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**Impact of the 1962 New York Agreement on Indigenous West Papuans' Political,
Cultural and Territorial Rights:**

A Historical and Legal Analysis of West Papuans' Rights to Self-determination

A thesis

submitted in fulfilment

of the requirements for the degree

of

Master of Philosophy in Law (International Law and Indigenous People Rights)

at

The University of Waikato

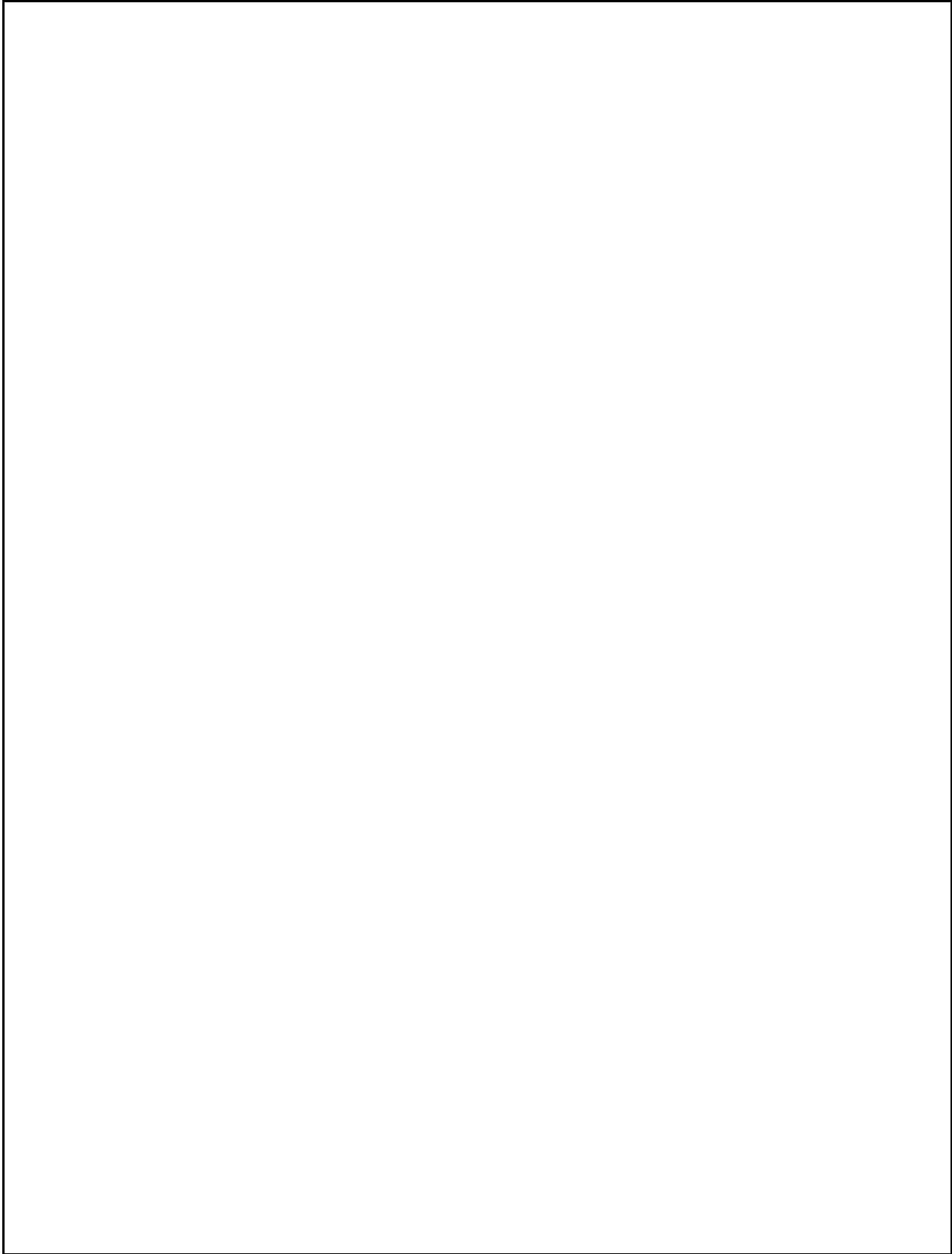
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Abstract

West Papua was incorporated into Indonesia under the 1962 New York Agreement, which was signed between the Netherlands and Indonesia without involving indigenous West Papuans. The Agreement attempted to legitimise Indonesia's claim of sovereignty over West Papua. It is the narrative around this Agreement that effectively dictates indigenous West Papuans' lives, including their subjugation to historical and ongoing human rights violations. This thesis closely examines the legal grounds of Indonesia's claim, with a particular focus on whether the New York Agreement was legitimately and authentically implemented through the processes of the 1969 Act of Free Choice.

Using primary and secondary sources, this thesis examines the legality of Indonesia's occupation in West Papua. It begins with the circumvention of international laws that prevented indigenous West Papuans from gaining the benefit of international decolonisation regimes during international decolonisation periods, which ultimately led to the re-colonisation of West Papua. A careful historical examination confirms that the indigenous people of West Papua have lost their legitimate standing in international law. The thesis contends the intentions behind the creation of the New York Agreement were not genuine, but that the Agreement was a purposely imposed colonising law to recolonise the territory.

By employing key legal arguments, this thesis contends that Indonesia's sovereignty claim over West Papua is legally invalid, historically unjustified and morally unacceptable. On reviewing both historical and ongoing violations of the human rights in the region, this thesis further argues that an internationally mandated process of self-determination should be considered as a legal remedy. The claims of indigenous West Papuans are historically supported, legally grounded and empirically demonstrated. This thesis establishes legal frameworks within the international law and institutions that can be utilised as practical pathways to West Papuan self-determination, with a particular focus on options within the United Nations systems.

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Dedication

As a legacy carrier, this piece of work is lovingly dedicated to my beloved parents, Wendanak G and Wendagwe M who have gone already. In their limitations they have raised and determined for my bright future, and for my siblings, brothers Rev. Pundius Ginia and Gurry Ginia; sister Mikana G Wenda who allowed me and trusted me in pursuing my dream and also supported me throughout the way.

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List of Abbreviations

ACNM	Advisory Council for Native Matters
AFC	Act of Free Choice
AI	Amnesty International
AII	Amnesty International Indonesia
ANC	Act of No Choice
AOIC	Advisory Opinion of the International Court of Justice
APR	Asia Pacific Report
ASD	Act of Self-Determination
BP-LNG	British Petroleum Liquid Natural Gas Companies
BPS	Central Statistical Agency of Papua Province (Badan Pusat Statistik)
BRIMOB	Brigade Mobile Police
CC	Constitutional Court
CCCP	Council's Confidential Complaint Procedure
CEP	Country Engagement Procedures
CESCR	Committee on Economic Social and Cultural Rights
CHR	Commission on Human Rights
CITP	Convention on Indigenous and Tribal Populations
CW	Cold War
DE	Dutch Eurasians
DEI	Dutch East Indies
DFM	Dutch Foreign Minister

DGACCP	Declaration of Independence of All Colonial Countries and People
DGACCP	Declaration on the Granting of Independence to Colonial Countries and Peoples
DNG	Dutch New Guinea
DPRP	Papuan People's Representative Council (Dewan Perwakilan Rakyat Papua)
DR	Decolonisation Regime
ECOSOC	UN Economic and Social Council
ENG	East New Guinea
FMFA	French Ministry of Foreign Affairs
FNPC	First Nation Peoples of Canada
FPIC	Free Prior and Informed Consent
GAPM	General Assembly Plenary Meeting
GAR	General Assembly Resolution
GDP	Gross Domestic Product
GNG	German New Guinea
HAM	Human Rights (Hak Asasi Manusia)
HRC	Human Rights Committee
HRCCP	Human Rights Council Complaint Procedure
HRCGC	Human Rights Committee General Comments
HRCP	Human Rights Council's Special Procedures
HRR	Human Rights Regime
HRT	Human Rights Treaties
HRWULS	Human Rights Weekly Update List Serve
IA	International Agreement
IAPSAO	International Alliance of Papuan Students Association Overseas

ICAT	International Convention Against Torture
ICCPR	International Covenant on Civil and Political Rights
ICEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Customary Law
ICP	International Coalition for Papua (Koalisi Internasional untuk Papua)
IDP	Internally Displaced People
ILO	International Labour Organisation
ILWP	International Lawyers for West Papua
IM	Indonesian Migrants
ING	Island of New Guinea
IPI	Indigenous Pacific Islanders
IPIWP	Indigenous Pacific Islanders of West Papua
IPWP	International Parliamentarian for West Papua
IRR	Indigenous Rights Regime
IWP	Indigenous West Papuans or Indigenous Papuans
JUBI	Jujur Bicara (Honest Talk)
KKR	Commission of Truth and Reconciliation (Komisi Kebenaran dan Rekonsiliasi)
KNPB	West Papua National Committee (Komite Nasional Papua Barat)
KOMNAS	Komisi Nasional (National Commission for Human Rights)
LIPI	Indonesian Institute of Science (Lembaga Ilmu Pengetahuan Indonesia)
LN	League of Nations

LNP	Lorentz National Park
MEP	Melanesian Ethnic Papuans
MIFEE	Merauke Integrated Food and Energy Estate
MMT	Ministry of Manpower and Transmigration
MO	Military Operation
MP3EI	Master Plan for the Acceleration and Expansion of Indonesian Economic Development
MRP	Papuan People’s Assembly (Majelis Rakyat Papua)
NEE	Netherlands East Indies
NGC	New Guinea Council
NGI	New Guinea Island
NGO	Non-Governmental Organisation
NGR	Niue Guinea Raad
NNG	Netherlands New Guinea
NSGT	Non Self-Governing Territory
NYA	New York Agreement
NZMFAT	New Zealand Ministry of Foreign Affairs and Trade
OCS	Operation Clean Sweep
OED	Oxford English Dictionary
OPC	Oil Plantation Companies
OPM	Free Papua Movement Organisation (Organisasi Papua Merdeka)
OTSUS	Special Autonomy Law (Otonomi Khusus)
PBB	Papua Behind Bars
PIF	Pacific Islands Forum
PIN	Pacific Island Nations
PMC	Pacific Media Centre

PNG	Papua New Guinea
PP	Papuan Population
PPG	Papua Provincial Government
PRP	Papuan People’s Petition (Petisi Rakyat Papua)
PTFI	Indonesia Freeport Limited Company (Perusahaan Terbatas Freeport Indonesia)
RTC	Round Table Conference
SCD	Special Committee on Decolonization (C-24)
SNG	South New Guinea
SPDC	Special Political and Decolonization Committee (Fourth Committee)
SWPO	Southwest Pacific Ocean
TAPOL	Tahanan Politik (Political Prisoners)
TPR	Trans Papua Road
UDHR	Universal Declaration of Human Rights
UEIC	United East India Company
ULWP	United Liberation Movement for West Papua
UN	United Nations
UNC	United Nations Charter
UNCD	United Nations Committee on Decolonisation
UNCI	United Nations Commission for Indonesia
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNGA-FC	United Nations General Assembly Fourth Committee
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Council

UNHRC-CP	United Nations Human Rights Council Complaint Procedure
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNEMRIP	United Nations Expert Mechanisms on the Rights of Indigenous People
UNR	United Nations Resolution
UNS	United Nations Secretariat
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNSRIP	United Nations Special Rapporteur on the Rights of Indigenous People
UNTC	United Nations Trusteeship Council
UNTEA	United Nations Temporary Executive Authority
UNTS	United Nations Treaty Series
UNTT	United Nations Trusteeship Territory
UPR	Universal Periodic Review
US	United States
USI	United States of Indonesia
UUD	National Constitution
VC	Vienna Convention
VDPA	Vienna Declaration and Programme of Action
VOC	Vereenigde Oost-India Company
WALHI	Indonesian Forum for Environment (Wahana Lingkungan Hidup Indonesia)
WALHI	Indonesian Forum for the Environment (Wahana Lingkungan Hidup Indonesia)
WB	World Bank
WCIP	World Council of Indigenous Peoples
WGIP	Working Group on Indigenous Populations

WI	West Irian
WNG	West New Guinea
WNGA	West New Guinea Administration
WPAA	West Papua Action Aotearoa New Zealand
WWI/WWII	World War One and World War II
WWM	West Wits Mining

Introduction

1. Background of the Thesis

West Papua is an Indonesian colony in the southwest Pacific region, situated in the north of Australia, within just a few miles distance, and bordering with Papua New Guinea (PNG) in the eastern half of New Guinea Island (NGI). It means, today, the indigenous people of West Papua are one of the last remaining colonised communities in the world in the oceanic region of the Pacific. The other Oceanic indigenous islanders who are undergoing similar colonisation include, the indigenous community of Kanak people in New Caledonia and French Polynesia under the French rule,¹ Native Hawaiians (Kanaka Maoli) and Guam under the United States of America, and a few other islands who are not governed by themselves.² The ongoing colonisation and the relentless human rights issues in West Papua are rooted in the complex history of foreign intrusions. In particular, a misconduct of international laws and the imposition of the 1962 New York Agreement,³ in which indigenous people of West Papua were disadvantaged.

After the European seafaring explorers sighted a massive island in the Pacific (New Guinea), it soon became a site of an imperial struggle between the European powers. In the 1820s, West Papua became a colonial possession of the Dutch for the first time and was named the Netherlands New Guinea or West New Guinea (NNG/WNG). With the development of international law,

¹ David Chappell *Self-Determination Interrupted. The Kanak Awakening: The Rise of Nationalism in New Caledonia* (University of Hawai'i Press, Honolulu, 2014) at 24.

² Robert F. Rogers *Destiny's Landfall: A History of Guam, Revised Edition* (University of Hawaii Press, Honolulu, 2011) at 170-180.

³ GA Res A/RES/1752/ (XVII) "Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian).

particularly the decolonisation regimes, the Dutch, as the colonial power over the territory, promised decolonisation for West Papua. In the fulfilment of that promise, the decolonisation process began in the 1950s in compliance with Article 73 of the UN Charter, and eventually led to the creation of the embryonic state of West Papua in December 1961. Its road to independence, however, was disrupted by the global political situation during the Cold War, and the influence of the West that was predominantly involved. This dynamic ultimately resulted in the expulsion of the Papuans from their legitimate place in international law (decolonisation regime).

As will be explained, with the involvement of the United States, including the United Nations,⁴ indigenous West Papuans experienced the second wave of colonisation, where West Papua was incorporated into Indonesia under the 1962 New York Agreement (NYA), which was signed between the Netherlands and Indonesia without involving indigenous West Papuans (IWP). The Agreement has been used to legitimise Indonesia's claim of sovereignty over the territory. It is that narrative that effectively dictates indigenous West Papuans human rights, including the historical and ongoing human rights violations that are presently still not much on the global attention.

