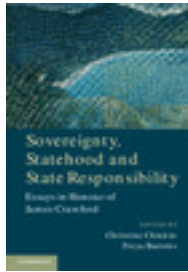


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## An analysis of the 1969 Act of Free Choice in West Papua

THOMAS D. MUSGRAVE\*

### 1 Introduction

This chapter will examine the so-called ‘Act of Free Choice’, which took place in West Papua in 1969, and which resulted in the incorporation of West Papua into Indonesia. ‘West Papua’ is the name by which the Papuans themselves refer to their homeland. The territory was originally known in colonial times as West New Guinea, and the territory is referred to as ‘West Irian’ in Indonesia. In this chapter the term ‘West Papua’ will be used to refer to the territory, except in those instances when it has been officially referred to either as West New Guinea or West Irian. The population of West Papua will be referred to as ‘Papuans’.

Leaders of the West Papuan independence movement assert that the population of West Papua was not accorded any real opportunity to exercise its right of self-determination upon the decolonisation of the territory in 1969. They argue that the so-called ‘Act of Free Choice’ administered by Indonesia was manipulated so as to ensure that West Papua was absorbed into Indonesia, without the true will of the population having been taken into account. As a result, the events surrounding the Act of Free Choice remain a source of deep and abiding grievance amongst Papuans. Indonesia, on the other hand, has always denied that there was anything untoward about the Act of Free Choice, and that West Papua was legally incorporated into Indonesia and now forms an integral part of the country. Recently no less a personage than Indonesian President Yudhoyono, referring to West Papua, declared that there ‘exist no manipulations

\* I wish to acknowledge my research assistant, Ms Anne Thomas, and to express my heartfelt thanks to her for her very helpful contributions to this chapter.

of history that must be revised'.<sup>1</sup> This chapter will examine the events leading up to and involving the 1969 Act of Free Choice, in the context of the legal requirements of the right of self-determination as it existed at that time, in order to ascertain whether the West Papuans were indeed denied a real opportunity to exercise their right to self-determination, and, if so, to analyse the consequences which flow from such a denial.

## 2 The development of self-determination in international law

In examining the legality of the 1969 act of self-determination in West Papua, it is first necessary to consider the status of self-determination in international law at that time. Up until World War II, self-determination had for the most part been solely a political process. Since then, it has increasingly become an established legal right in international law. This began with its inclusion in the Charter of the United Nations (UN), in Articles 1(2) and 55. Self-determination was not defined in the Charter, but in the 1950s it came to mean the process of decolonisation, for a majority of the members of the General Assembly. Colonies, or 'dependent territories', were addressed in Chapters XI, XII and XIII of the Charter. Although the term 'self-determination' was not utilised in these chapters, the fact that the term was increasingly associated with decolonisation meant that the provisions of these chapters were understood to constitute a primary application of the principle.

The UN Charter categorised these territories into two types: trust territories, which were addressed in Chapters XII and XIII of the Charter, and non-self-governing territories, which were addressed in Chapter XI. West Papua had been declared to be a non-self-governing territory by the General Assembly in 1960,<sup>2</sup> and therefore the provisions of Chapter XI applied to it. Chapter XI comprised two articles, Articles 73 and 74. Article 73 obliged Member States administering non-self-governing territories to develop self-government in those territories. However, the Charter had not defined when a territory would be considered to be non-self-governing, nor when it would cease to be non-self-governing.<sup>3</sup>

<sup>1</sup> Jennifer Robinson, 'Self-determination and the Limits of Justice: West Papua and East Timor' in Helen Sykes (ed.), *Future Justice* (Albert Park, Victoria: Future Leaders, 2010), 177.

<sup>2</sup> John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969* (London, New York: Routledge, 2003), 180.

<sup>3</sup> Thomas D. Musgrave, *Self-determination and National Minorities* (Oxford University Press, 1997), 69, 70.

Consequently the General Assembly sought to define and elaborate these issues in a number of Resolutions adopted in the 1950s, and to exert pressure on administering states to end the non-self-governing status of such territories as quickly as possible. Amongst the many Resolutions adopted by the General Assembly in this regard, the two most important ones were Resolution 1514(XV) of 14 December 1960 and Resolution 1541(XV) of 15 December 1960.

Resolution 1514(XV) was entitled 'The Declaration on the Granting of Independence to Colonial Countries and Peoples'. This Resolution equated self-determination with decolonisation. This can be seen in the juxtaposition of paragraphs 1 and 2. Paragraph 1 condemned the 'subjection of peoples to alien subjection and exploitation' and declared that this was 'contrary to the Charter of the United Nations and is an impediment to promotion of world peace and co-operation'. The Resolution then linked the reference to 'peoples' in Article 1 to their right to self-determination in Article 2:

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>4</sup>

The preamble declared 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. Paragraphs 3 and 5 provided further elaboration in this regard. Paragraph 5 called for the immediate transfer of 'all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour in order to enable them to enjoy complete independence and freedom'. This grant of independence to non-self-governing territories was not to be delayed, according to paragraph 3, by any inadequacy of political, economic, social or educational preparedness.

Paragraph 6 emphasised that the process of decolonisation was not to affect or alter the territorial boundaries of the newly independent State from the boundaries which had defined it as a colony:

<sup>4</sup> Para. 2 simply reiterated the identical wording of Art. 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although these two covenants did not open for signature and ratification until 19 December 1966, and did not come into force until 1976, common Art. 1(1) had been drafted in its final form and approved by the General Assembly in 1955.

