**WEST PAPUA**

**Real-Politic v International Law**

**----------**

**Summary**

This paper is designed to encompass in the one document the relevant facts and the international law relating to the chain of events that led to the masquerade of an "Act of Free Choice" perpetrated upon the indigenous peoples of West Papua in 1969.

The research relating to the facts commenced with the negotiations between the Netherlands and Indonesia at a Round Table Conference that was preceded by four years of armed conflict following Indonesia's proclamation of Independence on 17 August 1945. (In that same year, the Netherlands inaugurated a programme of development of institutions and political awareness in West New Guinea leading up to an Act of Self-Determination in the territory in 1970 to enable its peoples to achieve independence.)

West Papua was not an integral part of, nor a colony of, the State of Indonesia when it was admitted to membership of the United Nations Organisation in 1950.

In the course of those negotiations the Netherlands transferred sovereignty over its colonies in the Dutch East Indies, with the specific exclusion of Netherlands New Guinea, under a "Charter of Transfer of Sovereignty".

An exchange of letters between the parties confirmed that the Clause in the Charter that the status quo of the residency of New Guinea shall be maintained through continuing under the Government of the Netherlands. The Charter provided for the question of the political status of New Guinea to be determined through continuing negotiations between the States parties to the Charter for a year following its adoption.

In the minutes of the Round Table Conference at which the Charter was adopted by both parties it was agreed that the proviso meant that the territory would remain under Netherlands sovereignty: "None of the provisions in this agreement shall apply to the nationality of the inhabitants of the residency of New Guinea in case sovereignty is not transferred to the Republic of the United States of Indonesia."

During those negotiations which extended over two years Indonesia rejected all proposals for a settlement of that issue and insisted on sovereignty over West Papua being transferred to it, claiming that it was entitled to that outcome on its interpretation of the terms of the Charter. The Netherlands offered to ask for and abide by the decision of the International Court of Justice, but Indonesia refused to accept that proposal.

In view of that stalemate, and further having regard to the recent adoption of the UN Declaration on the granting of independence to Colonial countries and peoples (Resolution 1514 (XV), the matter was referred to the UN General Assembly for debate at its 1055th Plenary meeting on 15 November 1961 upon a number of alternative draft resolutions, the principal one advocating that the parties resume negotiations in an effort to reach an agreement, and if they should be unavailing the appointment of a commission to study the political, economic and social situation in the Territory and report to the General Assembly at its subsequent Plenary Session so that the Organisation would be able to decide, in full knowledge of the facts, whether to entrust the future of the indigenous peoples of the Territory to any particular organisation, on the clear understanding that these people will, at any time, be free to decide on the type of national or international status which, in their opinion would best satisfy their aspirations.

As that option was not considered, the General Assembly simply resolved to refer the matter back to the Parties to continue their endeavours to reach a settlement.

Indonesia's response to that Resolution was so rapid as to be indicative of a pre-ordained plan to obtain military support from Russia, a Permanent Member of the U.N. Security Council, and with that aid - Ships Submarines and Aircraft - to launch an armed invasion of West Papua on 19 December 1961 and illegally assume control over the territory.

That development of the "Cold War" provoked the U.S. President Kennedy to call a meeting between the Parties in New York culminating in the New York Agreement between the Parties on 13 August 1962 which was brokered by Ellsworth Bunker, then U.S. Ambassador to the United Nations.

Having regard to the purposes and principles of the U.N.Charter, and the provisions of G.A. Resolution 1514 (XV) and 1541 (XV), 1960, the terms of the New York Agreement are bizarre.

The latter resolution contemplates more than one outcome of self-determination:

(a) Emergence as an independent State;
(b) Free Association with an independent State; or
(c) Integration with an independent State.

It declares that Integration should be the result of the freely expressed wishes of the Territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal suffrage. The United Nations could, when it deems necessary supervise these provisions.

Resolution 1541 (XV) restated the Principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.