This thesis seeks the legal standing of the New York Agreement, and explores the legal grounds of Indonesia's claim by examining whether or not the Agreement was implemented appropriately in the 1969 Act of Free Choice (AFC). The thesis particularly examines the implementation of article XVIII of the Agreement in the context of a number of international legal regimes. The legal questions this thesis attempts to address are: (i) How are the indigenous people of West Papua disenfranchised from international law, especially the decolonisation regimes that were grounded under article 73 of the UN Charter? (ii) How legitimate is Indonesia's rule in West Papua today; (iii) What legal consequences of colonial waves had given rise to human rights towards indigenous West Papuans?; (iv) What relevant and authoritative international legal regimes are applicable to address the historical and ongoing human rights violations in West Papua?; and (v) How might those relevant international laws and legal regimes be applied to address the legal claims of indigenous West Papuans?

In response to the above research questions, this thesis argues that Indonesia's claim of sovereignty over West Papua is invalid, and that its ongoing rule is illegal under international law. The thesis

⁴ The New York Agreement 1962. Article XVII; Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 688.

confirms that the claims of indigenous West Papuans for the right to self-determination is legally well grounded, as the notion of self-determination is guaranteed under international law. The indigenous West Papuans' claims acquire further justification, on the ground that the historical invalidity of the integration process of West Papua into the Indonesia republic through the illegal process of the Act of Free Choice (Act of No Choice) in 1969. The thesis also argues that the imposition of the New York Agreement was a denial of the Papuans' legitimate rights to self-rule and independence - promised to them by international law (decolonisation regime). Therefore, the Agreement is viewed as a deliberate device to further colonisation of West Papua.

This thesis acknowledges with great respect both academic contributions and practical advocacy works by many individuals, groups and organisations. The existing scholarship indicates that scholars have kept pressure on the issue of self-determination, which is triggering the demand for justice and respect for the rights of West Papuan people. However, most of the attention has been focused on the domestic procedure to conduct a peaceful and constructive dialog between indigenous people of West Papua and the Indonesian government. That approach is facing a constant failure.⁵ Most importantly, there is almost no comprehensive scholarly legal work that has been conducted within international law and legal doctrines about the legal issues of West Papua. This has obviously left a gap in the literature and thus in the pathways considered for resolution and redress of West Papuan's claims. This thesis attempts such an analysis, particularly through reviewing the historical and legal questions raised by the sequence of events leading to West Papua's current situation. Being an indigenous West Papuan legal scholar affords the author the chance to provide further insights in terms of legal context.

This thesis is an initial response to ongoing legal issues, which require a comprehensive analysis to enable or precipitate UN intervention. The international human rights law instruments utilised include: Charter of the United Nations 1945,⁶ Universal Declaration of Human Rights (UDHR) 1948;⁷ International Covenant on Civil and Political Rights (ICCPR) 1966,⁸ International

⁵ S Muridan Widjojo *Papua Road Map: Negotiating the Past, Improving the Present and Securing the Future* (Jakarta, 2010) at 180.

⁶ United Nations Charter <<https://www.un.org/en/about-us/un-charter>>.

⁷ Universal Declaration of Human Rights UDHR. <<https://www.un.org>>.

⁸ International Covenant on Civil and Political Rights 2200A (XXI) (opened for signature 16 December 1966, entered into force 23 March 1976), in accordance with Article 49.

Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,⁹ and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965,¹⁰ and other relevant international instruments. This thesis also relies upon particular indigenous peoples rights regimes known as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹¹ as a legal basis for intervention. The applicable and available legal venues through which to proceed include: the United Nations Human Rights Council (UNHRC) and the Human Rights Council Complaint Procedure (HRCCP). Other treaty-based bodies may also be appropriate, such as: the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC) on Civil and Political Rights. Specific forums for indigenous issues considered also include: the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Special Rapporteur on the Rights of Indigenous Peoples (SRRIP) and the United Nations Experts Mechanisms on the Rights of Indigenous Peoples (UNEMRIP).

⁹ International Covenant on Economic Social and Cultural Rights 2200A (XXI) (opened for signature 16 December 1966, entered into force 3 January 1976), in accordance with article 27.

¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination 2106 (XX) (opened for signature and ratification by General Assembly resolution 2106 (XX) 21 December 1965, entered into force 4 January 1969), in accordance with article 19.

¹¹ *United Nations Declaration on the Rights of indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [the Declaration].

2. Methodology

The methodology adopted for use in this thesis had been an exploration of historical events and documents combined with a doctrinal examination of primary and secondary legal sources. Various international and domestic law is examined. Secondary sources cover a range of jurisprudential and doctrinal arguments, particularly those based on international human rights laws as primary legal sources. Ideas and concepts have also been gathered from secondary sources such as books and journal articles publications and from the websites. Utilising the secondary sources has significantly contributed to establishing legal arguments based on account of historical events. Information was also collected and examined from primary legal sources such as declarations, resolutions, conventions, covenants, charters, treaties including the New York Agreement. Legal analysis of positive law has been conducted to critically examine and interpret the law. Utilising a legal analysis method (positivism of international law) is largely compatible with the topic, because of the historical and ongoing nature of the human rights issues that required legal assessment, and to establish a cause and effect relationship as to the status of West Papua in international law.

In maximising positive legal and comparative analysis methods, the author gathered information from a range of relevant sources. Historical and ongoing human rights violations have been collected and analysed. Although there are limited sources in the legal scholarship, which was challenging, the few existing sources in the library databases have been valuable sources for this thesis. The author also borrowed a number of books from other universities including the scholarship of Pieter J Drooglever, an expert and historian on this topic. In the theoretical investigation, much of the focus was placed on the authentic accounts mostly by historians and other important observers regarding the disputes of West New Guinea. Particular attention was paid to the historical delineation of the integration processes, beginning from the signing of the New York Agreement in 1962, and its implementation in the 1969 Act of Free Choice. Through this historical investigation, the thesis acquired and identified sufficient grounds to enable it to establish the legal arguments presented, based on the historical account.

This thesis also investigated the ongoing human rights situations through verifiable sources such as the local and international media together with reports from relevant domestic and international organisations, including the Pacific Media Centre and the liberation movement for West Papua overseas. This method was essential because, (i) the dispute is an ongoing issue and thus the recent events of human right situations and crisis needed to be updated; and (ii) as mentioned above, there are few sources of publications, the majority of which by those not residing in West Papua. Even some Indonesians, who are interested in writing about the state oppression in West Papua, choose to write in English rather than writing in Indonesian and publish in other countries rather than in Indonesia. An example of this is Mr. Harsono, who secretly collected data on the situation, wrote in English and published it in Australia in (2019).¹² Therefore the media accounts had been utilised as additional sources in writing this thesis, such as JUBI an acronym for Jujur Bicara (Honest-talk) as the local media portal No 1.¹³ It has a link to Radio New Zealand - International (RNZ); Pacific Media Centre (PMC); Asia Pacific Report (APR) and other reliable international sources of media accounts.

The use of the jurisprudential arguments to analyse the provisions of international human rights laws has been a significant method adopted in this thesis. The international instruments used include core treaties of international human rights frameworks and resolutions, such as: the Universal Declaration of Human Rights (UDHR); the Charter of the United Nations;¹⁴ the 1960s General Assembly' Resolutions 1514 (XV) and 1541 (XV),¹⁵ the International Labour Organisation Conventions concerning Indigenous and Tribal Peoples (ILO) particularly Convention No 169;¹⁶ the United Nations Declaration on the Rights of Indigenous Peoples

¹² Mr. Harsono is a human rights observer, based in Jakarta. He frequently provides reports of the Indonesian government's oppressive approach towards the civilian and the minority groups in Indonesia. Particularly his main focus on the state's aggressive approach towards Indigenous People of West Papua. He recently published his book entitled "Race, Islam and Power: Ethnic and Religious Violence in Post-Suharto Indonesia" written in English version and published in Australia National University. His book will be one of the sources for this study.

¹³ JUBI is an acronym for Jujur-Bicara which simply means unbiased talk or honest talk. JUBI is the local West Papuan owned media and the most trusted and reliable local portal media number one in West Papua. It has the link to some International Media such as RNZ (Radio New Zealand International), Asia Pacific Reports and other media including Indonesia media such as the Jakarta Post as well.

¹⁴ Charter of the United Nations

¹⁵ GA Res 1514, XV (1960) *Resolution on Declaration on the granting of independence to colonial countries and peoples* and GA Res 1541, XV (1960). *Resolution on Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*

¹⁶ International Labour Organisation (ILO): Indigenous and Tribal Peoples Convention, 1989 (No. 169) <<https://www.ilo.org>>.

(UNDRIP),¹⁷ the International Covenant on Civil and Political Rights (ICCPR),¹⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁹ and other relevant human rights regimes.

The thesis incorporates a deep examination of the 1962 New York Agreement and its implementation in the Act of Free Choice in 1969.²⁰ The use and application of these legal instruments had been critical to West Papua's situation. They are core to a critical examination and analysis of the implementation of laws in the historical context of West Papua, especially as to the decolonisation processes in the 1950s - 1960s; and to any repositioning and strengthening of the legal narrative to push or enable the law to operate in a correct manner in regards to West Papua's situation. This analysis is fundamental to establishing a firm claim to the legal procedures some of these international instruments make available to pursuing the legal claims of indigenous West Papuans in the international arena.

It must be acknowledged that the author is writing as a legal scholar, and also as an indigenous West Papuan. Therefore, some of the parts of this thesis may be interpreted critically by the reader, but it should be acknowledged that they are the factual descriptions of indigenous West Papuans' day-to-day realities. One of the intentions of this study is to disrupt that colonial narrative that deposed West Papuans as indigenous peoples and rendered them as minority groups – the thesis aims is to restore their status and concomitant rights through the legitimate proper interpretation and application of international legal and rights regimes.

¹⁷ United Nations Declaration on Rights of Indigenous Peoples. (UNDRIP). <<https://www.un.org>>.

¹⁸ United Nations Office of the High Commissioner of Human Rights. International Covenant on Civil and Political Rights. (ICCPR). <<https://treaties.un.org>>.

¹⁹ United Nations Office of the High Commissioner of Human Rights. International Covenant on Economic, Social and Cultural Rights (ICESCR). <<https://www.ohchr.org>>.

²⁰ GA Res A/RES/1752/ (XVII) “Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea.”

3. Structure of the Research

This thesis comprises five chapters. Chapter 1 provides an overview of the pre-colonial times of West Papua, including indigenous peoples of the territory before colonial contact. It then delineates the outside intrusions into the territory through Colonisation – Decolonisation – and Recolonization,²¹ and how those colonial waves affected the human rights of the local inhabitants. The chapter critically investigates the legal dispute between the Dutch, after they claimed the territory in 1828,²² and Indonesia’s taking over West Papua through the New York Agreement in 1962.²³ It examines how those colonial waves affected indigenous West Papuans’ legitimate rights in international law, and particularly their interference with the decolonisation regimes that had been underway. By examining these historical accounts, the thesis argues that rectification (legal remedy) of the historical wrongs is necessary to reposition the Papuans’ standing in international law.

Chapter 2 examines the implementation of law in their historical context, and the resultant legal consequences to human rights on indigenous West Papuans. This chapter is one of the pivotal sections because it establishes the historical-legal arguments on the core question of ‘whether or not international laws (decolonisation regimes) were applied appropriately and on the question of whether Indonesia’s occupation is legitimate. It suggests that the indigenous people of West Papua have been disadvantaged from the denial of their rightful status in international law. The legitimate process under the decolonisation regime of the UN Charter was torpedoed by the Western backed bilateral 1962 New York Agreement which inevitably prevented further implementation of UN General Assembly Resolutions No 1514 (XV) and No 1541 (XV). As a result, people of West Papua were denied the protection of their human rights guaranteed in international law.

²¹Jan Pauwer “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH 157-179.

²² John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Routledge, NY, 2002) at 1.

²³ GA Res A/RES/1752/ (XVII) “Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea.”

The thesis proposes that this historical violation of international law left a gap that needs to be repaired. The path towards that can be discerned through the legal-historical re-examination of events, and has a possibility to lead to the appropriate plebiscite. It discusses that the deviation around international law accomplished through the 1962 New York Agreement created decades of human rights violations in the region. The impact of the Agreement to indigenous West Papuans civil, political, economic, social, cultural rights and other collective rights has been immense, creating a platform enabling serious human rights violations. This chapter concludes that the deliberate circumvention of international law,²⁴ and misapplication of the 1962 New York Agreement²⁵ remain a live legal matter of international law and that this historical infraction requires an internationally supported redress.

Chapter 3 examines international legal regimes relevant to the situation in West Papua. It focuses on human rights protections, including the legal right to self-determination. The chapter employs the broad principles of international human rights law and the specific legal frameworks that focus on indigenous peoples' rights, i.e., those that provide the protection of social, political, economic and cultural rights, including the affirmation of the legal right to self-determination. It confirms that these international human rights standards, while acknowledging some challenges, affirm that self-determination is 'a right to all people under those conditions of equality from which all peoples should be beneficiaries.'²⁶

It argues that the West Papuans, on the premise of their peoplehood and as indigenous peoples,²⁷ are legitimately entitled to exercise their rights of self-determination guaranteed in international human rights instruments.²⁸ This assertion is based on the argument that the legality of Indonesia's rule in West Papua today is legally invalid and historically unjustified.²⁹ Based on a well-grounded account of history, it claims Indonesia's administration in West Papua today remains that of a

²⁴ Charter of the United Nations, Chapters XI - XIII; GA Res 1514 (XV) and GA Res 1541 (XV).

²⁵ GA Res A/RES/1752/ (XVII).

²⁶ S James. *Anaya Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2000) at 78.

²⁷ Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov *Self-Determination and Secession in International Law*. (Oxford University Press, London, 2014) at 32.

²⁸ Charter of the United Nations, articles 1(2) and 55; [the Declaration], art 3; ICCPR art 1; GA Res 1514, XV (1960), art 2.