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.

Resolution 1514(XV) was adopted by the General Assembly by a vote of eighty-nine in favour, none against, and nine abstentions. Both Indonesia and the Netherlands voted for the Resolution.<sup>5</sup>

The day following the adoption of Resolution 1514(XV) the General Assembly adopted Resolution 1541(XV). This Resolution was also directed at dismantling colonialism. It laid down twelve principles with regard to Article 73 of the Charter and non-self-governing territories. Principle I specified that Chapter XI applied to territories which were 'known to be of the colonial type'. Principle VI set out the three ways in which a non-self-governing territory could obtain a full measure of self-government: independence, free association with an independent State or integration with an independent State. General Assembly Resolutions up to this point had stressed that independence was 'the normal and expected way in which a full measure of self-government would be achieved'.<sup>6</sup> It was therefore assumed in Resolution 1541(XV) that independence would be the usual outcome of an act of self-determination, and as a result Resolution 1541(XV) did not enumerate conditions for the attainment of independence by a non-self-governing territory. For the other two types of self-government, which were seen to be derogations from the normal and expected outcome of independence, the Resolution did lay down conditions. The conditions laid down for integration were particularly stringent, because integration was considered to be irreversible. Principle VIII declared that integration must occur 'on the basis of complete equality'. Principle IX declared that integration 'should come about' as follows:

- (a) The integrating territory should have attained an advanced stage of self-government with free political institution, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes.
- (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change to

<sup>5</sup> Dusan J. Djonovich (ed.), *United Nations Resolutions Series I: Resolutions Adopted by the General Assembly, VIII: 1960–1962* (Dobbs Ferry, New York: Oceana Publications, 1974), 21, 38.

<sup>6</sup> Musgrave, *Self-determination and National Minorities*, 72.

their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.<sup>7</sup>

Integration was thus discouraged in all but the most politically advanced of territories, that is those which would be the least likely to adopt this alternative.<sup>8</sup> Resolution 1541(XV) was adopted by the General Assembly by a vote of sixty-nine in favour, two against, and twenty-one abstentions. Indonesia voted for the Resolution; the Netherlands abstained.<sup>9</sup>

### 3 The uncertain status of West New Guinea

On 17 August 1945 the Indonesian nationalist leader Sukarno proclaimed the independence of the Republic of Indonesia, becoming its first president.<sup>10</sup> The new State of Indonesia emerged from the colony of the Dutch East Indies, and the Dutch attempted unsuccessfully to reassert control over their colonial possession. In 1949 the United Nations Commission on Indonesia was established. The Commission set up the 'Round Table Conference' at The Hague in order to resolve the Indonesian question. On 27 November 1949 the Netherlands and Indonesia signed the Hague Agreement, by which the Netherlands transferred sovereignty over the Dutch East Indies to Indonesia.<sup>11</sup>

During the Round Table negotiations the two sides could not agree on whether West Papua,<sup>12</sup> which had been a constituent part of the Dutch East Indies, should be transferred to Indonesia, or whether it should remain under Dutch sovereignty. There were on-going but fruitless negotiations on the status of West Papua throughout the 1950s. The Dutch argued that West Papua should develop as a separate colony under Dutch administration and should eventually become an independent State in

<sup>7</sup> United Nations General Assembly, Resolution 1541 (XV) Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, Fifteenth session, 948th plenary meeting, 15 December 1960, Resolutions adopted on the reports of the Fourth Committee, 29–30.

<sup>8</sup> Musgrave, *Self-determination and National Minorities*, 73.

<sup>9</sup> Djonovich, *United Nations Resolutions Series I: VIII*, 22, 40.

<sup>10</sup> Philip C. Jessup, *The Birth of Nations* (New York, London: Columbia University Press, 1974), 44; Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, xvi.

<sup>11</sup> Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 5.

<sup>12</sup> Then officially known as 'West New Guinea'.

its own right, because the population of West Papua had nothing in common with the population of Indonesia. The Melanesian population of West Papua was not only racially different from the Malay Indonesians, but also differed completely from them in terms of languages spoken, culture and religion.<sup>13</sup> The population of West Papua was also at a much lower level of social and political development than the population of Indonesia, and the Dutch seriously doubted whether the Indonesians would be capable of administering a population which was so different and so undeveloped in comparison with other parts of Indonesia.

Indonesia argued that the territory of West Papua rightly belonged to it, and that the exercise of continued Dutch sovereignty over the territory amounted to a violation of its territorial integrity. Indonesia noted that West Papua had been administered by the Dutch as an integral part of the colony of the Dutch East Indies.<sup>14</sup> Whatever differences might exist between the Malay Indonesians and the Melanesian West Papuans were not relevant, according to the Indonesians, because the essential factor which united all of the diverse groups within the former Dutch East Indies was that they had all equally suffered under Dutch colonialism.<sup>15</sup> Moreover, because Indonesian nationalists had been imprisoned by the Dutch in West Papua during the struggle for independence, Indonesia argued that West Papua had become 'a sacred site in the national imagining'.<sup>16</sup>

In 1950 the Netherlands proposed that the question of West Papua be dealt with either by the United Nations Commission on Indonesia or by the International Court of Justice. Indonesia, however, rejected this proposal out of hand.<sup>17</sup> Indonesia sought instead to mobilise the General Assembly into supporting Indonesia's claim on West Papua. Between 1954 and 1957 Indonesia put forward four draft Resolutions to the General Assembly, but in each case the Resolution was not adopted by the Assembly.<sup>18</sup> Indonesia thereupon decided that it had to embark on a different course of action in order to obtain West Papua. Throughout Indonesia

<sup>13</sup> Anthony L. Smith and Angie Ng, 'Papua: Moving Beyond Internal Colonialism?', *New Zealand Journal of Asian Studies*, 4 (2002), 97.