The Resolution also declared that a threat or use of force constitutes a violation of international law and of the Charter of the United Nations; and that a war of aggression constitutes a crime against the peace for which there is responsibility under international law; and that States have a duty to refrain from acts of reprisal involving the use of force; and that every State has the duty to refrain from any forcible action which derives peoples referred to in the elaboration of the principle of equal rights and self-determination and freedom and independence; and that the territory of a State shall not be the object of acquisition resulting from the use of force in contravention of the Charter; and that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force; and that no territorial acquisition resulting from the threat or use of force shall be recognised as legal.

Here was a situation in which the State holding lawful sovereignty over the territory of Netherland's New Guinea was embarked upon programmes in full compliance with the provisions of the U.N.Charter and the U.N. Resolutions, designed to facilitate the exercise by the peoples of the territory of their right of self-determination, and a neighbour State frustrating those programmes by the commission of a crime against the peace in pursuance of its admitted determination to annex the territory by force of arms.

You will not find any term in the New York Agreement that reflects that conduct of the parties. Without knowledge of these facts you would gain the clear impression that Indonesia was in the right and the Netherlands was in the wrong.

Its Articles provided for an immediate transfer by the Netherlands of its `administration' of the territory to a U.N. Temporary Authority (UNTEA) established by the Secretary General, then U Thant, until the arrival of the U.N. Administrator to be appointed by the Secretary General.

That Administrator was given the authority under the direction of the Secretary General to administer the territory for the period of the UNTEA Administration, and the discretion to transfer all or part of the administration to Indonesia at any time after the first phase of the UNTEA administration. UNTEA's administration would cease at the moment of transfer of full administrative authority to Indonesia.

UNTEA was to be provided with security forces to supplement existing Papuan police in the task of maintaining law and order. On the arrival of the U.N. administrator, the Papuan Volunteer Corps would cease being part of the Netherlands armed forces, which were to be repatriated as rapidly as possible, and the Indonesian armed forces in the territory would come under the authority of and at the disposal of the Secretary General.

In the first phase of the UNTEA administration (to be completed on 1 May 1963) the U.N. Administrator was to replace as rapidly as possible top Netherlands officials, but had authority to employ lesser Netherlands officials with UNTEA on a temporary basis, and to bring as many Papuans as possible into administrative and technical positions and to employ personnel provided by Indonesia.

The Articles provided for the U.N. security forces to be replaced by Indonesian security forces after the first phase of the UNTEA administration, and for all U.N. Security forces to be withdrawn upon the transfer of administration to Indonesia.

So, on 1 May 1963, the administration of the territory by the State holding lawful sovereignty over it, and which guaranteed to its peoples the right of self-determination, was effectively ousted and their aspirations for independence became entirely dependent upon the conduct of a State that had committed a crime against the peace upon them. On that same day, the Indonesian Government issued Presidential instructions closing West Papua to the international community; declaring it an active Indonesian military zone; and applied anti-subversion regulations to the West Papuans.

The appointment of Ortiz Sanz as the U.N. Representative by the Secretary General would not have lifted their spirits had they overheard him reveal his attitude to Hugh Lunn, who covered the final processes of the Act of Free Choice for Reuters, and reported: "Sanz told me he would love to see a U.S. base in Manokwari Harbour. Like the Americans he feared a communist takeover. He said West Irian is like a cancerous growth on the side of the U.N. and my job is to surgically remove it."

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

Article XV placed the responsibility upon Indonesia, as a primary task, of further intensification of the education of of the people, of the combating of illiteracy, and of the advancement of the their social, cultural and economic development, and to make efforts, in accordance with present Indonesian practice, to accelerate the participation of people in local government through periodic elections. Any aspects relating to the act of free choice will be governed by the terms of the agreement.