²⁹ Julian Mckinlay King and Andrew Johnson "West Papua Exposed: An Abandoned Non-Self-Governing or Trust Territory" (2019) 6 GJLHD at 99.

colonial type. Therefore, the decolonisation regimes grounded under article 73 of the UN Charter³⁰ and the General Assembly Resolution No. 1514 (XV),³¹ are legitimately relevant to apply, as it is an issue of an unfinished business of the decolonisation process.³² It also affirms that West Papuans, as being an indigenous people, ultimately are due the benefits of the provision of indigenous rights regime articulated in the Declaration on the Rights of Indigenous Peoples (UNDRIP), which guaranteed their individual and collective rights, including their claim for self-determination.³³

Chapter 4 focuses on the application of those relevant international human rights frameworks discussed in chapter three. It provides the relevant legal procedures and mechanisms that are available in international systems, through which indigenous West Papuans can pursue and obtain their internationally recognised rights, including the demands for a self-government as an ultimate legal remedy. Beginning with the United Nations Decolonisation procedure; it examines the mechanisms in the United Nations Human Rights Council (UNHRC) and other relevant procedures for obtaining a remedy within the international human rights systems. These include international forums and spaces that are specifically designed to address and provide redress for indigenous peoples concerns and aspirations.

The chapter outlines both the general mechanisms under the UN Charter and the UN Treaties-based procedures, and the specific mechanisms of indigenous people's forums that are capable of issuing decisions and recommendations. It confirms that through these various models indigenous West Papuans interests can be maximised effectively and in a compelling way, using the language of human rights in advocacy works at the global level. This can raise awareness and consciousness about the historical and ongoing violations of human rights committed by Indonesia, with the aim to obtain an adequate remedy to the harms and threats the state poses to the West Papuans' cultural personality, integrity, and survival. One such remedy is to secure the legal right to self-determination, and other collective rights that are affirmed by international law.

³⁰ Charter of the United Nations, art 73.

³¹ GA Res 1514, XV (1960).

³² Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 73.

³³ [The Declaration], art 3.

Chapter 5 is the final chapter. It contains the conclusion and summarises the legal issues that have been discussed. The thesis argues that an adequate solution to West Papua's legal issues is simply the 'de-occupation' of Indonesia's rule through the applicable international legal processes, i.e., that implementation of an appropriate plebiscite. This assertion is made under three equally sufficient separate legal arguments; the historical breach of international law and other human rights violations; the nature of great ongoing human rights violations towards indigenous West Papuans (IWP); and implementation of the provisions of general international law and the specific indigenous rights regimes that guarantee indigenous peoples' claim to self-determination. This final chapter also offers some recommendations; including a combined strategy of both legal and political action as a necessary approach to achieve the claim for a legal remedy.

1. CHAPTER ONE

HISTORICAL ANATOMY OF COLONIAL WAVES AND THEIR IMPACTS IN WEST PAPUA

1.1. Introduction

The outside world's interventions³⁴ into West Papua is a story of adventure, cultural loss, destruction, greed, genocide, ecocide, imperialism and political manoeuvring.³⁵ In the 19th century, West Papua became a site of imperial struggle between European powers. The Dutch were the successor after claiming the western half of New Guinea Island in the 1820s.³⁶ Subsequently West Papua became a colonial property under the aegis of the Dutch - until the promise of decolonisation of the 1960s.³⁷

Dramatic changes began with the second wave of colonisation by Indonesia, in the second half of the 20th century.³⁸ Since then, Asian and Javanese immigrants settled throughout the territory. In just 60 years, they gained control of most of the economy through the alienation of sacred lands,³⁹ imposing their culture to dominate and suppress the indigenous Papuans through a military style of government.⁴⁰ The most affected by these changes are indigenous

³⁴ Carmel Budiardjo and Liem S Liong *West Papua: The Obliteration of a People* (3rd ed, TAPOL, London, 1988) at 2-3.

³⁵ Robin Soborne *Indonesia's Secret War: The Guerilla Struggle in Irian Jaya* (Allen & Unwin Australia Pty, New South Wales, 1985) at 116.

³⁶ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Routledge, NY, 2002) at 5.

³⁷ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 324 and 150.

³⁸ Jan Pauwer "The Colonisation, Decolonization and Recolonization of West New Guinea" (2008) 34 JPH 157-179.

³⁹ Andreas Harsono *Race, Islam and Power: Ethnic and Religious Violence in Post-Suharto Indonesia* (Monas University Publishing, Victoria, 2019) at 201.

⁴⁰ David Robie "Review: How Indonesia's Political System has 'Failed' Minorities like Papuans" (2019) 25 PJR 297 at 299.

people of West Papua who had no voice in their own destiny, and their long-established culture and way of life had been disrupted and continued to face an uncertain future.

This beginning chapter discloses West Papua's unique history of dual-colonisations. It explains three stages of the historical event of foreign intrusions with West Papua; colonisation, decolonisation and re-colonisation.⁴¹ It imparts how those colonial waves influenced indigenous West Papuans' lives, and how they disrupted the Papuans' rightful place in international law. By examining these historical accounts, the thesis contends that the rectification of the historical wrongs is imperative.

For the purposes of this thesis, *colonisation* refers to the Dutch occupation in West New Guinea. This section begins with the colonial competition among European countries to seize the island, and how the territory became the Netherlands New Guinea. It examines further the legal and political status after the Dutch claimed the territory. In addition, it distinguishes between the Dutch colonial occupation and treatment of the Netherlands New Guinea (West Papua) and that of the Netherlands East Indies (Indonesia).

Similarly, *decolonisation* refers to the Dutch genuine intention to create self-governance for West Papua under the decolonisation regimes. It provides how the territory was disputed after the Dutch refused to cede the territory from its other former colony (Indonesia) in 1949.⁴² Furthermore, this section analyses the employment of international law in the decolonisation process and illustrates how the Dutch complied with the legal requirements under the UN charter,⁴³ which eventually led to the creation of an embryonic state of West Papua on the 1st of December 1961.⁴⁴

Further, *re-colonisation* refers to the Indonesian taking over of West Papua in the 1960s. It examines how international law was deliberately violated by the West and international institutions, including the United Nations by imposing the New York Agreement. This part examines the legal standing of the 1962 New York Agreement⁴⁵ and its implementation in the

⁴¹ At 157-179.

⁴² Leontine Visser *Governing New Guinea: An Oral History of Papuan Administrators, 1950-1990* (KITLV Press, the Netherlands, 2012) at 3.

⁴³ Charter of the United Nations, art 73.

⁴⁴ Catherine Scott & Neles Tebay "The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace" (2006) 94 CJA 599 at 600.

⁴⁵ GA Res /1752/ (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

Act of Free Choice in 1969.⁴⁶ It also discusses how the international law of decolonisation had been supplanted by the Agreement. With that, the 1962 New York Agreement is considered as the colonial law imposed to validate further colonisation. Finally, the chapter discusses the legal impact of successive waves of colonisation on indigenous West Papuans. Particularly examining those impacts from the outcome of the re-colonisation process that remain of deep concern today.

⁴⁶ Pacific Media Centre “Vanuatu Steps up UN bid for West Papua Rights, New Referendum” <www.asiapacificreport.nz>.

1.2. West Papua and the People

1.2.1. West Papua

West Papua⁴⁷ is the western half of the world's second-largest island called; the Island of New Guinea (ING).⁴⁸ It encompasses around 786,000 square kilometres, located in the Southwest Pacific Ocean (SWPO) - lying just north of Australia.⁴⁹ West Papua is a home of more than 250 tribes of indigenous Papuans. Its dramatic landscape of natural formation of geography, ethnography, ecology and an unpredictable climate are no different from its neighbouring half of Papua New Guinea (PNG) in the East,⁵⁰ which is divided right down the middle at 141° east longitude.⁵¹ Despite the shared land and cultural bond, however, West Papua has been drifted away politically by the repeated colonial waves, and thus, today West Papua remains under the colonial rule of Indonesia - with 5 administrative provinces with different names.⁵² But the term West Papua or West New Guinea as the whole of the Western half will be used throughout this thesis.

⁴⁷ West Papua is the name of the territory of western half of the Island of New Guinea, geographically located in the Southwest Pacific. In 1828, it was named as West New Guinea and the Netherlands New Guinea after the Hollands laid its colonial claim to the territory. In 1961, Indigenous Papuans officially adopted 'West Papua' as the name of their country through the Netherlands-sponsored West New Guinea Council as part of the Decolonisation process. In the 1960s, when Indonesia recolonised the territory, it gave its own name as 'Irian Barat' and then 'Irian Jaya' until 1999, and in 2000, the Papuans chose to put their mother lands back to its original name as 'West Papua' through 2000 Papuan Congress. When it refers to Indonesia's administrative terms, there are two provinces; Papua and West Papua. But 'West Papua' is the original name preferred by Indigenous West Papuans and it is well-known to International communities. Therefore, this thesis is preferred to use the original name of the territory "West Papua" as the whole of the western half of the New Guinea Island.

⁴⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London and New York, 2003) at 1.

⁴⁹ Bruce M. Beehler *New Guinea: Nature and Culture of Earth's Grandest Island* (Princeton University Press, New Jersey, 2020) at 18.

⁵⁰ Peter McDermott "Australian Citizenship and the Independence of Papua New Guinea" (2009) 32 UNSWLJ 50 at 57-58.

⁵¹ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 34.

⁵² Asia Pacific - Reuter Stanley Widiyanto and Kate Lamb: Indonesia passes contentious law to create more provinces in Papua: June 30, 2022. <<https://www.reuters.com/world/asia-pacific/indonesia-passes-contentious-law-create-more-provinces-papua-2022-06-30/>>.

In order to conceptualise a proper definition of ‘aboriginality’ or ‘indigeneity’ of Papuans,⁵³ it is important to correlate human arrival in the territory. The earliest setting of the humans’ feet in New Guinea remains hypothetical, but also appealing.⁵⁴ In the account of a paleoanthropologist, the origin of human habitation in New Guinea is inextricably linked to the form of the New Guinea-Australia landmass.⁵⁵ It was during the Pleistocene, where Australia and New Guinea formed a large southern continental, called Sahul, covering approximately ten million square kilometres, offering a large target for human colonisation.⁵⁶ The separation of New Guinea from Australia only occurred during the time of the rise of the sea level after the glacial period around 12,000-8,000 ago.⁵⁷

Beehler assumed, “there can be no real distinction between first arrival in Australia and first arrival in New Guinea - they were one and the same landmass,”⁵⁸ after a rapid expansion of human migration (homo sapiens), they came out from Africa through one migration route via southeast Asia into Sahul.⁵⁹ With that, it has been suggested that the Papuans inhabited the territory for approximately 50,000 years back.⁶⁰ Some studies have suggested earlier than 40,000 years, as first documented dating back to the final part of the Pleistocene is the human presence in New Guinea Island.⁶¹ With this assumption, the inhabitants of New Guinea Island, including West Papuans, are therefore, considered to be the descendants of the first human inhabitants of the island land, which one might argue should suffice to meet any proposed definition of indigeneity.

⁵³ The term ‘Papuans’ refers to the natives or the Indigenous peoples who occupied the Island of New Guinea, who were characterised by a black or dark brown complexion and crisp, frizzled and curly hair, nor any of unaffiliated languages to New Guinea.

⁵⁴ Moore Clive *New Guinea: Crossing Boundaries and History* (University of Hawai'i Press, Honolulu, 2003) at 21.

⁵⁵ At 22.

⁵⁶ At 23.

⁵⁷ Tommaseo-Ponzetta M and others “Mitochondrial DNA Variability of West New Guinea Populations” (2002) 117 *AJPA* 49-67 at 51.

⁵⁸ Bruce M. Beehler *New Guinea: Nature and Culture of Earth's Grandest Island* (Princeton University Press, New Jersey, 2020) at 234.

⁵⁹ See Moore Clive, above n 54, at 23.

⁶⁰ New Internationalist, “A History of Betrayal” (2002) 04 PQ, at 22-23.

⁶¹ Tommaseo-Ponzetta M and others “Mitochondrial DNA Variability of West New Guinea Populations” (2002) 117 *AJPA* 49-67 at 50.

1.2.2. Indigenous Peoples

1.2.2.1. International Definitions

Determining the international legal definition of indigenous peoples remains somewhat difficult and controversial. The conundrum of this can be seen in the United Nations - not adopting an official definition of indigenous peoples. This is primarily due to the high level of controversy and the perceived political stakes within the United Nations.⁶² Nonetheless, in 1972, when the United Nations established a Sub-Commission on Prevention of Discrimination and Protection of Minorities,⁶³ Jose Martinez Cobo, appointed as Special Rapporteur who also authored; the *Study on the Problem of Discrimination against Indigenous Populations*,⁶⁴ developed an important working definition of the category that:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”⁶⁵

In 1975, the World Council of Indigenous Peoples (WCIP)⁶⁶ in a near sense defined indigenous people as:

“People living in countries which have a population composed of differing ethnic or racial groups who are descendants of the earliest populations living in the area and who do not as a group control the national government of the countries within which they live.”⁶⁷

⁶² Benedict Kingsbury ““Indigenous Peoples” in International Law: A Constructivist Approach to the Asian Controversy” (1998) 92 AJIL 414 at 419.

⁶³ Jose R. Martinez Cobo *Study of the Problem of Discrimination Against Indigenous Population: Final Report (First Part) Reported by the Special Rapporteur* E/CN.4/Sub.2/476/Add.4 30 (1981).

⁶⁴ Adam Dahl "Colonial Dispossession and the Settler Social State" In *Empire of the People: Settler Colonialism and the Foundations of Modern Democratic Thought*, (University Press of Kansas, 2018) at 77.

⁶⁵ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 28.

⁶⁶ Pōkā Laenui, Hayden Burgess and TCP “The World Council of Indigenous Peoples An Interview with Pōkā Laenui (Hayden Burgess)” (1990) 2 CP 336 at 345.

⁶⁷ See Benedict Kingsbury, above n 62, at 422.

In a similar, but slightly more exclusive view - by a former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya describes:

“Indigenous-generally understood as groups that are descended from the original or long time inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aboriginal people of Australia, the Maori of Aotearoa New Zealand, Native Hawaiians and other Pacific Islanders.”⁶⁸

In the absence of universally agreed definitions of indigenous peoples, however, above-mentioned individual experts’ views make an important contribution in an attempt to comprehend the global understanding of indigenous people.

1.2.2.2. Indigeneity or Indigenous Peoples

The term ‘indigeneity’ is not found in the Oxford English Dictionary, but its nearer synonym is “aboriginality” which the Oxford Dictionary defines, as “the quality or condition of being indigenous; existence in or occupation of a land from the earliest stage of its history.”⁶⁹ Similarly, the term “indigeneity” is derived from an old Latin root *indu* meaning ‘within’ and *gignere*, meaning to ‘beget’.⁷⁰ Therefore, indigeneity means “produced or born naturally in a land or region; native or belonging naturally to the soil and region.”⁷¹

Indigeneity can be defined in two ways: First, indigenous peoples are the descendants of the first human inhabitants of a land or territory, meaning that they are the original inhabitants; and

⁶⁸ S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2004) at 3.