<sup>14</sup> The Dutch countered this argument by asserting that the territory of West Papua had been administered from Batavia (Jakarta) by the same governor and colonial administration simply because it had not been practical to create a separate administrative apparatus when there had been such a small Dutch presence in West Papua.

<sup>15</sup> Clinton Fernandes, *Reluctant Indonesians* (Melbourne: Scribe Publications, 2006), 54.

<sup>16</sup> *Ibid.*

<sup>17</sup> Pieter Drooglever, *An Act of Free Choice* (Oxford: Oneworld Publications, 2009), 326.

<sup>18</sup> Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 6.

the securing of West Papua had become the primary focus of nationalist expression, extending 'across the entire political spectrum'.<sup>19</sup> Amongst Indonesians the dispute over West Papua was understood as simply the most recent episode in their on-going struggle against the Dutch imperialists. This struggle, as Smith and Ng point out, was 'at the heart of Indonesian nationalism' and was one of its most fundamental aspects.<sup>20</sup> In December 1957 the 50,000 Dutch nationals living in Indonesia were expelled from the country and their businesses were nationalised. Indonesia now began a campaign which involved threats of military force, as well as the infiltration of armed Indonesians into West Papua, in order to attain its end.<sup>21</sup>

#### 4 The growth of West Papuan nationalism

Throughout the 1950s the Dutch began to prepare the population of West Papua for eventual independence. Schools were set up in the territory, in order to train Papuans as teachers, bureaucrats, paramedics, police and tradesmen. The Dutch made sure that this small but educated class of Papuans found employment within the colonial administration as well as in the wider community,<sup>22</sup> and they cultivated the notion of greater autonomy amongst this local elite.<sup>23</sup> The rapid expansion of opportunities intensified pro-independence sentiments within the territory and several political parties were formed, all of which supported the eventual independence of West Papua, apart from one party which was exclusively Indonesian in composition.<sup>24</sup> However, the growth of this pro-independence sentiment amongst the educated class of West Papuans must be seen in light of the fact that approximately half of the population of West Papua at this time still lived in areas which were not even under Dutch administration.<sup>25</sup> Most West Papuans in these areas lived in very primitive conditions, and had no understanding whatsoever of such concepts as self-determination, autonomy and independence.<sup>26</sup>

<sup>19</sup> *Ibid.* <sup>20</sup> Smith and Ng, 'Papua: Moving Beyond Internal Colonialism?', 96.

<sup>21</sup> Peter King, *West Papua and Indonesia since Suharto* (Sydney: University of New South Wales Press, 2004), 21; Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, xvii, 6.

<sup>22</sup> Fernandes, *Reluctant Indonesians*, 53; Smith and Ng, 'Papua: Moving Beyond Internal Colonialism?', 97.

<sup>23</sup> Fernandes, *Reluctant Indonesians*, 21.

<sup>24</sup> Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 9, 10.

<sup>25</sup> *Ibid.*, 10. The population of West Papua has been estimated at approximately 700,000 to 800,000 persons at this time.

<sup>26</sup> Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 9, 10.



Nevertheless, the Dutch pushed ahead with plans to implement self-government in West Papua, preparatory to the eventual grant of independence to the territory. In 1959 the Dutch set up both a central representative body, known as the West New Guinea Council, as well as regional councils throughout the territory. The first election for the West New Guinea Council was held in February 1961. Sixteen councillors were elected in the developed areas from amongst ninety candidates, and an additional twelve councillors were appointed by the Dutch to represent those areas thought not to be politically ready for the electoral process.<sup>27</sup>

In September 1961 the Netherlands submitted a Resolution to the General Assembly, in which it proposed to relinquish sovereignty over West Papua, which would then be administered by a United Nations Commission. The Commission would organise a plebiscite amongst the population in order to determine West Papua's ultimate political status.<sup>28</sup> The proposed Resolution received a majority of votes in the General Assembly, but failed to achieve the two-thirds majority required for its adoption.<sup>29</sup> The West New Guinea Council, however, endorsed the proposed Resolution on 1 December 1961, and issued a statement calling on all states to respect the right of the West Papuans to self-determination.<sup>30</sup> The Council renamed the territory West Papua, and adopted a national anthem and a national flag, known as the 'Morning Star'.<sup>31</sup>

Indonesia reacted forcefully to these moves by the Netherlands and the West New Guinea Council. On 19 December 1961 President Sukarno delivered a speech in which he declared that Indonesia would never permit the Dutch to set up a 'puppet State' in West Irian, and that it was the Indonesian flag which must inevitably fly over this territory. Sukarno called for a general mobilisation of the Indonesian people in order to 'liberate' West Irian, and proceeded to set up a military task force to integrate West Papua into Indonesia by force.<sup>32</sup>

<sup>27</sup> *Ibid.*, 10. Of the sixteen elected councillors, three were Dutch, two were Eurasians, and eleven were Papuans.