Article XVI is important, and not only because it is a fundamental term of the Agreement which Indonesia

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

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

In his report to the Secretary General, Ortiz Sanz referred to his addresses to the Indonesian Government of 14 May 1963 informing it of the persons he had designated as the UN Experts called for under that Article. He approached the Government on numerous occasions for the purposes of their implementing its provisions but failed to obtain a favourable reply. On 7 January 1965, Indonesia withdrew from the United Nations and it became impossible to send the U.N. experts to West New Guinea.

The Indonesian Military and its Security apparatchiks who, over the intervening period, had been preoccupied with the overthrow of Sukarno in a coup, the massacre of 1,000,000 Indonesians suspected of being or friends and family members of those suspected to be communists, with the aid of weapons provided by the U.S.A; and a frustrated attempt to annex by force of arms two states under Malaysian sovereignty, deliberately frustrated the implementation of the terms of Articles XVI and XVII of the treaty.

In tandem with that deliberate breach of a fundamental term of the treaty, as Jacob Rumbiak discloses in his paper presented at a Conference at Sydney University on 19 April 2000, the Indonesian President Suharto, in 1966, issued new Indonesian Government Regulations, the application of which in West Papua enabled the Indonesian administration to rig the West Papuan Representative Council through its own appointment of 1026 West Papuans of various backgrounds, namely 400 traditional leaders, 300 regional representatives, 266 representatives of political and social organisations, and 60 Christian Church and Islamic representatives.

Those representatives, painstakingly selected, manipulated and orchestrated by Murtopo's "Opsus", and purporting to represent the 816, 896 indigenous peoples of West Papua participated in the final charade of an act of free choice, surrounded by armed military personnel. All stood up when they were told to stand up to demonstrate that they chose to integrate with the State of Indonesia. However, and significantly, an official Indonesian Government publication in 1969 revealed that when they were asked to sign an Integration Statement 851 of those representatives refused to sign the Statement.

The processes and procedures adopted by Indonesia had no resemblance to universal adult suffrage or international practice or even Indonesian electoral practice, except for the rigging of the vote.

Immediately on the transfer of Administration to UNTEA, it was to widely publicise and explain the terms of the New York Agreement and inform the population concerning the transfer of administration to Indonesia and the provisions of the Act of Self-Determination as set out in the Agreement. They had not

been consulted about the Agreement prior to its adoption by the Parties.

Ortiz Sanz in his report to the Secretary General outlines the steps taken during UNTEA's administration to comply with that obligation, but it is clear that the dispersal of the population, the landscape, the logistics available, the time involved in his own discussions in Jakarta, and the attitude of members of his staff revealed to Hugh Lunn, severely limited the effectiveness of those steps.

The provisions relating to the Act of free Choice are set out in the following Articles of the New York Agreement:

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

(a) Consultations (Musjawarah) with the representative councils on procedures and appropriate methods to be followed for ascertaining the freely expressed will of the population.

(b) The determination of the actual date of the exercise of free choice within the period established by the present agreement.

(c) Formulation of the questions in such a way as to permit the inhabitants to decide (a) whether they wish to remain with Indonesia; or (b) whether they wish to sever their ties with Indonesia.

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

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

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

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

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

It is important to understand that the validity of the purported decolonisation of West Papua was dependent upon the terms of the New York Agreement entered into between the States parties to it; the nature of the processes and procedures involved in the conduct of the act of free choice; compliance with the terms of the treaty by the contracting states and the absence of unconscionable conduct by either of the States Parties in entering into the treaty or over the course of it.

It was necessary to register the treaty with the U.N. Secretariat for publication under the provisions of Article 102 of the UN Charter. If it were not so registered and published it would have no force and effect.

On its registration, the General Assembly took note of the Agreement, and as it had a facilitatory role under

its terms, passed a Resolution authorising the Secretary General to carry out that role.

The General Assembly at no time adopted the Agreement or adopted or validated its outcome.