⁶⁹ *Oxford English Dictionary* (3rd ed, Oxford University Press, Oxford, 2021).

⁷⁰ *Oxford English Dictionary*, above, vol VII 867. The etymology of "indigenous" is from Late Latin *indigenus*, from Latin *indigena*, n, "native", from Old Latin *indu*, endo, "in", "within" and Latin *gignere*, "to beget".

⁷¹ Jeremy Waldron “Indigeneity? First People and Last Occupancy” (This paper was presented as the 2002 Quentin-Baxter Memorial Lecture at the Victoria University of Wellington Law School, December 2002) Professor Waldron critically examines two principles invoked in New Zealand and elsewhere in debates about "indigeneity": first occupancy and prior occupancy at 56.

second, indigenous peoples are the descendants of those who inhabited the land at the time of European colonisation.⁷²

A Māori scholar, Linda Tuhiwai Smith articulates:

“The concept of ‘Indigenous Peoples’ is, in and of itself, a revolutionary one. The term “Indigenous peoples” (born of activist movements during the latter half of the twentieth century) allows “the collective voices of colonised people to be expressed strategically in the international arena, enabling communities and peoples to come together, transcending their own colonised contexts and experiences, in order to learn, share, plan, organise and struggle collectively for self-determination on the global and local stages.”⁷³

Professor Tuhiwai conception, is fitting into the second category of comprehending indigeneity, where it equates indigenous people as 'colonised people' which then ultimately provokes collective struggle for their survival.

In these senses, the people of West Papua have attachment to both definitions. That is to say that, West Papuan peoples are the indigenous inhabitants - for the fact that they were the ‘first human occupants’ of the land; and they exist today as the descendants of those ‘first inhabitants’ prior to the Netherlands’ colonisation⁷⁴ and Indonesia’s re-colonisation.⁷⁵ And their existence today under the Indonesian rule, makes them as a colonised people, in which their enabling communities and peoples to come together, transcending their own colonised contexts and experiences, in order to learn, share, plan, organise and struggle collectively for self-determination on the global and local stages.”⁷⁶

Corresponding to the above-mentioned concepts, defining indigeneity for West Papuans is paramount important for the current complexities they are facing. Particularly the opposition from the Indonesian government, who deny the concept of indigenous peoples.⁷⁷ The government’s argument is that the international category of indigenous peoples⁷⁸ is not relevant to Indonesia's situation, with the view that, “all the people in the archipelago are indigenous,

⁷² At 62.

⁷³ Journal of the Native American and Indigenous Studies Association (Issue 2, 2019) vol 6 (2) Native American and Indigenous Studies at [7].

⁷⁴ Jan Pouwer “The Colonisation, Decolonization, and Recolonization of West New Guinea” (2008) 34 JPH 157 at 159.

⁷⁵ David Webster “Self-determination Abandoned: The Road to the New York Agreement on West New Guinea (Papua), 1960 -62” (2013) 95 JA 9 at 10.

⁷⁶ Journal of the Native American and Indigenous Studies Association (Issue 2, 2019) vol 6 (2) Native American and Indigenous Studies at [7].

⁷⁷ Benedict Kingsbury ““Indigenous Peoples” in International Law: A Constructivist Approach to the Asian Controversy” (1998) 92 AJIL 414 at 417.

⁷⁸ *United Nations Declaration on the Rights of indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [the Declaration].

and there is no colonial or postcolonial history of reserving land for particular ethnic or cultural groups.”⁷⁹ This narrative in the context of the West Papuan people is not a legitimate or valid argument and cannot be justified. It is a rhetorical betrayal of the existence of indigenous West Papuans and legally not plausible for the fact that West Papuans are ‘colonised people’⁸⁰ and ‘minority group’ within Indonesia's Muslims majority and Java-centric rule.⁸¹ It also undermines the other indigenous communities in the archipelago.

1.2.2.3. West Papuans as Indigenous Peoples

The term Papuans referred to “the Natives or indigenous peoples who occupied the island of New Guinea, who were characterised by a black or dark brown complexion and crisp, frizzled and curly hair, or any of unaffiliated languages to New Guinea.”⁸² These are descended from their *Inombo*,⁸³ or Ancestors who first arrived to New Guinea when the island was connected with the large Continent of Australia.⁸⁴ Papuans are ethnolinguistic groups with tribal leaders that were governed by their own traditional legal systems, social structures,⁸⁵ since their habitation in New Guinea Island (NGI), until European contact in the 19th century.⁸⁶ They are considered as one of the most diverse communities in the world, representing around 20% of

⁷⁹ Tania Li “Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia’s Forest Zone” (2001) 53 MAS 645 at 646.

⁸⁰ Andreas Harsono *Race, Islam and Power: Ethnic and Religious Violence in Post-Suharto Indonesia* (Monas University Publishing, Victoria, 2019) at 219.

⁸¹ David Robie “Review: How Indonesia’s Political System has ‘Failed’ Minorities like Papuans” (2019) 25 PJR 297 at 299.

⁸² Thesaurus.com, <www.dictionary.com>.

⁸³ *Inombo* is a (plural noun) in a Lanny Tribes Language when describing their ancestors who first arrived, lived and occupied the land and territory now occupied by their descendants.

⁸⁴ Bruce M. Beehler *New Guinea: Nature and Culture of Earth’s Grandest Island* (Princeton University Press, New Jersey, 2020) at 248.

⁸⁵ Martha Nurfaiza Widdi *Transnational Corporations and West Papua: A Friend or Foe for Indigenous People of This Region?* (Springer International Publishing, 2019) at ch 1.

⁸⁶ Moore Clive *New Guinea: Crossing Boundaries and History* (University of Hawai’i Press, Honolulu, 2003) at 21.

the world's languages.⁸⁷ More than 800 different languages are spoken in Papua New Guinea and over 300 languages in West Papua.⁸⁸

Although the island is politically divided between West Papua and Papua New Guinea, local inhabitants of both sides are in some ways proud to maintain the term 'Papuan' from one *Inombo* as one people, one soul and one land.⁸⁹ As their story remains bound together throughout generations, indigenous West Papuans called themselves Pacific Islanders as part of Melanesia,⁹⁰ where they shared a sense of identity with their immediate neighbours of Papua New Guinea, the indigenous people of New Caledonia, Fiji, Vanuatu, Solomon Islands and Torres Strait Islands, as well as Aboriginal Australians.⁹¹ They have strong bounding roots in their Melanesian identity in their past with the emerging slogan of Bernard Narokobi's contextualisation of 'Melanesian Way'⁹² or 'Wantok's obligation.'⁹³

With those general characteristics, West Papuans may be specifically defined as "the living descendants of the first inhabitants (*Inombo-Alom*),⁹⁴ who arrived and lived in the western half of New Guinea as the original peoples"; and or "the descendants of those who inhabited the territory at the time of the Netherlands' colonisation, and now Indonesia's re-colonisation and its support of outside Asian migration to the territory, has distressingly resulted in indigenous West Papuans becoming minority in their own land."⁹⁵ With their ethnic distinction, Robert Walsh asserts, "there is no doubt that the present inhabitants of New Guinea differ from the present inhabitants of Indonesia and Malaya. To date, studies have revealed no Asian groups which might represent a parent stock from which the New Guinea native may have arisen."⁹⁶ This affirmed that West Papuans are indigenous people, who lived there, descended from the *Inombo* who first arrived and occupied the territory, long before the arrival of any other

⁸⁷ See Bruce M. Beehler, above n 84, at 253 and 254.

⁸⁸ L. Steven Danver *Native Peoples of the World: An Encyclopaedia of Groups, Cultures and Contemporary Issues*. (New York: Routledge, 2013) at 13.

⁸⁹ Maire Leadbeater "See No Evil: New Zealand's Betrayal of the People of West Papua" (2017) 27-39 at 30.

⁹⁰ Johnny Blades "Melanesia's test: The political quandary of West Papua" (2014) 20 *PJR* 23 at 24.

⁹¹ Robin Soborne *Indonesia's Secret War: The Guerilla Struggle in Irian Jaya* (Allen & Unwin Australia Pty, New South Wales, 1985) at 1.

⁹² Bernard Narokobi *The Melanesian way: total cosmic vision of life* (Boroko, PNG.: Institute of Papua New Guinea, 1980) as cited in Dobrin and others "The Legacy of Bernard Narokobi and the Melanesian Way" (2020) 55 *JPH* 149 at 156.

⁹³ See Maire Leadbeater "See No Evil: New Zealand's Betrayal of the People of West Papua", above n 89, at 30.

⁹⁴ *Inombo Alom* refers to the roots of the ancestors who first arrived in a particular territory or land (New Guinea Island).

⁹⁵ Bruce M. Beehler *New Guinea: Nature and Culture of Earth's Grandest Island* (Princeton University Press, New Jersey, 2020) at 248.

⁹⁶ John Wilkes *New Guinea and Australia* (Angus and Robertson, Sydney, 1958) at 47.

segments of society. Especially the Europeans (the Dutch occupation) and Asians (Indonesia reoccupation).

1.2.2.4. Indigenous West Papuans as Sovereign People

Before dual colonisations of West Papua in the 1820s by the Dutch,⁹⁷ and the 1960s by Indonesia,⁹⁸ indigenous West Papuans were already self-determined people. They were highly organised within tribal communities, self-sufficient in a social system based on communal land tenure with their economic, cultural, religion and political entities that had been well-maintained for generations.⁹⁹ Each tribal community member was intimately connected to their traditional lands with its sacred places, ceremonial areas, burial places, gardens and hunting ground, just similar to indigenous Māori in Aotearoa New Zealand and other indigenous Pacific Islanders (IPI).¹⁰⁰ With the limited sources, the thesis elaborating a short analysis on the author's own tribe to describe the general independent entity of indigenous West Papuans.

In a tribal hierarchy setting, generally it goes from the biggest tribes followed by the number of sub-tribes and the small tribes. In the central highlands of West Papua, for instance, the Danni is one of the biggest tribes,¹⁰¹ and then the Lanni Tribes¹⁰² down to Murib-Tabuni and then Giniagalo where I belong to as the lowest rank.¹⁰³ These tribes were independent entities before alien colonisations, where each tribe such as Giniagalo makes decisions for Giniagalo, or Murib-Tabuni make decisions for Murib-Tabuni according to their own rules and interests. For instance, to maintain peace and enforce legal and social order, they were governed by their

⁹⁷ Kylie McKenna "Corporate Security Practises and Human Rights in West Papua" (2015) 15 CSD 359-385.

⁹⁸ May Ronald James "The West New Guinea Debacle: Dutch Colonisation and Indonesia 1945-162" (2004) 16 *The Contemporary Pacific* 207 at 208.

⁹⁹ Carmel Budiardjo and Liem S Liong *West Papua: The Obliteration of a People* (3rd ed, TAPOL, London, 1988) at 1.

¹⁰⁰ See Maire Leadbeater, *See No Evil: New Zealand's Betrayal of the People of West Papua*, above n 47 at 29.

¹⁰¹ Leslie Butt "KB kills: Political violence, birth control, and the Baliem Valley Dani" (2001) 2 *APJA* 63 at 63.

¹⁰² Julie Adams and Maria Wenda "If They Are Human, They Will Feel It": A Conversation with Maria Wenda" (2011) 12 *APJA* 402 at 403.

¹⁰³ Giniagalo is the smallest tribe from the Dani Tribal hierarchy (biggest tribe in West Papua). In this tribe, it goes from the Dani tribe as the biggest one – Lani Tribe – Murib-Tabuni and - Giniagalo the lowest rank or the smallest tribe. There are similar hierarchies to other sub-tribes under the Dani tribe.

own legal principle known as *Mage Wene* as a law. Mage means “Peace or Do Not”, and Wene means, “voice or announcement; principle and or instruction.” Thus, Mage Wene is “Principle of Peace”¹⁰⁴ With such a principle, indigenous Papuans are consciously mindful to distinguish between legal and illegal. For instance, the prohibitions to take human life, stealing of others belongings, and duty of not harming others including a rape prohibition. If the principles of ‘Mage Wene’ are violated, there are strict legal consequences for those who have committed those crimes, which the settlement is commonly made under the authority of the tribal chief, which requires them to return in the form of compensation.

A tribe can also make a decision as to why and when to engage in a war and when to stop a war. Such tribal warfare is also governed by a set of legal requirements. For instance, when they go to a tribal war and enter the enemy's territory, women, children and older people are not allowed to become the target or even be intimidated; the sacred sites and the spiritual places are not allowed to be destroyed, and no attack to be carried out in the dark or at night time.

A tribe is a self-governing entity, but there is also a relationship between tribes or among tribes that while retaining their own independence, they can work interdependently to make joint decisions on matters of common interests. For example, the peaceful means of resolving tribal wars are also set out under their legal systems,¹⁰⁵ mostly held with the traditional peace agreement known, *Wim Mage*¹⁰⁶ simply means “No More War” and is often involved with the symbolic fracturing of the arrow and spear in the presence of mass witnesses of all conflicting parties (tribal warriors).

In ceremonial events for a common purpose, the collective responsibility to protect, arrange and utilise their lands,¹⁰⁷ all tribal members come together to the *Kunume*¹⁰⁸ a (traditional circle house), similar to the *Marae* for indigenous Māori to make a collective agreement with the ritual ceremony to get both blessings and permission before making a new garden. Such a ritual ceremony is crucial to respect the relationship between them and the lands and environment

¹⁰⁴ Mage Wene is a Lanni Language that is spoken within the Lani Tribes in the central highlands of West Papua. This principle has also often been referred to as “Mage Wene o Maan Peregerak”. Literally means this principle that has existed from the beginning of the ancient times that preserved well.

¹⁰⁵ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2017) at 29.

¹⁰⁶ Wim Mage is a Lanni Language of Lani Tribe, which is referring to a Peace Agreement process that had been practised throughout generations. It is a significant ceremony in an attempt to create peace among the tribal groups, in which the ultimate agreement is respected among the involved tribal groups.

¹⁰⁷ Bruce M. Beehler *New Guinea: Nature and Culture of Earth's Grandest Island* (Princeton University Press, New Jersey, 2020) at 251.