<sup>28</sup> Fernandes, *Reluctant Indonesians*, 54; Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 10, 11.

<sup>29</sup> There were 53 votes in favour, and 41 votes against: Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, xviii.

<sup>30</sup> Fernandes, *Reluctant Indonesians*, 54.

<sup>31</sup> Smith and Ng, 'Papua: Moving Beyond Internal Colonialism?', 98; Fernandes, *Reluctant Indonesians*, 54; Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 11.

<sup>32</sup> Fernandes, *Reluctant Indonesians*, 21; Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 11.

## 5 The New York Agreement

Since 1957 the Soviet Union had been supplying arms to Indonesia and giving it diplomatic support with regard to the 'liberation' of West Papua.<sup>33</sup> During this same period the Indonesian Communist Party had become the largest political party in the country. It garnered significant support among Indonesians by promoting a nationalist campaign for the integration of West Papua into Indonesia.<sup>34</sup>

These developments caused considerable alarm in the United States. In the broad context of the Cold War the primary concern of the United States was to ensure that Indonesia did not become aligned to the Communist bloc. From the United States' perspective, Indonesia's claim on West Papua seemed to be a very minor issue and certainly not one which should jeopardise the Cold War balance of power.<sup>35</sup> The Americans therefore began to bring considerable pressure upon the Dutch to come to some sort of agreement with Indonesia concerning West Papua. Negotiations between the two sides began in March 1962, with the American diplomat, Ellsworth Bunker, appointed by the United Nations as mediator.

The negotiations between the Netherlands and Indonesia proved to be very difficult, and talks were broken off several times. The Dutch sought to ensure that the West Papuans were accorded an act of self-determination, whereas the Indonesians were only 'prepared to give the Papuans the opportunity to confirm that they wanted to continue on as part of Indonesia'.<sup>36</sup> The United States proposed a plan whereby administration of the territory would be granted for an initial period to the United Nations, and then administration would pass to the Indonesians, with an act of self-determination for the Papuans taking place some years later. This proposal eventually became the basis for the New York Agreement, which was signed by the Netherlands and Indonesia on 15 August 1962. At no point in the proceedings did any Papuans take part.<sup>37</sup>

By virtue of Article II of the Agreement the Netherlands was to transfer administration of West Papua to a United Nations Temporary Executive Authority (UNTEA). UNTEA would then administer the territory for a

<sup>33</sup> King, *West Papua and Indonesia since Suharto*, 21. <sup>34</sup> *Ibid.*

<sup>35</sup> One advisor to the Kennedy administration went so far as to declare that self-determination for the 'stone-age' Papuans would be meaningless: Memo from Rostow, Deputy Special Assistant for National Security Affairs to President J. F. Kennedy, 13 October 1961. *US Foreign Relations 1961–62*, 440. Quoted in Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 11.

<sup>36</sup> Drooglever, *An Act of Free Choice*, 429.

<sup>37</sup> John Saltford, 'United Nations Involvement with the Act of Self-Determination in West Irian (Indonesian West New Guinea) 1968 to 1969', *Indonesia*, 69 (2000), 72.

minimum period of seven months. At the end of the minimum period the head of UNTEA would then determine, pursuant to Article XII, when to transfer administration to Indonesia, and the territory would then be administered by Indonesia. Article XIV stated that once administration of West Papua had been transferred to Indonesia, Indonesian national laws and regulations would be applicable in the territory. However, Article XXII(1) specified that both UNTEA and Indonesia would ‘guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly, of the inhabitants of the area’. The Article went on to state that these rights would ‘include the existing rights of the inhabitants of the territory at the time of the transfer of administration to the UNTEA’.

Article XX specified that the ‘act of self-determination’ was to be ‘completed before the end of 1969’.<sup>38</sup> Of particular note were Articles XVII and XVIII. Article XVII specified that the arrangements for ‘the Act of Free Choice’, as it was referred to, were the ‘responsibility of Indonesia’, but that the ‘Representative of the Secretary-General’ would ‘advise, assist and participate in the arrangements’ together with Indonesia. The Representative, by virtue of Article XVI, would be supported by a ‘number of United Nations experts’, who would ‘participate at the appropriate time in the arrangements for self-determination’, but whose functions would ‘be limited to advising on, and assisting in, preparations for carrying out the provisions for self-determination’. Indonesia was thus to have effective control in the organising and implementation of the ‘act of free choice’, and the role of the United Nations was to be limited to ‘advising’ and ‘assisting’.

Article XVIII set out the parameters for the Act of Free Choice, as follows:

Indonesia will make arrangements, with the assistance and participation of the United Nations Representative and his staff, to give the people of the territory the opportunity to exercise freedom of choice. Such arrangements will include:

- (a) Consultations (*Musyawahah*) 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;

<sup>38</sup> Arts. X and XVII also used the term ‘self-determination’ in their wording.

- (d) The eligibility of all adults, male and female, not foreign nationals, to participate in the act of self-determination to be carried out in accordance with international practice, who are resident at the time of the signing of the present Agreement and at the time of the act of self-determination, including those residents who departed after 1945 and who return to the territory to resume residence after the termination of Netherlands administration.