Article 103 of the U.N.Charter stipulates that in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

That provision applies to the conflict between the obligation imposed upon the States Parties to their Agreement by its Article XVIII (c), which limited the options of the outcome of the act of self-determination available to the West Papuan peoples by excluding the option of `Free Association with an Independent State', That provision of the treaty is in conflict with the obligation imposed upon the Parties, both Members of the United Nations, to include that option imposed them by the General Assembly's Declaratory Resolution 1541 (XV) 1960 which preceded both the General Assembly's 1055th Plenary Meeting and the New York Agreement.

Those circumstances alone, I suggest, cast grave doubt upon the validity of the act of free choice.

Indonesia, interpreting the provisions of Article XVIII (a) of the Treaty to confer solely upon it, the power to make the arrangements referred to in that Article, persistently rejected proposals put forward by Ortiz Sanz, who deferred to that attitude in the belief that his role was limited to consulting and advising, without seeking from the Secretary General a legal opinion on the scope of his role.

On his own report to the Secretary-General, while he consulted and advised with a modicum of success, he could not be said to have shared with the Indonesian administration the making of the arrangements put in place to give the people of West Papua the opportunity to exercise freedom of choice, or in the choice of appropriate methods to be followed in ascertaining their freely expressed will.

The `musjawarah' consultations adopted in that Article and the procedures and processes adopted by Indonesia for the act of free choice were, on the evidence and the jurisprudence of the International Court of Justice and the rejection by the General Assembly of an application by South Africa for endorsement of an act of integration by the indigenous peoples of Namibia following organised consultations with the resident population, a mixture of tribal processes for the Blacks, sought to be justified on the basis that such method was appropriate in less advantaged communities, and normal adult suffrage for the Whites, clearly incompatible with international practice.

The International Court, in response to a request by the General Assembly in December 1949 to the Court for an advisory opinion upon the legal issues concerning the international status of Namibia advised, inter alia that South Africa had no competence to modify the international status of the territory or any of the international rules respecting the rights, powers and obligations relating to the administration of the territory and the supervision of the administration.

That jurisprudence raises a fundamental issue of whether the Netherlands, a U.N. Member State bound by the "Sacred Trust" imposed on it by Chapter 11 of the UN Charter was competent to enter into a bilateral treaty with Indonesia, the terms of which required the Netherlands to repudiate its obligations under that Trust and transfer the administration of its non-self governing territory and effectively transfer the obligations under the Sacred Trust to Indonesia, and particularly without consultation with the beneficiaries of that trust and having regard to Indonesia's armed invasion and occupation of the non-self governing territory.

Such repudiation and transfer of the obligations under the Sacred Trust would appear to be quite inconsistent with the customary law relating to treaties and the provisions of the UN Charter.

In its judgment in the Namibia "Legal Consequences" Case in 1966, the Court, after referring to a previous judgment of the Court in 1962, prior to the adoption of the New York Agreement, relating to the South African Mandate over Namibia under the League of Nations, which described it, in fact and in Law as an international Agreement having the character of a treaty or convention, added this opinion:

"The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject. In the light of those rules, only a material breach of a treaty justifies termination..."

The Vienna Convention was adopted on 22 May 1969, subsequent to the New York Agreement but prior to the implementation of the act of free choice in West Papua. While it did not come into force until 1980, the Member States of the United Nations were aware of its terms prior to their noting of that act by the GA Resolution in November 1969.

They were also well aware of the threat and use of armed force by Indonesia in West Papua that tainted the New York Agreement at the outset prior to the debate in the General Assembly in 1962 which led to the adoption of the Resolution which noted the Agreement and sanctioned the role of the Secretary General in its implementation.

They were also aware of the Machiavellian terms of the New York Agreement. The failure of the General Assembly to refer the matter to the Security Council must be regarded, along with that organ's subsequent failure to impose sanctions against Indonesia following its armed invasion of East Timor as the high water marks of Real-Politic.

Article 4 of the Vienna Convention provides: "Without prejudice to the application of any rules set forth in the present convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

Article 52 of the Vienna Convention stipulates that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the UN Charter.

