globe* (online ed, 11November 2011)
[103] King at 152
[104] Rex Rumakiek "The case and the cause for returning West Papua to the United Nations General Assembly", in above n 98, at 214

rights violations have caused the international community to shift that balance back towards the rights of peoples.[105] The plight of the Papuan people and their 50-year fight for recognition of their rights must at some point be finally settled. There seem to be two options available now: self-government in free association with Indonesia or complete independence. Political autonomy under Indonesian sovereignty would seem to be the simplest solution. As Joku implores:[106]

> The one option staring us right in our face is the path to equality and prosperity through empowerment and emancipation without sovereignty. Once we, the people of Papua, choose that option we will have chosen between reality and dream.

That may well be the end result but the key word in that quote is "chosen". As Wilson noted, democracy was first and foremost about choice, the will of the people, which has been codified in every constitutional document since the 17th century. The lack of choice in this case has been clearly established: the Act of Free Choice in 1969 was a sham; the people of Papua have expressed their wish for independence on three occasions (1961, 2000 and 2011); their human rights have been abused and they have suffered hundreds of thousands of deaths at the hands of the Indonesian military over the last 50 years; they have been ignored by the international community and their attempts to create democratic institutions have been constantly undermined. One might ask, where is the law? That ultimately is the purpose of this paper. Do the Papuan people have a right under international law to secede from Indonesia?

Vanuatu certainly thought so when it passed a motion to refer the matter to the ICJ.[107] Unfortunately due to international pressure, Vanuatu has not followed up

---

[105] See the report from the International Commission on Intervention and State Sovereignty (ICISS) "Responsibility to Protect" (2001)
[106] Franzalbert Joku "A self-governing Papua within Indonesia versus the archaic notion of an independent nation state: Choice between a reality and a dream", in above n 98, at 208
[107] Motion No.2, Second Extraordinary Session of 2010, Vanuatu Parliament, accessed at http://wpan.wordpress.com/2010/06/20/vanuatu-challenges-the-annexation-of-west-papua-through-the-1969-act-of-free-choice/

on this.[108] Yet the question remains: would international law (or state practice for that matter) support the West Papuan claim? It is appropriate now to review the four cases examined previously and see how each of them might support this claim.

Quebec: The Canadian Supreme Court stated the following:

(1) There was an undisputed right for colonial peoples to exercise self-determination by breaking away from the imperial power.
(2) There was a clear right to external self-determination, where a people have been subject to subjugation, domination or exploitation.
(3) Where a people have been denied the right to self-determination, they may exercise that by secession.

It would seem from the evidence that all three requirements would apply to the West Papuan case. It is also important to note, especially for those who take a sanguine view of the right to self-determination, that the Quebec case established a boundary around the right of secession, so that it can only take place in exceptional conditions and if the above conditions have been satisfied.

Kosovo: The ICJ made the following judgment:

(1) The unilateral secession by the people of the Assembly of Kosovo was not unlawful.

This would suggest that if the Papuan Council made a formal declaration of independence (as it did so at the Third Papuan Congress), that this would not be unlawful. In the Kosovo case, immediate international recognition by a number of states advanced the legitimacy of the declaration. In the case of West Papua, this has not happened, with only Vanuatu providing recognition, though as

[108] Winston Tarere "WTO and Indonesia team to silence Vanuatu on West Papua" Vanuatu Daily Post (online ed, 21 May 2012)

noted, this has not been followed up on. Nevertheless, this could be supportive for any future claim (or advancement of the current one). The supposed *sui generis* nature of the Kosovo declaration has yet to be tested but there are similarities in the human rights abuses experienced by both populations, even though there have been claims to the contrary. For example, the UK FCO Under-Secretary for Foreign Affairs, Meg Munn, noted in a 2008 letter to the MP of a constituent, that the UK's position was that Kosovo was a "unique case" and that the UK "respects the territorial integrity of Indonesia and therefore does not support the independence of Papua".[109] Of course, this is contrary to the UK's position on Gibraltar, where self-determination is accepted as a core principle.

East Timor: The ICJ reinforced the following principles in its judgment:

(1) The court noted the inalienable right of the people of East Timor to self-determination in accordance with Resolution 1514 (XV)
(2) It confirmed that this right was *erga omnes* and that this was one of the essential principles of international law.

East Timor was subject to a military invasion by Indonesia. West Papua was also subjected to military action from Indonesia, under the guise of national security and sovereignty. In East Timor's case, their right to self-determination was taken away by Indonesia in an overtly illegal manner. In West Papua's case, their right to self-determination, as a process of decolonization set out by the UN, was given away, under duress, by its colonial power, the Dutch. Eventually the people of East Timor were granted a true and proper referendum under UN auspices and with the approval of Indonesia. The West Papuan people have not had that opportunity.

Gibraltar: The Gibraltar case demonstrates the following:

[109] Letter from Meg Munn, FCO, to Andrew Smith, MP dated 13 March 2008 http://www.freewestpapua.org/index.php?option=com_content&task=view&id=599&Itemid=26

(1) Even whilst sovereign powers dispute "ownership" of a territory, the people of that territory may exercise their self-determination, as granted by the constitutive documents of the UN and reinforced in many resolutions since, including 1514 (XV).
(2) Exercising self-determination does not always mean a desire for complete independence. Self-governance within a sovereign State can be appropriate, when that State treats the people of its self-governing territory with respect.

The Gibraltar case showed that peoples are ultimately the ones who exercise self-determination; even when sovereign powers contest their claim over that territory.

VI: Conclusion

This paper has looked at the development of self-determination as a principle of international law over the 20th Century and investigated the current status of that principle, by examining four contemporary independence claims of varying nature. It has then looked at the situation in West Papua and how the outcomes of those cases might apply to its claim for independence. The evidence suggests that there is strong support for West Papuan secession on the grounds of not being able to fully exercise their right to self-determination, under the New York Agreement and subsequent Act of Free Choice; furthermore, as a people, they have been subjected to 50 years of repression and denial of their "human rights and fundamental freedoms", in clear breach of international law and customary norms. There is also no "logical" reason why Indonesia should have claimed sovereignty over West Papua in the first place. It was opportunistic and a result of the international community turning a blind eye. The Papuans, as Melanesians,

should logically have enjoyed the same outcome as their neighbour and kin, Papua New Guinea.[110]

If there is a choice between concrete and full political autonomy within Indonesia or full independence, then that is a choice for the people of West Papua to make, just as the people of East Timor, Kosovo, Gibraltar and others have done. It is time for the international community to live up to the purposes and objectives of the UN Charter and allow the people of West Papua to exercise their self-determination. If international law is to develop further, "the international community ought to strengthen it not undermine it".[111] The realist tendency towards the primacy of territorial integrity should not overrule the reality of the continued repression of people, denial of human rights and willful ignorance of customary international law. Indonesia must bow to the inevitable and grant the Papuans the opportunity to decide their future.

[110] See Bernard Narokobi *The Melanesian Way* (2nd ed, Institute of Papua New Guinea Studies, Suva, 1983)
[111] Leite, above n 71, at 16