Thus, although Indonesia had control over the way in which the Act of Free Choice would be conducted, the parameters of such arrangements were circumscribed by the provisions set out in Article XVIII.

## 6 The Act of Free Choice

Although no maximum period had been set for the administration by UNTEA, the UN Authority transferred the administration of West Papua to Indonesia within the precise minimum period of time set out in the Agreement, on 1 May 1963.<sup>39</sup> The territory was thereafter administered by Indonesia. On 4 May 1963, the newly installed Indonesian administration banned all existing Papuan political parties, and prohibited unauthorised political activity. Protests by West Papuans against Indonesian rule were brutally suppressed, and the Indonesian military undertook a 'sustained campaign of violence, conditioning and intimidation' against the West Papuans.<sup>40</sup> This led to a number of mutinies amongst Papuan policemen, and an on-going series of armed rebellions in the various parts of the territory. In 1965 the Papuan resistance movement known as the OPM (*Organisasi Papua Merdeka*, or 'Free Papua Movement') was formed to fight the Indonesians.<sup>41</sup> The Indonesian military responded with counter-insurgency operations, in which many thousands of West Papuans were killed.

When the UN team arrived in 1968 to assist in the arrangements for the act of self-determination they discovered that the Indonesians had already decided on the method to be used. There would not be a 'one person, one vote' process. Instead, the Indonesian practice of *musyawarah* would be used. Smith and Ng define *musyawarah* as a 'process of consultation towards consensus to secure the people's approval'.<sup>42</sup> In the context

<sup>39</sup> Saltford, 'United Nations Involvement with the Act of Self-Determination in West Irian', 72.

<sup>40</sup> Robinson, 'Self-determination and the Limits of Justice', 172.

<sup>41</sup> Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, xxi–xxiv.

<sup>42</sup> Smith and Ng, 'Papua: Moving Beyond Internal Colonialism?', 100.

of the self-determination of West Papua the Indonesians decided that *musyawarah* would involve a consultation process with the representatives of an enlarged version of the eight regional councils of West Papua. The existing members of the regional councils had been appointed by Indonesia and, as it turned out, the additional members were also hand-picked by Indonesian officials. The membership of the eight enlarged councils amounted to 1,022 representatives. Only these representatives would be involved in the process of *musyawarah*, which, according to Indonesia, would then constitute the appropriate act of self-determination for West Papua. Indonesia justified the use of *musyawarah* on the basis that West Papua was 'one of the most primitive and undeveloped communities in the world' and that Western democratic procedures would therefore be totally inappropriate.<sup>43</sup> The eight regional councils voted successively in the Act of Free Choice throughout July 1969, and into the first week of August 1969. From early July the representatives of the councils had been isolated by Indonesian authorities, and there is very credible evidence that most, if not all, of them were either bribed, threatened or otherwise intimidated by the Indonesian military or other Indonesian officials.<sup>44</sup> When the votes of the representatives were tallied, not unsurprisingly all 1,022 had voted that West Papua be integrated into Indonesia.

The Act of Free Choice was clearly nothing of the kind, and certainly did not represent the view of the vast majority of Papuans, who had shown their resistance to becoming a part of Indonesia through repeated demonstrations and armed rebellions throughout the entire period of Indonesian administration. Numerous observers remarked on the fact that the Papuans manifestly did not want to be integrated into Indonesia. The UN team of experts, sent to 'assist and advise' the Indonesians, privately expressed the view that some 95 per cent of Papuans did not want to become a part of Indonesia, and instead wanted to become independent.<sup>45</sup> A confidential briefing paper written by a member of the British Foreign Office was even more blunt, noting that 'the people of West Irian have no desire to be ruled by the Indonesians who are of an

<sup>43</sup> Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 165.

<sup>44</sup> Drooglever, *An Act of Free Choice*, 721; Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 158; Robinson, 'Self-determination and the Limits of Justice', 172; Smith and Ng, 'Papua: Moving Beyond Internal Colonialism?', 100; King, *West Papua and Indonesia since Suharto*, 22.

<sup>45</sup> Smith and Ng, 'Papua: Moving Beyond Internal Colonialism?', 100.

alien (Javanese) race, and that the process of consultation did not allow a genuinely free choice to be made'.<sup>46</sup>

The matter was then brought to the General Assembly. Although there was some debate about the legitimacy of the Act of Free Choice, particularly from African states, the General Assembly adopted Resolution 2504(XXIV) on 19 November 1969.<sup>47</sup> The wording of this Resolution was cloyingly vague and anodyne, but the thrust of it was that the General Assembly granted its imprimatur to the Act of Free Choice.<sup>48</sup> Thus, with the blessing of the General Assembly, West Papua was incorporated into Indonesia.

## 7 Analysis

During the Paris Peace Conference of 1919, the principle of self-determination had been applied by its progenitor, President Woodrow Wilson, largely on an ethnic basis. This meant that the reconfiguration of European boundaries, in conformity with this understanding of the principle, occurred largely on the basis that the new states of Europe would reflect as much as possible the geographic distribution of particular ethnic groups. Ideally, each new State would comprise a single ethnic group.