Article 53 provides applies to treaties conflicting with a peremptory norm of general international law (jus cogens): "A treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purposes of this present Convention, a peremptory norm of general international law is a norm recognised by the international community of States as a whole as a norm from which no derogation is permitted, and which can only be modified by a subsequent norm of general international law having the same character."

Invalidity extends to titles to territories acquired in violation of a peremptory norm. The invalidity is incurable in character. A treaty or title does not become valid in the course of time. Its invalidity can be invoked at any time.

There are three groups of peremptory norms relevant to the facts and circumstances of the New York Agreement and its aftermath:

1. Prohibition of the use of aggressive armed force by States in the international sphere.
2. Obligations not to obstruct the right of peoples to self-determination.
3. Prohibition of the gravest violation of human rights.

Since peremptory norms cause the invalidity of rules, treaties and titles which are in conflict with them, and the invalidity is incurable in character, third States are under obligation not to recognise such a rule, treaty, or title as valid and legal.

In his report to the Secretary General Ortiz Sanz noted:

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

"I suggested that the Government should prepare an information paper indicating its decision to implement the act of free choice and explaining, in brief and simple terms, the provisions of the Agreement relating to it and the meaning of the decision the people would be asked to make. I said the document, which could serve as a starting point for an enlightenment campaign, should be widely distributed among the literate people and its content conveyed orally by local officials, tribal chiefs, and missionaries to those who were illiterate. I indicated that my mission was ready to offer the Government any assistance in this regard.

"In its reply on 15 November, the Government stated that it also was concerned about the question of providing the people of West Irian with information on the Agreement, and particularly the act of free choice. However, in disseminating such information it had to proceed with care, for the act of free choice was not only a delicate political issue in Indonesia but had been the source of controversy and conflict among politically minded people in West Irian. To some extent, information about the act of free choice had been given for some time to the "politically literate few" in the cities of the territory. The Government would not fail to continue the dissemination of information, in a manner that would not disturb the normal working of the Provincial Government or hamper the peaceful development of the people of the Region.

"After I had talks with Ambassador Tjondronegoro, a paper entitled "Explanation of the New York Agreement from the year 1962 to 1969" was published on 28 October which was distributed among the members of the Representative Councils.

That paper was not included in the Documents transmitted by the Indonesian Government to the Secretary General, or by the Secretary General to the delegates attending the final Plenary Session of the General Assembly on the West Papua issue. We are left to wonder why!

However, Ortiz Sanz, in his report to the Secretary General, set out the list of the top Indonesian administrative, military and security brass in attendance at all of the sessions of consultation, involving the eight `consultative assemblies' between 14 July and 2 August 1969, amongst whom were Ali Moertopo, the head of 'Opsus', masquerading as "Groups Chairman for Logistics, Social and Political Affairs" and Brigadier-General Sarwo Edhie, Commander of the Indonesian Military in the territory, under the pretentious title of `Muspida' Regional Leadership Consultatative Body"

It would be a bold West Papuan, I venture to suggest, who would not stand up when he was told to stand up

and say what he was told to say under the supervision of coves like them.

This summary concludes with a treatise on Self- Determination and Territorial Integrity - issues which the leaders of Australia's major political parties appear to share little sympathy with the concept of self-determination and little understanding of the meaning of `territorial integrity' and its scope.

The Principle of Self-Determination is a controversial one. It has a long history in international relations as a reason for the cession of territory from one State to another and for the use of plebesites to establish the wishes of the inhabitants in this connection. Under the United Nations Charter, it became the cornerstone of the General Assembly's decolonisation policy of the 1960's and 1970's.

The controversy has concerned the principle's status in International law and its meaning. The point has been reached where the principle has generated a rule of international law by which the political future of a colonial, or similar non-independent territory should be determined in accordance with the wishes of the inhabitants, within the limits of `uti possidetis'.

It does not extend to claims for independence by minority groups in a non-colonial context.