¹⁰⁸ Kunume is a traditional circle-house made for men. It is the place where any issues can be discussed and solved based on the collective consultation or agreement.

they would enter. Because the lands through indigenous Papuans' worldview is where they have come from. It is a belief that their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands.¹⁰⁹ The land is therefore, their sacred mother, life giver and the source of their survival. It is everything and their ties were held unbreakable and non-transferable, and the tribes made careful arrangements to guard and utilise their land and territory.¹¹⁰

Economically they were sufficient. Most of the interior indigenous highlanders had developed elaborate terraced gardens to grow yams and sweet potatoes and raise pigs as livestock. Meanwhile, the coastal indigenous Papuans were dependent on fishing and the cultivation of sago as important sources of food.¹¹¹ However, the colonisations or re-colonisation of West Papua is a threat to those political and legal philosophies that are required to find ways to practise some of those important inherited values.

¹⁰⁹ James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2004) at 3.

¹¹⁰ Alexandra Xanthaki *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, New York, 2007) at 237.

¹¹¹ Maire Leadbeater, above n 47, at 29.

1.3. Colonisations (Outside Intervention)

1.3.1. The Colonisation

1.3.1.1. Colonisation and its Nature

Colonialism, in a broader sense, can be described as a relation between two or more groups of unequal power in which one not only controls and rules the other, but also endeavours to impose its cultural order onto the subordinate group(s).¹¹² As colonialism has taken many forms, it can also be described in a number of ways. In a modern application, the Oxford English Dictionary (OED) defines colony as:

“A settlement in a new country; a body of people who settle in a new locality, forming a community subject to or connected with their parent state; the community so formed, consisting of the original settlers and their descendants and successors, as long as the connection with the parent state is kept up.”¹¹³

In his theoretical overview, Professor Jürgen Osterhamel defines: “colonisation as ‘a process of territorial acquisition’, colony as ‘a particular type of socio-political organisation’, and colonialism as ‘a system of domination.’”¹¹⁴ Osterhamel notes further that colonialism is a relationship in which the entire society is robbed of its historical line of development and externally manipulated.¹¹⁵ The settler colonial theory, developed by Lorenzo Veracini and many others asserted that, “colonialism foregrounds the fundamentally violent nature of appropriating people’s land and usurping their sovereignty.”¹¹⁶

Moreover, settler success involves obliterating indigenous presence both physically and epistemologically, affecting what Patrick Wolfe has called the “elimination of the native.”¹¹⁷ Philosopher Jean-Paul Sartre, in a similar sense points out; “colonialism by its nature is

¹¹² Sally Engle Merry “Law and Colonialism” (1991) 25 LSA 889 at 895.

¹¹³ *OED Online*, Oxford University Press, December 2021, <www.oed.com/view/Entry/36547>.

¹¹⁴ Natsu Taylor Saito *Settler Colonialism. In: Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (New York University Press, New York, 2020) at 43.

¹¹⁵ At 44

¹¹⁶ Lucy Taylor “The Welsh Way of Colonisation in Patagonia: The International Politics of Moral Superiority” (2019) 47 JICH 1073 at 1079.

¹¹⁷ Lynette Russell “Patrick Wolfe (1949 - 2016)” (2017) 48 AHS 115 at 116.

genocidal, perpetuating the distinction between the colonisers and the colonised from the social, political and economic institutions.”¹¹⁸ Raphael Lemkin describes, “Colonisation is criminal to destroy, cripple, or degrade entire nations, racial and religious groups, and thereby eradicate their cultures and the contribution they had made or might make to humanity.”¹¹⁹ According to Stokely Carmichael, colonisation is “not just the economic raping of someone” but the “destroying of the person’s culture, his language, his history, his identification and his total humanity.”¹²⁰ Corresponding to these scholars’ views, colonialism remains an ongoing reality for many societies in the 21st century. This is especially so for indigenous peoples globally, who are abandoned and continue to experience disparity in all facets of life under the established system of colonial traditions.

It is historically a unique approach to correlate ‘colonialism’ in a narrower sense to West Papua’s situation. Where the Dutch colonisation did not last long,¹²¹ suggesting the costs of colonialism were not experienced by indigenous Papuans. But colonial subjugation and racial domination began in reality, when Indonesia re-colonised the territory in the 1960s.¹²² This is to say that, in light of the colonial nature described by those philosophers, Indonesia’s ongoing colonisation in West Papua means genocide, violence, greed, cultural loss and destruction, racial discrimination, and inequality in social; political and economic realities.

¹¹⁸ See Natsu Taylor Saito, above n 114, at 53.

¹¹⁹ Thomas M Butcher “A ‘synchronized attack’: On Raphael Lemkin’s holistic conception of genocide” (2013) 15 GJR 253 at 261.

¹²⁰ See Natsu Taylor Saito, above n 114, at 43.

¹²¹ Danilyn Rutherford *Living in the Stone Age: Reflections on the Origins of a Colonial Fantasy* (2nd ed, Chicago Press, Chicago, 2019) at 50.

¹²² Resolution A/RES/1752/ (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

1.3.1.2. Prior to the Dutch Colonisation

The Oceanic region of the Pacific, consisting of mostly small islands, is the home of indigenous Pacific islanders (Pacifica) in the large blue ocean.¹²³ This stretches from Hawai'i and Mariana Islands in the North to Aotearoa New Zealand to the South; and from New Guinea Island in the West to Rapa Nui Island to the East.¹²⁴ These islanders have encountered dramatic challenges following European explorations in the 16-17th centuries,¹²⁵ and have a common history of colonisation imposed by the following formal colonisations occurring mostly in the 19th century.¹²⁶ Many still remain under the alien rules and have ongoing struggles for secession. These include West Papua, Hawai'i, Guam, Northern Mariana Islands, Rapa Nui Island, French Polynesia, and Kanaky New Caledonia.¹²⁷

New Guinea Island also reflects the imperial struggles among the Europeans in the Pacific. According to K.W Galis, there are three phases of European explorations.¹²⁸ He classified the Spanish and Portuguese in the 16th century,¹²⁹ the Dutch during the 17th and the first half of the 18th centuries,¹³⁰ and the English and French voyages in the second half of the 18th and the first half of the 19th centuries.¹³¹ Subsequent to these European intrusions, the island of New Guinea which was occupied by indigenous black Melanesian¹³² encountered great

¹²³ Oceania is the most preferred term used by Indigenous Islanders in the Pacific, including Australia and New Zealand.

¹²⁴ Sarah Runzheimer and Jörg Krieger "Athletics on the Pacific Islands – A Historical Approach" (2020) 37 IJHS 60 at 63.

¹²⁵ Richard Lansdown (ed) *Strangers in the South Seas: The Idea of the Pacific in Western Thought* (University of Hawaii Press, Honolulu, 2006) at 7.

¹²⁶ At 232.

¹²⁷ Peace Movement Aotearoa Nuclear Free and Independent Pacific Day 2019 (Online ed, Peace Movement Aotearoa, Wellington, 2019) at 1.

¹²⁸ Jan Pouwer "The Colonisation, Decolonization, and Recolonization of West New Guinea" (2008) 34 JPH 157 at 159.

¹²⁹ Clive Moore *New Guinea: Crossing Boundaries and History* (University of Hawai'i Press, Honolulu, 2003) at 75.

¹³⁰ "West Papua." Britannica Academic, Encyclopaedia Britannica, 5 May. 2012. <www.academic-eb-com>.

¹³¹ See Jan Pouwer, above n 128, at 159.

¹³² The term Melanesia is the colonial term which means the black-dark skinned and curly-haired people of Papuans, who have been in the territory for tens of thousands of years back as the first nation people.

challenges,¹³³ as the island became an arena for imperial struggles between those European powers.¹³⁴

Eventually, in the second decade of the 19th century, New Guinea Island was partitioned, the indigenous inhabitants split up and their cultural bounds cut off by the Western concept of allocating the territory among three claimant Western powers, and became three administrative divisions of North, West and the South.¹³⁵ The Dutch claimed control of the Western half, which became the Netherlands New Guinea (NNG) in 1824.¹³⁶ Meanwhile, in the Eastern half, Papua and New Guinea were originally two separate colonial entities until 1942. Papua was a British protectorate as East New Guinea (ENG) and subsequently an Australian colony. New Guinea was a German protectorate as German New Guinea (GNG) from 1884 – 1921 and later a mandate of the League of Nations (LN) and then UN Trusteeship.¹³⁷ After World War One (WWI), the German New Guinea was ceded to the British and Australia through the League of Nations and thus Australia fully controlled the whole of the Eastern half until 1975,¹³⁸ and now an independent state of Papua New Guinea (PNG).¹³⁹

¹³³ Hope Geoffrey S (ed) “History.” *New Guinea: Nature and Culture of Earth's Grandest Island*, by Bruce M. Beehler and Tim Laman, (Princeton University Press, Princeton; New Jersey, 2020) at 58.

¹³⁴ Clive Moore *New Guinea: Crossing Boundaries and History* (University of Hawai'i Press, Honolulu, 2003) at 95.

¹³⁵ Jan Pouwer “The Colonisation, Decolonization, and Recolonization of West New Guinea” (2008) 34 JPH 157 at 159.

¹³⁶ West Papua is the name of the territory of the western half of the Island of New Guinea. Prior to the Indonesia occupation, West Papua also called West New Guinea and then Dutch New Guinea or the Netherlands New Guinea after the Dutch laid its claim.

¹³⁷ See Clive Moore, above n 134, at 149.

¹³⁸ Maire Leadbeater “See No Evil: New Zealand’s Betrayal of the People of West Papua” (2017) 27-39 at 17.

¹³⁹ Peter McDermott “Australian Citizenship and the Independence of Papua New Guinea” (2009) 32 UNSWLJ 50 at 57-58.

1.3.1.3. The Dutch Colonisations

1.3.1.3.1. The Dutch in the Dutch Indies (Indonesia)

In order to contravene the Indonesian claim over West Papua, and to establish the historical-legal arguments in context, it is necessary to distinguish the different nature of the Dutch colonisations of the Dutch New Guinea (West Papua) and the Dutch East Indies (Indonesia). As part of the overseas invasion, the Dutch invaded the Indies (Indonesia) as early as the 17th century,¹⁴⁰ under its Vereenigde Oost-India Compagnie (VOC) or United East India Company (UEIC) in seeking to control the valuable spice trade.¹⁴¹ The VOC had set up an administration centre in the vibrant trading port of Batavia (Jakarta) and expanded its exploitation ports across the Malay archipelagos while brutally oppressing the local inhabitants, and many tens of thousands have died.¹⁴² It took over two centuries from the 1600s to the 1800s before the Dutch formally claimed full control over the archipelagos by eliminating the VOC and making it the Netherlands East Indies (Indonesia) to run its administrative government.¹⁴³ The Dutch continued utilising its power to suppress Indonesians, maximised the use of the Indonesian criminals as forced labourers to minimise the costs under the King's proclamation in 1828.¹⁴⁴

The Indonesians had experienced more oppression, they were sold as slaves and, in some instances, had been tragically executed. Willard Hanna, a historian, has estimated that about 14,000 of 15,000 of the original population of local Bandanese in the easternmost island were slaughtered under the Dutch colonial power.¹⁴⁵ Other evidence indicates that the local inhabitants of the Moluccas severely suffered from the brutal methods imposed by the Dutch authority, estimating at least 100,000 of the Moluccans were killed in the beginning of the 17th

¹⁴⁰ Pieter C Emmer and Jos J.L Gommans *The Dutch Overseas Empire, 1600-1800* (Cambridge University Press, England, 2020) at 10.

¹⁴¹ Nordholt Henk Schulte "Ulbe Bosma and Remco Raben (2008) Being 'Dutch' in the Indies: A History of Creolisation and Empire, 1500-1920. Singapore: NUS Press. (Translated from the Dutch by Wendie Shaffer)" (2012) 40 AJSC 144 at 144.

¹⁴² Azlan Tajuddin, Jemie Stern "From Brown Dutchmen to Indo-Americans: Changing Identity of the Dutch-Indonesian (Indo) Diaspora in America" (2015) 28 (4) IJPCS 349 at 353.

¹⁴³ At 354.

¹⁴⁴ Matthias Van Rossum "The Carceral Colony: Colonial Exploitation, Coercion, and Control in the Dutch East Indies, 1810s-1940s" (2018) 63 IRSH 65 at 75.

¹⁴⁵ Des Alwi *Friends and Exiles: A Memoir of the Nutmeg Isles and the Indonesian Nationalist Movement*, edited by Barbara S. Harvey, (Cornell University Press, Ithaca, New York, 2008) 1-8. *JSTOR* at 2.

century.¹⁴⁶ The Netherlands Indies was one of The Hague's biggest colonial territories overseas. Many accounts indicate that Indonesia was among the category of the most efficaciously exploited territory in the Dutch colonial era.¹⁴⁷ The Dutch imperial invasion, and its treatment towards the local populations of Indonesia can undoubtedly be characterised as the most extractive towards its natural resources and oppressive towards its peoples.

After centuries of being under the foreign colonial hegemony,¹⁴⁸ the Indonesians understood that the colonial treatments were unacceptable and hence an independence struggle quickly emerged among the Indonesian nationalists.¹⁴⁹ The first mass anti Dutch movement emerged through religiously based movements, especially the Sarekat Islam as the Muslim Union in 1912.¹⁵⁰ Indonesia, capitalised on the Japanese defeat at the end of the World War II to resist the Dutch attempt to resume its colony.¹⁵¹ Soekarno and Mohammad Hatta declared independence of Indonesia on the 17th August 1945, where both Soekarno and Hatta were appointed as president and vice-president of the country.¹⁵² The Dutch officials did not accept the announcement instead denounced it and accused Soekarno as a criminal and the Dutch authority jailed him.¹⁵³ After four years of national liberation struggle, the conflict attracted the UN's attention and led to the formation of the UN Commission for Indonesia (UNCI) and established a 1949 Round Table Conference.¹⁵⁴ Ultimately, through this UN brokered of the Round Table Conference (RTC), the delegations of the parties agreed to transfer the sovereignty of the Dutch Indies to the United States of Indonesia (USI).¹⁵⁵ It was Indonesia's triumph to gain its independence, but the sovereignty of West New Guinea was not included

¹⁴⁶ Ewout Frankema and Frans Buelens *Colonial Exploitation and economic Development the Belgian Congo and the Netherlands Indies compared* (Taylor & Francis Group, New York, 2013) at 42.

¹⁴⁷ At 3.

¹⁴⁸ Robert C.M, Weebers & Yahaya Ahmad "Interpretation of Simon Stevin's ideas on the Verenigde Oostindische Compagnie (United East Indies Company) settlement of Malacca" (2014) 29 PP 543 at 544.

¹⁴⁹ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 41.

¹⁵⁰ Anthony J. S. Reid *Indonesian National Revolution 1945 - 50* (Longman Australia Pty Limited, Victoria, 1974) at 4.