However, as has been seen above, a new understanding of self-determination arose subsequent to World War II, one which equated self-determination with decolonisation.<sup>49</sup> This new understanding of self-determination did not sit well with the older understanding. Many colonies had been arbitrarily established with no consideration of the various ethnic groups within a particular colony. In such situations the question for the General Assembly was how appropriately to effect the decolonisation of a non-self-governing territory in a way which would accommodate the political needs and desires of that colony's diverse and often mutually hostile ethnic groups. In the 1950s the practice of the General Assembly was occasionally to permit the division of a non-self-governing territory into a number of states when it was apparent that the ethnic groups comprising that non-self-governing territory would not be

<sup>46</sup> PRO: FCO 24/449. (FWD1/4). FCO briefing on West Irian prepared for the British delegation to the UNGA (10 September 1969). Quoted in Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 171.

<sup>47</sup> Dusan J. Djonovich (ed.), *United Nations Resolutions Series I, XII: 1968–69* (Dobbs Ferry, New York: Oceana Publications, 1975), 213.

<sup>48</sup> The vote was eighty-four in favour, none against, and thirty abstentions: *ibid.*, 75.

<sup>49</sup> See pp. 210–13 above.

able to co-exist in a single independent State.<sup>50</sup> This was precisely the situation pertaining in the Dutch East Indies, where the population of West Papua could not have been more different from the Malay population of the rest of the colony, and where the vast majority of Papuans repeatedly made it clear that they did not want to be a part of an independent Indonesia. That such a radically different group as the West Papuans should be entitled to determine their own political destiny was recognised not only as a legitimate but as a ‘paramount’ right by no less than the legal counsel of the United Nations, Constantin Stavropoulos, who in 1962 wrote as follows:

Our study has revealed that the subject of self-determination is a complex one, presenting many facets. However, at least since President Wilson enunciated the principle of self-determination in 1918, there appears to emerge a strong presumption in favour of self-determination in situations such as that of Western New Guinea on the basis of the wishes of the peoples of the territory concerned, irrespective of the legal stands or interests of other parties to the question. While other factors may also be taken into account, there seems to be a growing practice of recognising that the wishes of the local population should be paramount, and should thus be ascertained before a final disposition is made of any particular territory.<sup>51</sup>

Indonesia, however, countered the argument that the West Papuans were entitled to a separate right of self-determination by pointing to paragraph 6 of Resolution 1514(XV), which required that a non-self-governing territory retain its territorial integrity upon decolonisation.<sup>52</sup> The necessary concomitant of paragraph 6 was that the population of West New Guinea could not be entitled to self-determination, because the ‘people’ who are so entitled under Resolution 1514(XV) must comprise the entire population of the non-self-governing territory.

This argument, however, cannot apply in the context of the relationship of Indonesia to West New Guinea. This is so for two reasons. First, when the General Assembly in 1960 listed West Papua specifically as a separate non-self-governing territory, this necessarily meant that it was then the population of West Papua who constituted the ‘people’ who were entitled

<sup>50</sup> This occurred, for example, in the partitions of the Palestine mandate into Jewish and Arab states in 1947, British India into the two states of India and Pakistan in 1947, the British Cameroons in 1958 and the trust territory of Ruanda-Urundi in 1962. See Musgrave, *Self-determination and National Minorities*, 157, 158.

<sup>51</sup> UN Series 100, Box 2, File 7. Stavropoulos to U Thant, 29 June 1962. Quoted in Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 169, 170.

<sup>52</sup> See p. 212 above, where para. 6 is set out *verbatim*.

to the right of self-determination by virtue of paragraphs 2 and 5 of Resolution 1514(XV), and whose territory, the territory of West Papua, was protected from dismemberment by virtue of paragraph 6.<sup>53</sup> Secondly, once West Papua had been recognised by the General Assembly as a separate non-self-governing territory, Indonesia could not then rely on Paragraph 6 as the basis for its claim to West Papua, because the provisions of the Resolution were now applicable to West Papua rather than to Indonesia.

By signing the New York Agreement, Indonesia itself explicitly acknowledged, particularly in Articles X and XVIII(d),<sup>54</sup> that the population of West Papua was entitled to an act of self-determination. This meant that the population of West Papua did indeed constitute a 'people', since only 'peoples' are entitled to self-determination at international law.<sup>55</sup> It also meant that Indonesia was barred from relying on paragraph 6 to claim the territory of West Papua.

Resolution 1514(XV) addresses those cases of decolonisation in which the act of self-determination results in the independence of the non-self-governing territory. However, with West Papua it was questionable whether this was actually the issue to be decided. The wording of Article XVIII(c) of the New York Agreement frames the issue in terms of the Papuans having to decide whether or not to separate themselves from Indonesia and become an independent State in their own right.<sup>56</sup> In this scenario, the provisions of Resolution 1514(XV) only would apply. But the wording of Article XVIII(c) does not reflect the true nature of the dispute between the Netherlands and Indonesia or the context in which that dispute was to be resolved, in several respects. Whereas Article XVIII(c) referred to the 'inhabitants' of West Papua, the population of West Papua was actually a 'people', as indicated above. Moreover, as the General Assembly had listed West Papua as a separate non-self-governing territory in 1960, the wording of Article XVIII(c), in framing the issue in terms of whether the Papuans desired 'to remain with Indonesia', was at variance with reality, because at this point West Papua was not a part of Indonesia. The real issue to be decided by the people of West Papua was not whether they wished to 'remain' with Indonesia, but rather whether they wished to become integrated into Indonesia.