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

The key to the determination of post colonial boundary disputes is the concept of `uti possidetis juris', the meaning of which was discussed in the Frontier Dispute (Burkino Faso v Mali) I.C.J. Rep, 1986; p 554.

"The essence of the Principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delineations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. This is true both of the States which took shape in the regions of South America which were dependent on the Spanish Crown, and of the States Parties to the present case, which took shape within the vast territories of French West Africa. Uti Possidetis, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of colonization wherever it occurs.

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

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

"The parties have invoked in support of their respective contentions the "colonial effectivites', in other words the conduct of the administrative authorities are proof of the effective exercise of territorial jurisdiction in the region during the colonial period... The role played in this case by such effectivites is complex. Where the act corresponds exactly to law, where effective administration is additional to the uti

possidetis, the only role of the effectivites is to confirm the exercise of the right derived from a legal title. Where the act does not correspond with the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the effectivite does not coexist with any legal title, it must be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectives can then play an essential role in showing how the title is interpreted in practice."

That approach was followed by another I.C.J. Chamber in El Salvador v Honduras. I.C.J. Rep. 1992, in which the Chamber also noted that the boundary at the date of independence of States may change as a result of adjudication or the conduct of the parties (treaties, administration, acquiescence).

Indonesia formulated its claim to sovereignty over West Papua upon pre-colonial ties, which must be regarded as a long shot in the light of the jurisprudence of the I.C.J. in the Western Sahara case, and reliance upon paragraph 6 of G.A. Resolution 1514 XV: "Any attempt aimed at the partial disruption of the national unity and territorial integrity of a country is incompatible with the purposes and prin iples of the Charter" contending that West Papua was an integral part of Indonesia.

That provision was expanded in the G.A.Declaration 2625 (XV) "to prohibit any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in the compliance with the principle of equal rights and self-determination of peoples of a colony or other non self governing territory which has a status separate and distinct from the State administering it and retains that status until the people of the colony or territory have exercised their right to self-determination, and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

Having regard to that restatement and the respective conduct of The Netherlands and Indonesia in relation to the "Sacred Trust" and the rights of the West Papuan beneficiaries, that argument must also be regarded as a long shot.

The Indonesian Representative, in the debate on Resolution 1514 (XV) in the General Assembly persuaded the Guatamalan representative to withdraw a proposed amendment to Para.6. The proposed amendment stated that "the principle of self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to the recovery of territory". The Indonesian representative argued that Paragraph 6 as written already protected the claims of Nations to their pre-colonial territory.

What the Indonesian representative was really concerned about, I suggest, was the Netherlands policy of maintaining its administration and promoting a program in its colony of Western New Guinea, designed to lead to its decolonisation, which was frustrating Indonesia's desire to annex the territory contrary to the purposes and principles of the UN Charter.

The provisions relating to territorial integrity have been infrequently but forcefully invoked to justify an historical claim to neighbouring territory and a right to re-integrate it. However, this is not the most favoured interpretation. States have more often invoked Paragraph 6 in order to deny one faction of the population of a non-self-governing territory, or of an independent country, the right to secession.

Most States voting for Resolution 1514 (XV) Para 6 probably did so in the belief that they were creating a sort of grandfather clause: setting out the right of self-determination for all colonies, but not extending it to parts of decolonised States and seeking to ensure that the act of self-determination occurs within the established boundaries of colonies, rather than within sub regions. The U.N. Debates and their juxtaposition

with events in the former Belgian Congo made clear that the desire to prevent self-determination from becoming a justification for Katanga-type secessions was uppermost in the minds of most delegates. This approach to Para 6 is consistent with the principle of uti possidetis, or respect for the boundaries at the time of decolonisation recognised by the Chamber of the International Court in the Frontier Dispute Case.

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

"As far as the question of secession is concerned, the United Nations has never accepted the principle of secession of a part of a Member State"

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

G.E.Lambert 12/09/01