¹⁵¹ Michael Karabinos "The Djogdja Documenten: The Dutch-Indonesian Relationship Following Independence Through an Archival Lens" (2015) 50 ICA 372 at 372.

¹⁵² George McT Kahin "Sukarno's Proclamation of Indonesian Independence" (2000) 69 *Indonesia* (Ithaca) 1 at 3.

¹⁵³ See Maire Leadbeater, above n 149, at 41.

¹⁵⁴ *United Nations Security Council: United Nations Commission for Indonesia, Appendices to the Special Report to the Security Council on the Round Table Conference S/1417/Add1*, (1949).

¹⁵⁵ See Maire Leadbeater, above n 149, at 44.

in that transfer.¹⁵⁶ This affirms that West Papua became the only remaining colonial territory of the Dutch.

1.3.1.3.2. The Dutch in the Dutch New Guinea (West Papua)

The second decade of the 19th century was a genesis of imperial struggles among the European colonists over New Guinea Island; the Netherlands claimed the Western half of the island in 1824.¹⁵⁷ That succession came as an outcome of the Dutch determination in seeking a safe haven and new colonial territory.¹⁵⁸ The Dutch managed to set up an outpost, Fort Dubus, at Triton Bay on the southern coast of the Birds Head Peninsula.¹⁵⁹ In 1828, the Dutch formally claimed by extending the territory further east to the 141st meridian, and it officially became the Netherlands New Guinea.¹⁶⁰ Since then the Dutch successfully maintained only colonial territory in the south Pacific.¹⁶¹

Initially, the reason behind the Dutch struggle to take West Papua rested on gaining new colonial soil with an economic potential, as well as to avert the probability of claim by its European rivals.¹⁶² The other attraction was the close proximity of the western end of New Guinea and the Moluccas as part of the Dutch occupied archipelagos of Indonesia,¹⁶³ and the reliance on Sultan Tidore's claim of the west coast of New Guinea into the conversation to justify the ownership, despite the later denial of Tidore's influence in West New Guinea.¹⁶⁴

¹⁵⁶ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 727.

¹⁵⁷ Kylie McKenna "Corporate Security Practises and Human Rights in West Papua" (2015) 15 CSD 359-385.

¹⁵⁸ Jan Pouwer "The Colonisation, Decolonization, and Recolonization of West New Guinea" (2008) 34 JPH 157 at 159.

¹⁵⁹ Maire Leadbeater "See No Evil: New Zealand's Betrayal of the People of West Papua" (2017) 27-39 at 33.

¹⁶⁰ Carmel Budiardjo and Liem S Liong *West Papua: The Obliteration of a People* (3rd ed, TAPOL, London, 1988) at 3.

¹⁶¹ Emma Kluge "West Papua and the International History of Decolonization, 1961-69" (2020) 42:6 IHR 1155 at 1157.

¹⁶² John Saltford John Subritzki "The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal" (2003) 30 NZIR 29 at 29.

¹⁶³ Andreas Harsono *Race, Islam and Power: Ethnic and Religious Violence in Post-Suharto Indonesia* (Monas University Publishing, Victoria, 2019) at 203.

¹⁶⁴ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 12.

After the Netherlands secured West New Guinea,¹⁶⁵ indigenous Papuans were still undisturbed for nearly a century until the early 1900s.¹⁶⁶ The Dutch officials decided to put aside its newly colonial possession as a separate territory, and were not willing to include it into its existing territory of the Netherlands East Indies (Indonesia).¹⁶⁷ This was in view of the fact that the Dutch laid its claim over the territory after nearly three decades in 1828, after its formal colonisation of Indonesia in 1800.¹⁶⁸ (Practically from the 1600s – 1900s).¹⁶⁹ The Dutch also knew nothing about the natural resources and the benefits, nor of the challenges, New Guinea had for them. The Dutch officials were also aware that West Papua was geographically linked to the Pacific, and its inhabitants belonged to a different ethnic group that had no cultural connection with its colonised Asian ethnic group.¹⁷⁰

During Indonesia's anti-Dutch movement and up until the Round Table Conference, the subject of West Papua was mostly absent from the conversation. The Papuans were also not included in the Round Table in 1949.¹⁷¹ The Papuans have never been associated with any liberation groups,¹⁷² and never included as part of Indonesian territory.¹⁷³ From the other main Indonesian grouping movements, representing East Indies including Bali, Timor, Celebes, Lombok, Moluccas and others, West New Guinea was excluded from their list of Indonesian territory when they were lobbying at the United Nations Security Council in 1947.¹⁷⁴ It reflected in the Round Table agreement, article 2 of section II regarding the territory of the state, where the Netherlands New Guinea did not mention the territory of Indonesia.¹⁷⁵ The first vice president, Mohamed Hatta in his own words even argued that; “the Papuans were not Indonesian” he

¹⁶⁵ See Kylie McKenna, above n 153, at 385.

¹⁶⁶ Maire Leadbeater “See No Evil: New Zealand’s Betrayal of the People of West Papua” (2017) 27-39 at 34.

¹⁶⁷ Danilyn Rutherford *Laughing at Leviathan: Sovereignty and Audience in West Papua* (The University of Chicago Press, Chicago, 2012) at 50.

¹⁶⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Routledge, NY, 2002) at 1.

¹⁶⁹ See Jan Pouwer, above n 154, at 159.

¹⁷⁰ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 389.

¹⁷¹ Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 45.

¹⁷² At 46.

¹⁷³ Catherine Scott and Neles Tebay “The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace” (2005) 94 RTL 599 at 600.

¹⁷⁴ See John Saltford, above n 170, at 5.

¹⁷⁵ *Security Council of the United Nations Commission for Indonesia: Round Table Conference S/1417/Add1*, (1949) at [22].

further affirmed that “the Papuans had a right to their own state.”¹⁷⁶ Therefore the legal status of West Papua is historically and legally unrelated to Indonesia’s claim.

From the 1900s-1920s, the Dutch began to set up a nominal administration through a combined approach involving the civil servants, scientists, military detachment and missionaries employed to increase its settlements.¹⁷⁷ After WWII, the Dutch officials who had managed to survive the war, were neither mentally nor physically capable of resuming the mission more quickly.¹⁷⁸ As the Dutch made this move, the Dutch parliament in The Hague emerged with a debate over the proportion of the budget to be allocated separately for West New Guinea.¹⁷⁹ According to the Dutch official account, “the Netherlands was by now prepared to do something for the development of the country and gave immediate priority for the wellbeing of the population.”¹⁸⁰ The period after 1920 is regarded as one of great generosity on the part of the colonial Dutch.¹⁸¹ When the Dutch moved into commencing the colonial project, they designed a promising development in the area. Including forming three administrative districts of north, west and south under a District Commissioner, Lulofs in 1923.¹⁸²

Dutch officials were determined “to advance education in all moral and social virtues; sensible development, making life more pleasant, and cultural fabric of society.”¹⁸³ With that, the indigenous Papuan kids received extremely elementary education lessons in civilising the local population.¹⁸⁴ In the 1930s, the Dutch intensively penetrated further from the coastal lowlands into the interior highlands where they discovered the presence of indigenous populations (Lanni Tribes) in the central highlands,¹⁸⁵ which described as, “one of the most conspicuous things about the cultures of preliterate peoples like the Danni or the Lanni tribes is that it is their whole way of life that is closely linked with creation - unique, evanescent, dependent for

¹⁷⁶ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 5.

¹⁷⁷ Jan Pouwer “The Colonisation, Decolonization, and Recolonization of West New Guinea” (2008) 34 JPH 157 at 161.

¹⁷⁸ At 166.

¹⁷⁹ See John Saltford, above n 170 at 2.

¹⁸⁰ Jan Pouwer “The Colonisation, Decolonization, and Recolonization of West New Guinea” (2008) 34 JPH 157 at 163.

¹⁸¹ Danilyn Rutherford *Living in the Stone Age: Reflections on the Origins of a Colonial Fantasy* (2nd ed, Chicago Press, Chicago, 2019) at 51.

¹⁸² Jan Pouwer “The Colonisation, Decolonization, and Recolonization of West New Guinea” (2008) 34 JPH 157 at 163.

¹⁸³ At 164.

¹⁸⁴ At 167.

¹⁸⁵ Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 32.

its very existence entirely on the continued practise of each generation.”¹⁸⁶ Until the 1940s, indigenous West Papuans were gradually integrated well in more friendly attitudes with the hope that it would bring prosperity, greater progress, and social equality.¹⁸⁷

It is clear that during the early settlement period, the Dutch were good-natured towards indigenous peoples, and that indigenous Papuans suffered at the hands of the Indonesians by way of the Ambonians. The Ambonians often forced the locals to break radically with their preserved cultures triggering conflicts. This led to immediate responses from the Dutch to train indigenous Papuans instead of utilising those Indonesians.¹⁸⁸ With such historical and ongoing experience, indigenous West Papuans views on Indonesians present in West Papua is a serious threat.

Dutch officials were of the mind that a tale of the colonial claim of West Papua is hugely distant to Indonesia, where West Papua claimed for nearly three decades in 1928.¹⁸⁹ The Dutch, from the early on, had argued that indigenous West Papuans were not Indonesians. They are ethnically and culturally different, geographically distant and historically unrelated to Indonesia.¹⁹⁰ This argument led to the exclusion of West New Guinea under the Round Table Agreement, which articulated in article two of the Round Table Conference that, “the status quo of the residency of New Guinea shall be maintained.”¹⁹¹ Implying, West New Guinea continues to be under the Netherlands control.

The Dutch colonial occupation in Indonesia over the three centuries long indicates there is no mutual history of colonial treatment between the indigenous Melanesian Papuans and the colonised people of Indonesia.¹⁹² The Indonesian government insists that West Papua was part of the territory (Indonesia), cannot be justified,¹⁹³ as the claim only rested on the Sultan Tidore who had trade relations with the very few Papuans in the coastal area of Bird’s Head Peninsula.¹⁹⁴ The Dutch historian Meinisma opposed the claim, asserting:

¹⁸⁶ At 33.

¹⁸⁷ At 166.

¹⁸⁸ At 162.

¹⁸⁹ At 33.

¹⁹⁰ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 389.

¹⁹¹ At 391.

¹⁹² At 389.

¹⁹³ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 8.

¹⁹⁴ Danilyn Rutherford “An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua” *Indonesia*, no. 90, Trans-Regional Indonesia over One Thousand Years (October 2010) 173 at 174.

“in reality, the Sultan’s influence was limited to a few coastal settlements”¹⁹⁵ He further revealed in a secret British memorandum on the issue, “There is no evidence of the Sultan’s authority having ever been recognised by the natives on any part of the (New Guinea) Mainland (Beyond the Bird’s Head Peninsula), or of his people having ever visited any part of it.”¹⁹⁶

Such a claim cannot and will not be accepted by indigenous people of West Papua, for the fact that they have been self-governed within their respective tribal communities, with their tribal leader who has influence. Any strangers who entered their territory are considered as enemies and should be expelled or otherwise exterminated.

1.3.2. The Decolonisation

1.3.2.1. Disputes on Decolonisation

The dispute began with the establishment of the Round Table Conference under the UN Commission for Indonesia in 1949.¹⁹⁷ It was after the deadlock of The Hague’s attempt to resume its colonial activity in former territory (Indonesia), following the Japanese capitulation in World War Two.¹⁹⁸ The two parties had reached a consensus based on the Renville Agreement that what used to be the Netherlands East Indies should become an independent state of Indonesia.¹⁹⁹ Eventually, on 27 December 1949, the Dutch formally transferred its sovereignty to the United States of Indonesia.²⁰⁰ Since it was an unhappy ending for The Hague, they were unwilling to include Dutch New Guinea into the newly created federal Republic of

¹⁹⁵ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 29.

¹⁹⁶ At 30.

¹⁹⁷ *United Nations Security Council: United Nations Commission for Indonesia, Appendices to the Special Report to the Security Council on the Round Table Conference S/1417/Add1*, (1949).

¹⁹⁸ Fred L. Borch *Military Trials of War Criminals in the Netherlands East Indies 1946 - 1949* (Oxford Scholarship Online, 2017) at 23.

¹⁹⁹ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 390.

²⁰⁰ *United Nations Security Council: United Nations Commission for Indonesia, Appendices to the Special Report to the Security Council on the Round Table Conference S/1417/Add1*, (1949).

Indonesia.²⁰¹ Jakarta did not welcome the exclusion of West New Guinea either, and viewed it as a continuation of colonialism. Indonesia argued it should be included into the agreement of the transfer.²⁰² But, perhaps in their eagerness to attain the sovereignty of Indonesia republic, Indonesia's delegation conveyed little insistence on West Papua.

Two parties agreed to negotiate the legal status of West New Guinea later, which added a second article in the Appendix VII of the Charter that: in view of various considerations it enumerated that the status quo of West New Guinea to be maintained and its political status should be determined within a year through negotiation.²⁰³ The Indonesian government recognised the agreement that: "The clause in article 2 of the Draft Charter of Transfer of Sovereignty, reading 'the status quo of the residency of New Guinea shall be maintained' means: 'through continuing under the Government of the Netherlands' (Appendix XXIV: 164–165)."²⁰⁴ In these negotiations, the sovereignty of West New Guinea was a central legal matter, but neither party made any mention of it, therefore the sovereignty issue was left unresolved.²⁰⁵

The Dutch should have received the bitter cup after the success of the Japanese aggression to eliminate European colonies in Southeast Asia, Indonesia in particular.²⁰⁶ It was during this time of hot political tension, that West New Guinea was inescapably herded into an inauspicious situation, where the Dutch did not voluntarily relinquish its colonial possession of Indies to Indonesia, and wanted to retain West Papua as its new colony.²⁰⁷ Conversely, Indonesia's view on the Dutch colonial rule in Indies over the centuries was that it had been aggressive and oppressive and should be abolished completely,²⁰⁸ and therefore the Dutch

²⁰¹ Jaarsma S. A "An Ethnographer's Tale: Ethnographic Research in the Netherlands (West New Guinea 1950-1962)" (1991) 62 *Oceania* 128 at 130.

²⁰² United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 391.

²⁰³ Danilyn Rutherford "An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua" *Indonesia*, no. 90, *Trans-Regional Indonesia over One Thousand Years* (October 2010) 173 at 175.

²⁰⁴ Julian McKinlay King "A Soul Divided: The UN's Misconduct over West Papua" (2019) 16 *UTS ePress* 59 at 61. "Agreement also included Indonesian recognition that: 'The clause in article 2 of the Draft Charter of Transfer of Sovereignty reading 'the status quo of the residency of New Guinea shall be maintained' means: 'through continuing under the Government of the Netherlands' (Appendix XXIV: 164–165)."