<sup>53</sup> See p. 212 above, with regard to paras. 2 and 5.

<sup>54</sup> See p. 218, n. 38, and p. 219 above.

<sup>55</sup> Musgrave, *Self-determination and National Minorities*, 148, 167.

<sup>56</sup> See p. 218 above.



The provisions of Resolution 1514(XV) govern those cases of self-determination in which the independence of the non-self-governing territory is the end result. But in those exceptional cases in which integration of a non-self-governing territory into another State is in issue, it is the provisions of Resolution 1541(XV) which apply. The integration of West Papua into Indonesia should therefore have conformed to the conditions set out in Resolution 1541(XV) in order to constitute a legitimate act of self-determination. The reference to 'international practice' in Article XVIII(d) of the New York Agreement underscores this requirement. But the conditions set out in Resolution 1541(XV) were egregiously violated by Indonesia.<sup>57</sup>

Under the conditions set out in Principles VIII and IX of Resolution 1541(XV) an act of self-determination involving the integration of West Papua into Indonesia should not have taken place, as it was premature, given the level of political and social development of the people of West Papua. Principle VIII required integration to occur only 'on the basis of complete equality', and Principle IX(a) required that the integrating territory have 'attained an advanced stage of self-government with free political institutions', so that its people 'have the capacity to make informed and democratic processes'.<sup>58</sup> When the Act of Free Choice took place in 1969 the people of West Papua clearly had not yet attained the level of political and social development envisaged in Resolution 1541(XV). Indonesia itself acknowledged as much when it argued that *musyawarah* was the appropriate voting procedure for the 'primitive Papuans'.<sup>59</sup>

Although paragraph 3 of Resolution 1514(XV) declares that the 'inadequacy of political, economic, social, or educational preparedness' cannot be invoked to delay the process of decolonisation, Indonesia cannot rely on this provision, because paragraph 3 declares that the enumerated forms of unpreparedness 'should never serve as a pretext for delaying independence'. In other words, paragraph 3 applies only in the context of an act of self-determination resulting in independence. But when the act of self-determination involves the integration of a non-self-governing territory into another State, as was the case with West Papua, it is Resolution 1541(XV) which applies: *inclusio unius, exclusio alterius*. When

<sup>57</sup> It should be recalled that Indonesia voted in favour of Resolution 1541(XV).

<sup>58</sup> See pp. 212–13 above for the full text of Principle IX.

<sup>59</sup> Indonesian Foreign Minister Adam Malik justified the use of *musyawarah* by declaring that the 'primitive Papuans' should not be entitled to a voting procedure which the 'so much further advanced people of Java and Sumatra' did not yet have: Drooglever, *An Act of Free Choice*, 680.

integration is in issue, the provisions of Resolution 1541(XV) derogate from paragraph 3 of Resolution 1514(XV), and very stringent conditions with regard to the preparedness of the people must be complied with.

However, even if the people of West Papua could be said to have reached a stage of preparedness which would have enabled them to engage in an act of self-determination involving the question of integration, Indonesia itself, during the period of its administration of West Papua, fundamentally violated the requirements set out in Resolution 1541(XV), in ways which ensured that the act of self-determination could not comply with those requirements. Principle IX(a) required that an act of self-determination involving integration occur only after the integrating territory had attained 'an advanced stage of self-government with free political institutions'. Principle IX(b) required the act of self-determination to occur 'through informed and democratic processes' and to be 'based on universal suffrage'. Upon assuming control of West Papua, the Indonesian administration banned all political parties, appointed the members of the regional councils, and suppressed free speech and demonstrations. For its part the Indonesian military brutally oppressed the local population and resorted to violence whenever it encountered Papuan opposition to Indonesian domination. These acts were all flagrant breaches of Article XXII of the New York Agreement.<sup>60</sup> There was thus nothing remotely resembling real self-government in West Papua during this time, nor were there in place 'free political institutions' and 'informed and democratic processes'. The process of *musyawarah* was a blatant violation of the requirement set out in Principle IX for 'universal adult suffrage'.

The use of *musyawarah* was, however, not simply a violation of the requirement of universal adult suffrage set out in Principle IX, but was also a violation of the terms of the New York Agreement itself. Indonesia argued that neither the word 'referendum' nor that of 'plebiscite' had been used in the New York Agreement, whereas the word *musyawarah* had been explicitly used in Article XVIII(a). Indonesia also stressed that Article XVIII(a) granted it, in consultation with the representative councils, the right 'to determine the procedures and appropriate methods to be followed for ascertaining the freely expressed will of the population'. In the light of these provisions and given the political and social level of the West Papuans, *musyawarah*, in Indonesia's opinion, was the most appropriate method of determining the will of the population.

<sup>60</sup> See p. 218 above.

Although the term *musyawarah* was used in Article XVIII(a), the Article as a whole makes it clear that the *musyawarah* form of proceeding was to be limited to the initial consultation process between the Indonesian authorities and the regional councils in determining the appropriate method of proceeding.<sup>61</sup> Moreover, although Indonesia was granted the right to determine the appropriate method of proceeding, the method chosen had to be one which enabled the entire population of West Papua to participate. The wording of Article XVIII allows for no other interpretation. The introductory clause of Article XVIII specifies that Indonesia was to make arrangements 'to give the people of the territory the opportunity to exercise freedom of choice'. Subsection XVIII(a) contains the phrase 'for ascertaining the freely expressed will of the population'. Subsection XVIII(d) refers to the 'eligibility of all adults, male and female, not foreign nationals, to participate in the act of self-determination to be carried out in accordance with international practice'. These phrases indicate unequivocally that, whatever the form of proceeding Indonesia might adopt to determine the will of the people of West Papua, it had to be one which allowed for universal suffrage by the population of West Papua. The reference to 'international practice' in Article XVIII(d) is particularly significant. International practice with regard to the integration of a non-self-governing territory, as has already been seen, specifically requires universal suffrage. Moreover, should the issue fall solely within the parameters of Resolution 1514(XV) rather than those of 1541(XV), 'international practice', as Robinson points out, also connotes universal suffrage.<sup>62</sup> Therefore not only did Indonesia not comply with the requirements set out in Resolutions 1514(XV) and 1541(XV), but in addition it failed to fulfil the clear and unambiguous requirements of the New York Agreement.

Indonesia failed even to conduct a valid act of *musyawarah*, because the Papuan representatives chosen to participate in the act were isolated, coerced and bribed by the Indonesian authorities to ensure that they voted for integration. It is self-evident that in such circumstances the Papuan representatives were unable to give a valid consent to the integration of West Papua. It is an elementary principle of law that there cannot be a valid consent when that consent has been obtained through coercion or corruption.<sup>63</sup>

<sup>61</sup> Drooglever, *An Act of Free Choice*, 758.

<sup>62</sup> Robinson, 'Self-determination and the Limits of Justice', 173.

<sup>63</sup> This principle is reflected, for example, in Arts. 50 and 51 of the Vienna Convention on the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980),

In his report to the General Assembly, the head of the UN Mission to West Papua failed to make mention of the coercion and corruption by which Indonesia manipulated the votes of the *musyawarah* representatives. The report did acknowledge, albeit in vague language, that Indonesia had complied with neither the requirements of Resolution 1541(XV), nor with the terms of the New York Agreement, by noting that the Indonesian administration had ‘exercised at all times a tight political control over the population’ and that ‘an act of free choice’ had taken place in West Irian ‘in accordance with Indonesian practice’ by the ‘representatives of the population.’<sup>64</sup> Yet in adopting Resolution 2504(XXIX) the General Assembly ‘chose to do nothing about the terrible abuses of the consultation process.’<sup>65</sup>

## 8 Conclusion

There is no doubt whatsoever that the process of self-determination in West Papua was nothing more than a sham and amounted to a gross travesty. From whatever angle the situation is considered, be it the requirements of Resolutions 1514(XV) and 1541(XV), or the terms of the New York Agreement, or basic principles of general international law, Indonesia not only failed to fulfil its international obligations but in fact consistently acted in a manner which traduced those obligations. As a result, the people of West Papua were never given any real opportunity to exercise their right of self-determination and West Papua was incorporated into Indonesia without the true consent of its people.

In November 1969, after the General Assembly had confirmed the Act of Free Choice, and West Papua was incorporated into Indonesia, President Suharto declared that Indonesia had no further territorial ambitions. A mere six years later, however, Indonesia invaded the Portuguese colony of East Timor and incorporated this non-self-governing territory into the country. This also occurred without the people of East Timor having any opportunity to exercise their right of self-determination. But in 1995, the International Court of Justice addressed the issue of self-determination for the people of East Timor, in the *East Timor case (Portugal v. Australia)*.<sup>66</sup>

1155 UNTS 331. Art. 50 addresses the corruption of a representative of a State, and Art. 51 the coercion of a representative of a State.

<sup>64</sup> UNGA Official Record, Agenda item 98, Doc. A/7723 (6 November), Annex I, paras. 251 and 253. Quoted in Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969*, 166.

<sup>65</sup> King, *West Papua and Indonesia since Suharto*, 22.

<sup>66</sup> *East Timor case (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports (1995), 90.

Although the Court decided that it did not have jurisdiction to hear the case, the Court nevertheless noted that the right of self-determination was a right *erga omnes*, and that the people of East Timor continued to possess this right.<sup>67</sup> In other words, they possessed it against Indonesia. On 27 January 1999 Indonesia announced that it would permit a referendum to be held in East Timor and on 30 August 1999 the people of East Timor voted in favour of independence, by a margin of 78.5 per cent.<sup>68</sup>

Like the people of East Timor until 1999, the people of West Papua have not been able to exercise a genuine act of self-determination, and like the people of East Timor, their territory was incorporated into Indonesia without their consent. And therefore like the people of East Timor, the people of West Papua are still entitled to exercise a right of self-determination, which right is exercisable *erga omnes*. In other words, the people of West Papua possess a right to self-determination which neither Indonesia nor the General Assembly can gainsay.

East Timor seemed irrevocably integrated into Indonesia in 1975. But twenty-four years later, the East Timorese exercised their right of self-determination, and when they did so, it was to separate themselves from Indonesia and to create their own independent State. The West Papuans have now been waiting to exercise a genuine right of self-determination for forty-six years. When they finally get the opportunity to do so, they may very well take the example of East Timor to heart in determining their chosen future.

<sup>67</sup> *Ibid.*, 102.      <sup>68</sup> Musgrave, *Self-determination and National Minorities*, xii.