²⁰⁵ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 727.

²⁰⁶ Peter Steele "Memorialising Colonialism: Images of the Japanese Occupation of Indonesia in Japanese Popular Theatre" (2012) 29 *ATJ* 528 at 532.

²⁰⁷ Jaarsma, S. A "An Ethnographer's Tale: Ethnographic Research in the Netherlands (West New Guinea 1950-1962)" (1991) 62 *Oceania* 128 at 130.

²⁰⁸ Paragraph (1) of the definition of "independence" in s 1 of the National Constitution of Indonesia Republic 1945. <<http://luk.tsipil.ugm.ac.id>>.

claim on retaining control over West New Guinea was not welcome, albeit Indonesia's interest for West Papua was very little.²⁰⁹

The decolonisation of West Papua began much earlier in 1946, when the Dutch talked about the preparations for the Papuans' right to self-determination and their interests as the colonists.²¹⁰ A problem at this point, however, was that the Dutch's political topography over West New Guinea was practically invisible. Nonetheless, the Dutch's grudging relinquishment of its former colony (Indonesia) shifted them into a new focus. Based on this, the scholars and historians set different assessments on the Dutch decolonisation of West Papua. Arend Lijphart in his thesis 'The Trauma of Decolonisation', assessed that:

“The Netherlands had no economic or strategic motives to keep West New Guinea. Instead, the government's policy was exclusively caused by an emotional attachment to colonialism that derived from a sense of frustrated national pride after the loss of the Dutch East Indies”²¹¹

While not discounting this stance, there had been some genuine sincerity motivating the Dutch belief in the principle of decolonising the territory.

1.3.2.2. The Dutch Rationales

The Dutch rationalised that an extended post-war period was necessary to prepare the Papuans for decolonisation, ideally as an independent polity with ongoing ties with The Hague.²¹² It had started in 1946, through government policy. Minister Jonkman had made a link between the preparations for the Papuans right to self-determination and the Dutch interests as the colonists, because Indigenous Papuans began to have political awakening.²¹³ This was confirmed by the senior Dutch official J.P.K. van Echoed in 1947 that:

²⁰⁹ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 5.

²¹⁰ See Pieter J Drooglever, above n 205, at 150.

²¹¹ Fenneke Sysling “The Human Wallace Line: Racial Science and Political Afterlife” (2019) 63 JICH 306 at 307.

²¹² At 175.

²¹³ At 150.

“It seems that in practically every area of New Guinea the young people among the Papuans have become politically aware, albeit to varying degrees. More extraordinarily, this is expressed on all sides in the form of a longing to be consulted in all matters and decisions concerning the interest of New Guinea and associated with this regulation of Indonesia”²¹⁴

In 1952, West New Guinea had been incorporated into the Netherlands constitution as a part of the Kingdom of the Netherlands.²¹⁵ It was on the view of the fact that the Dutch were predetermined that; “indigenous Papuans were not Indonesians, and therefore they should not be permitted to be transferred anywhere outside New Guinea before they have become sufficient in the capacity of themselves to take their destiny in their own hands, thus other races do not look down upon them.”²¹⁶

The Dutch further argued that in many ways, indigenous Papuans have nothing in common with those Indonesians.²¹⁷ New Guinea is not a part of Indonesia either geographically or ethnologically.²¹⁸ In fact, under the Batavia declaration in 1910, the Dutch did not include its newly colonial possession of West New Guinea as part of the Netherlands East Indies. Its Colonial boundary was designated from Sabang to Moluccas.²¹⁹ Furthermore, the territory was administered separately from the Dutch East Indies,²²⁰ because indigenous Papuans are ethnically Melanesians and racially distinctive from those Asians,²²¹ as it was argued that the ‘Negroid’ West Papuans belonged to a different race than the ‘Mongoloid’ Indonesians.²²²

The Dutch also pushed for a range of other interests. These included:

“domestic political considerations in The Hague; the Netherlands wanted to retain some measure of control in the Pacific and not to lose its status as a complete colonial power; after the transfer of sovereignty, there were Dutch Eurasians (DE) in Indonesia who wanted to move

²¹⁴ Pieter Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-Determination in West Papua* (Oxford and New York, NY, 2009) at 854 as reviewed in Gerry van Klinken “Three books on Papua” (Bijdragen tot de taal-, land- en volkenkunde, 2010) 529 at 529.

²¹⁵ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 392.

²¹⁶ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 75.

²¹⁷ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 389.

²¹⁸ Amry Vandenbosch “The Netherlands - Indonesian Union: The Hague Agreement, Based on Mutual Compromise, Replaces the Old Colonial Relationship with a “Loose” Union Dependent on the Good Will of Both Parties” (1950) 19 AIPR 1 at 2.

²¹⁹ Markus Haluk “Apakah Indonesia Masa Depan Papua?” (Paper Presented to a Webinar Conference, Holandia, July 2021).

²²⁰ Stephanie Lawson “West Papua, Indonesia and the Melanesian Spearhead Group: Competing Logics in Regional and International Politics” (2016) 70 AJIA 506 at 508.

²²¹ John Martinkus *The Road: The War is Not Ending, it is Beginning. Uprising in West Papua* (Black Inc, Victoria, 2020) at 13.

²²² Vincent Kuitenbrouwer “Beyond the ‘Trauma of Decolonisation’: Dutch Cultural Diplomacy during the West New Guinea Question (1950-62)” (2016) 44 JICH 306 at 312.

to a pre-war colonisation outside the territory of the new state, and politically conscious Papuans who had resisted the power of the Amberi²²³ and demanded for self-determination.”²²⁴

As such, the indigenous West Papuans were conscious of and well-engaged with the Dutch government and made infrastructure developments and with the promise that these were to enable them to grant independence.²²⁵

1.3.2.3. Indonesia’s Claims

Indonesia on the other hand, claimed that under the doctrine of *uti possidetis juris*, the national boundary of Indonesia should be the whole islands of the former colonial territory of the Dutch Indies, and West New Guinea was part of the Dutch East Indies, therefore it belongs to Indonesia.²²⁶ This doctrine, however, has a flawed argument. Michael Freeman, an academic from Essex University asserted that:

“Most States were multinational and polytechnic, and many subordinate and ethno-nationalist perceived the doctrine of *uti possidetis juris* to be an ideology that justified the domination of weak peoples by groups that managed to seize state power. Consequently, secessionist war and non-secessionist repression became pervasive features of the post-colonial world order. The UN states system could not live in peace with the nationalism that it had itself encouraged. It would only recognize states, while it denied to many peoples the rights to their own state”²²⁷

Therefore, the claim under *uti possidetis juris*, is irrelevant to the territorial dispute on the ground that West New Guinea has vastly different tales of colonial claim and time, colonial nature and treatment, and political circumstances. However, to persuade the international community, Indonesia fabricated more counterfeit arguments: that the West New Guinea was

²²³ Amberi is the Biak term for the Indonesians Evangelists, Teachers and Government’s Officials; who betrayed many Indigenous West Papuans to be the Japanese Oppressive slaves. This term is still being used by Indigenous West Papuans today when they refer to all Indonesian migrants in West Papua as ‘Amber or Ambery’.

²²⁴ Jan Pauwer “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH 157 at 166-167.

²²⁵ Elizabeth Brundige and others *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (Lowenstein International Human Rights Clinic Yale Law School, Prepared for the Indonesia Human Rights Network Paper, March 2011) at 12.

²²⁶ Pieter King and others “Comprehending West Papua” (2012) West Papua Project: Centres for Peace and Conflict Studies at 12.

²²⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 8.

an integral part of Indonesia for centuries²²⁸ and made a claim of an historical link, arguing that it was part of the kingdom of Majapahit. But this was an uncertain position as the claim was a littered and unsourced argument.²²⁹ Indonesia further claimed that the Papuans and Indonesians had some cultural links and they used the same language (Indonesian) as their lingual franca.²³⁰ They even made a specious claim that indigenous black Melanesian Papuans look much more like Indonesians than the white Dutch men.²³¹

1.3.2.4. Legal Basis

The decolonisation dispute discussed above suggests that the Dutch motive for new colonial soil did not go away. As Danilyn Rutherford argued, “there was also direct continuity with colonial fantasies about the possibilities of turning New Guinea into a profitable dependency.”²³² While not denying this stance, however, there was a genuine motive of the Dutch to decolonise the territory. J. Drooglever, in his extensive analysis on the history of New Guinea argued:

“Although it cannot be denied that the Dutch policy to some extent was based on resentment against Indonesia, it partly derived from a genuine belief in the principle of Papuan self-determination.”²³³

Despite the bureaucratic fragmentations, several clear principles emerged that constituted the basis for the Dutch policy towards New Guinea. From the very start of the dispute, the Dutch

²²⁸ United Nations General Assembly: On the Twelve Session. First Committee 912th Meeting. Agenda Item 62 on the Question of West Irian (West New Guinea) (A/3644, A/C.1/L.193) at 243.

²²⁹ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 113.

²³⁰ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 389.

²³¹ United Nations General Assembly: On the Ninth Session: 477th Plenary Meeting. Agenda Item 8: Adoption of the Agenda, First Report on the General Committee. (A/2733) at 45.

²³² Danilyn Rutherford *Laughing at Leviathan: Sovereignty and Audience in West Papua* (The University of Chicago Press, Chicago, 2012) at 69-71.

²³³ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 147, 174.

argued that its tutelage over the territory was in accordance with the UN Charter.²³⁴ Official documents referred to Article 73 of the UN Charter, which states that member states that rule ‘non-self-governing territories, recognize the interest of the local population are paramount’ and promote their advancement and self-government.²³⁵

To implement the principle of self-determination, the Dutch undertook with reference to the decolonisation regime, arguing that West New Guinea had to be administered as a Non-Self Governing Territory under article 73 of the United Nations Charter. Thus, in compliance to its legal requirements, it considered that the native Papuans were ill-prepared to practise the right to self-determination and they had to be prepared until they were capable of being granted some form of self-governing by its autochthonous inhabitants.²³⁶ Because the territory had been marginalised from development for a century, it thus deserved to be the focal point of the Dutch administration's efforts for decolonisation.²³⁷

1.3.2.4.1. Article 73 of the United Nations Charter

Since the establishment of the United Nations Charter in 1945, it has become an instrument of international law and a source of binding principles to its member states.²³⁸ Article 73, chapter XI of the UN Charter is the Declaration regarding Non-Self Governing Territories (NSGT), which provides:

“members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter”²³⁹

²³⁴ Vincent Kuitenbrouwer “Beyond the ‘Trauma of Decolonisation’: Dutch Cultural Diplomacy during the West New Guinea Question (1950-62)” (2016) 44 JICH 306 at 312.

²³⁵ Charter of the United Nations, art 73.

²³⁶ Jaarsma, S. A “An Ethnographer’s Tale: Ethnographic Research in the Netherlands (West New Guinea 1950-1962)” (1991) 62 Oceania 128 at 130.

²³⁷ Danilyn Rutherford “An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua” Indonesia, no. 90, Trans-Regional Indonesia over One Thousand Years (October 2010) 173 at 175.

²³⁸ The United Nations Charter <<https://www.un.org>>.

²³⁹ Charter of the United Nations. Article 73.

This provision became a legal basis for the Dutch to prepare the territory for self-governance.²⁴⁰

In honouring article 73 of the charter, the Dutch determined a ten year period as a decade of decolonisation leading to eventual independence that was set to be achieved by 1970.²⁴¹ In the 1950s, the Dutch also attempted to put the question of West New Guinea to be dealt with either by the United Nations Commission on Indonesia, and or by the International Court of Justice (ICJ), however Indonesia was not interested with the proposal.²⁴²

1.3.2.4.2. Employment of Article 73 of the UN Charter

In the fulfilment of legal requirements of the decolonisation regime under article 73 of the UN Charter, and other declarations,²⁴³ the Dutch began preparing the territory for eventual self-rule and brokered a New Deal to promote ‘Papuanisation’, aiming to accelerate educational, economic, sanitary, social and political development of West New Guinea.²⁴⁴ Indigenous West Papuans had been advanced with education preparing them for the upper echelons of government and as civil servants, teachers, bureaucrats, paramedics, police and tradesmen.²⁴⁵ The schooling system was set up at almost every village level, in designated elementary and civilisation schools. The Dutch officials engaged in rapid localization, training indigenous civil servants. The village school system expanded rapidly, producing an education cadre of over 68% indigenous teachers.²⁴⁶

²⁴⁰ See Jaarsma, S. A, above n 236, at 130.

²⁴¹ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 10.

²⁴² Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 214.

²⁴³ Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514(XV), UN Doc A/RES/1514 (20 December 1960).

²⁴⁴ Jan Pauwer “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH 157 at 166-167.

²⁴⁵ Emma Kluge “West Papua and the International History of Decolonization, 1961 -69” (2020) 42 IHR 1155 at 1158.

²⁴⁶ Clive Moore *West New Guinea: European Trade and Settlement, 1520 - 1880* (University of Hawaii’s Press, Honolulu, 2003) at 191.

Economic development concentrated on the cultivation of export crops, including nutmeg, copra, coffee, cocoa and rubber. The development of these crops entailed expansion, quality improvement, increased production, storage management, and the retailing of existing native production.²⁴⁷ The Department of Agriculture formed a ‘core’ of Papuan farmers who provided practical training based on individual initiative, individual selection, and family ties.²⁴⁸ The rapid expansion of opportunities intensified pro-independence sentiments within the territory and several political parties were formed, all of which supported eventual independence.²⁴⁹ A vision for West Papua independence was articulated by the emerging Papuan leaders collectively, under the guidance of Nicholas Tanggahma and Aristarcus Torey, who began to discuss their own destiny.²⁵⁰

When the Dutch made their last-ditch stand in West New Guinea from the 1950s to the early 1960s, they hurried to upgrade educational and employment opportunities for the Papuans who were academically trained and were entrusted to administrative offices.²⁵¹ In 1951, the Dutch governor nominated those educated indigenous Papuans in the position of an Advisory Council for Native Matters (ACNM). The public service was indigenised, to include about 19,000 indigenous Papuans by 1962.²⁵² In February 1961, election took place for the Niue Guinea Raad (NGR) or (New Guinea Council) in Hollandia with 28 elected members, including (three Dutch and two Eurasians) in an atmosphere described in the New York Times as being devoid of racial feeling.²⁵³ ‘Papuans’ was adopted as the name of the people, and ‘West Papua’ as the name of the state. Whatever its limitations, the Council was a genuine attempt to accelerate the establishment of an indigenous political elite eventually to lead an independent West Papua.²⁵⁴

It was significant, as Frederick van der Cloot expresses:

“The significance of the New Guinea Council elections was immense. Despite some shortcomings, the elections were a dazzling success, producing an extensive rise in local political consciousness, a reasonable turnout and a sizable Papuan majority. The polls

²⁴⁷ See Jan Pauwer, above n 244, at 166-169.

²⁴⁸ At 166-170.

²⁴⁹ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Taylor & Francis Group, London, 2003) at 9.

²⁵⁰ Emma Kluge “West Papua and the International History of Decolonization, 1961 -69” (2020) 42 IHR 1155 at 1158.

²⁵¹ Clive Moore *West New Guinea: European Trade and Settlement, 1520 - 1880* (University of Hawaii’s Press, Honolulu, 2003) at 189.

²⁵² At 199.

²⁵³ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 548.

²⁵⁴ See John Saltford, above n 249, at 10.

demonstrated that the Dutch programme for the political development of West New Guinea was indeed a practical proposition. The creation of a national assembly gave the elected and appointed representatives of the inhabitants of West New Guinea, the opportunity to articulate their sentiments on such vital questions as the region's political future and economic development²⁵⁵

Following the establishment of New Guinea Raad, political awareness and the imagination of a new nation grew rapidly among the Papuans.²⁵⁶

In September 1961, the Dutch Foreign Minister, Luns proposed to the UN General Assembly for the Dutch termination of sovereignty and to withdraw from the territory. "The Luns Plan" was to be replaced by the UN Commission that would supervise the administration and organise a plebiscite to decide the final status of the territory.²⁵⁷ In response, the members of the Papuan Council called a meeting for all the key figures from all territories numbering 72 peoples. They have selected 17 persons and formed a National Committee.²⁵⁸ The Committee was tasked to choose the symbols that will reflect the identity of the country and people. They adopted the national symbols. They have agreed for the 'Morning Star' as their flag; for the coat of arms they chose a 'Stylized Crested Pigeon'; 'Oh my Papuan Homeland' (Hai Tanahku Papua) as a national anthem; 'Papuan' as the name of its Indigenous inhabitants and 'West Papua' as preferred name of their country.²⁵⁹ According to the written report, the meeting took place in a dignified, serious mood and in remarkable harmony.²⁶⁰ The moves were in line with the Dutch promise of independence, where the Papuans were to make a stand for their own cause, disconnected from the conflict between the Netherlands and Indonesia.

On the 1st of December 1961, the Morning Star flag was raised alongside the Dutch Three-Colour in Hollandia City for the first time, in the presence of the local officials and members of the New Guinea Council, this occurred in great solemnity and calm.²⁶¹ The Council also voted to support the Luns plan and demanded all nations to respect the right for West Papuans to self-determination.²⁶² In February 1962, the support for West New Guinea's independence

²⁵⁵ Frederik van der Vloodt, 'Political development and sentiment in West New Guinea 1944 - 1961', research essay, MA, History Department, University of Auckland, 1981, at 44.

²⁵⁶ See Pieter J Drooglever, above n 253, at 555.

²⁵⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Routledge, NY, 2002) at 11.

²⁵⁸ See Pieter J Drooglever, above n 253, at 556.

²⁵⁹ Danilyn Rutherford *Laughing at Leviathan: Sovereignty and Audience in West Papua* (The University of Chicago Press, Chicago, 2012) at 92.

²⁶⁰ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 557.

²⁶¹ At 560.

²⁶² See John Saltford, above n 257, at 11.

was noted in a report by an Australian official that: “The Papuans with whom I spoke at the various centres were unanimous in their conviction that they could not permit Indonesia to take over.”²⁶³ Despite the sovereignty still resting under the Dutch, for indigenous Papuans it was a political pinnacle of the West Papuan world that would elevate to full independence as the political steps always had the full approval of the Dutch government.²⁶⁴

To date, indigenous people of West Papua in their struggle for independence, consider and commemorate the 1st of December 1961 as a national day, and their global supporters raise the flag every year. As Richard Chauvel describes, “for many Papuans the 1 December date is a key element in their nationalist historiography.”²⁶⁵ It was the nation-in-waiting and this manifesto concluded:

“On this basis we the Papuan people demand to obtain our own place among the other free peoples and nations. In addition, we, the Papuan people, wish to contribute to the maintenance of the freedom of the world.”²⁶⁶

The Dutch genuine belief for the realisation of the principle of self-determination had been well-placed under the decolonisation regime of the UN Charter. However, it was disrupted and had been derailed by the West-backed Indonesia’s recolonisation.

²⁶³ At 10.

²⁶⁴ See Pieter J Drooglever, above n 260, at 560.

²⁶⁵ Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 81.

²⁶⁶ At 80.

1.3.3. The Recolonisation

1.3.3.1. From the International Law of Decolonisation to the Colonial Law of the New York Agreement

The developing independent state of West Papua, emerging through legitimate process under the international regime of decolonisation article 73 of the UN Charter.²⁶⁷ However, it was disrupted by imposing the 1962 New York Agreement.²⁶⁸ It was a bilateral Treaty between the Netherlands and Indonesia concerning West New Guinea, requiring the territory to be administered by the United Nations and then by Indonesia.²⁶⁹ This Agreement is critical. The derailment from the decolonisation process under the UN Charter, to the re-colonisation process through the 1962 New York Agreement, is no different to say ‘the shifting process from the law of decolonisation - to the law of colonisation (re-colonisation)’.

This argument is made on a number of legal grounds:

First, West Papua was legally considered by the UN General Assembly in 1960 as a Non-Self-Governing Territory, and its inhabitants were dependent.²⁷⁰ Therefore, the only legal regimes capable to determine the final status of the territory should have been through article 73 of the Charter of the United Nations,²⁷¹ and the 1960’s followed-up adoption of the UNGA Resolutions 1514 (XV)²⁷² and 1541 (XV).²⁷³ Secondly, in line with the Vienna Convention and an ICJ’s Opinion, no state has any competence to modify the Non-Self-Governing Territory status of West Papua, except through an Advisory Opinion of the International Court of Justice, and the UN regulations that impose decolonisation under the UN Charter.²⁷⁴

²⁶⁷ Charter of the United Nations, art 73.

²⁶⁸ David Webster “Self-determination Abandoned: The Road to the New York Agreement on West New Guinea (Papua), 1960 -62” (2013) 95 JA 9 at 10.

²⁶⁹ GA Res /1752/ (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

²⁷⁰ GA Res/448 (V). “Development of self-government in Non-Self-Governing Territories”

²⁷¹ Charter of the United Nations, Chapter XI, art 37.

²⁷² GA Res 1514 (XV) of 1960 “Declaration on the Granting Independence to Colonial Countries and Peoples.” <<https://www.ohchr.org>>.

²⁷³ GA Res 1541 (XV) of 1960 “United Nations and Decolonisation” <<https://www.un.org>>.

²⁷⁴ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 84.

Moreover, America formulated the 1962 New York Agreement in such a way as a means to require the Dutch officials lose administering power, and to legitimise Indonesia's eventual administration, after the period of UN interim administration (UNTEA).²⁷⁵ Further, in the draft proposal, the word '*referendum*' or '*plebiscite*' was not spelled out. This was done deliberately for the desired outcome in the end.²⁷⁶ This suggests that the transfer of administration from one hand to another hand would take place without any expressed will of indigenous Papuans, which right was enshrined in International Treaty and International Customary Law.²⁷⁷ Furthermore, in the report to the General Assembly in November 1969 about the Act of Free Choice, the Secretary General used a one-sided or biased narrative with his representative Ortiz Sanz,²⁷⁸ and made no mention of the deliberate breach of international mechanisms mentioned in the Agreement about the conduct of the Act of Free Choice.²⁷⁹

Corresponding to the arguments mentioned above, the 1962 New York Agreement was a normative instrument deliberately established for further colonisation of West Papua. As a result, indigenous people of West Papua had lost their legitimate place in international law in the first place, and their ongoing status as 'colonised people - under the Indonesian rule' is a legal consequence that serves as authentic evidence of these arguments.

Re-colonisation began when the Dutch faced international pressure, especially from the United States.²⁸⁰ As mentioned earlier, the Dutch political frustration of relinquishing its colonial property of Indonesia had (partially) driven its position to retain West New Guinea.²⁸¹ Meanwhile, in Indonesia's views, it was the colonial continuation of the oppressive Dutch that had to be expelled completely.²⁸² West Papua therefore, remained the subject of dispute between The Hague and Jakarta.

²⁷⁵ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 468.

²⁷⁶ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 13.

²⁷⁷ General Assembly resolution 1514 (XV) of 14 December 1960: The Declaration on the Granting of Independence to Colonial Countries and Peoples, Article 1 which states; "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation".

²⁷⁸ See John Saltford, above n 275, at 172.

²⁷⁹ The New York Agreement, art 18d.

²⁸⁰ Jan Pauwer "The Colonisation, Decolonization and Recolonization of West New Guinea" (2008) 34 JPH 157 at 166-171.

²⁸¹ Vincent Kuitenbrouwer "Beyond the 'Trauma of Decolonisation': Dutch Cultural Diplomacy during the West New Guinea Question (1950-62)" (2016) 44 JICH 306 at 307.

²⁸² United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 391.

The New York Agreement was established in 1962, in response to Indonesia's determination to evict the Netherlands, through hard - international diplomacy. Particularly the Soviet Union's arms equipment provided support to Indonesia to liberate West Papua in the 1960s.²⁸³ The crisis provoked considerable alarm in the minds of the US officials. In the broad context, the Cold War was a main concern. America predetermined to prevent Indonesia from becoming a Communist bloc state, and the issue of Indonesia's claim on West New Guinea was regarded as less important.²⁸⁴ This is an authentic origin of the legal issues in West Papua today. To gain the benefit of its political ambition in the end, John F. Kennedy put more pressure on the Dutch to take his interest through some sort of agreement with Jakarta.

In March 1962, the US told the UN to appoint its diplomat, Ellsworth Bunker to take on a duty of negotiations.²⁸⁵ In the Bunker's plan, "the territory would be administered temporarily by the UN, and would hand over the administration to Indonesia a year later, and the act of self-determination would be given to the Papuans to exercise."²⁸⁶ This formulation suggests that, America was already undermining the international law of decolonisation regimes articulated in the UN Charter,²⁸⁷ by imposing the New York Agreement, which this thesis considered as 'colonial law' to validate a new coloniser (Indonesia).

For this reason, the Bunker's plan was bitterly rejected by the UN Secretary General, U Thant, and condemned the US, reasoning the move is outside the order of the UN Systems.²⁸⁸ Similar rejection took place in the debate of the United Nations General Assembly by African countries, commenting that:

"Much has been said on the subject of self-determination; but when we pursue this Agreement, what do we see in the Articles dealing with self-determination? Not once - I repeat, not once - do we find in the text any mention of a "referendum", the most formal, the most usual and the most objective form of public expression of opinion. The most precise formula we find is the vague one of "the free express will of the population", without any indication of how that will

²⁸³ Thomas D. Musgrave "An Analysis of the 1969 Act of Free Choice in West Papua" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 217.

²⁸⁴ One advisor in the Kennedy administration went so far as to declare that self-determination for the 'stone-age' Papuans would be meaningless: Memo from Rostwo, 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 Indonesia Takeover of West Papua, 1962-1969* at 11.

²⁸⁵ See Thomas D. Musgrave, above n 282, at 217.

²⁸⁶ At 430.

²⁸⁷ Charter of the United Nations, Chapters XI and XII; GA Res/1514 (XV); GA Res/1541 (XV).

²⁸⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 12.

is to be expressed... The actual public expression of opinion will be organised entirely by the party which has the greatest interest in the yielding of results that are favourable to it”²⁸⁹

Nonetheless, U Thant and the Dutch Cabinet reluctantly decided to accept the proposal.²⁹⁰ Eventually, the Treaty Agreement was signed on 15 August 1962, at the UN headquarters in New York.²⁹¹ The signing of the Agreement was seen as an important victory for America and its Western allies. For the Soviet Union, it was a great disappointment, as it had been the single supplier of military equipment to Indonesia.²⁹² In the end, it was the indigenous Papuans, who were betrayed by the settlements, because they were neglected and not included in the negotiations, but they are the ones who would have to live with the consequences.²⁹³ The decisive American intervention not only violated international law and order, but while benefiting Indonesia, in full awareness, it also prevented the people of West Papua from gaining their best place in international law.

1.3.3.2. Transferred to UNTEA

After the signing of the Treaty, article 2 of the New York Agreement required the Netherlands to transfer the territory to the United Nations Temporary Executive Authority (UNTEA) for temporary administration.²⁹⁴ The UNTEA would in turn transfer the administration to Indonesia in accordance with article 12 of the Agreement.²⁹⁵ The administration would then be

²⁸⁹ At 26.

²⁹⁰ At 72.

²⁹¹ Resolution A/RES/1752/ (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

²⁹² John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 14.

²⁹³ David Webster “Self-determination Abandoned: The Road to the New York Agreement on West New Guinea (Papua), 1969 - 62” (2013) 95 JA 9 at 18.

²⁹⁴ The New York Agreement. Article II. “*After the adoption of the resolution referred to in article I, the Netherlands will transfer administration of the territory to a United Nations Temporary Executive Authority (UNTEA) established by and under the jurisdiction of the Secretary-General upon the arrival of the United Nations Administrator appointed in accordance with article IV. The UNTEA will in turn transfer the administration to Indonesia in accordance with article XII*”.

²⁹⁵ Article XII. “*The United Nations Administrator will have discretion to transfer all or part of the administration to Indonesia at any time after the first phase of the UNTEA administration. The UNTEA's authority will cease at the moment of transfer of full administrative control to Indonesia.*”

under Indonesian control with the condition that the act of self-determination had to take place before the end of 1969.²⁹⁶

Prior to the UN Temporary Administration, the Netherlands brought the news about the Agreement to the Papuans, which made them angry and felt betrayed by the Netherlands, America and the United Nations, because they were politically aware of the consequences of being handed to the UN and to Indonesia.²⁹⁷ Nicholas Jouwe, one of the emerging prominent leaders expressed; “the Papuans have been asked to sign their own death warrant.”²⁹⁸ The UNTEA served as a buffer between outgoing Dutch and incoming Indonesians. The transitional periods between the UNTEA and Indonesia had caused considerable impact on the people in the territory. The previous administration of the public service, the police, the judiciary, banking systems and other infrastructure switched over to Indonesian systems.²⁹⁹ Some countries expressed their concerns over the transfer issue of West Papua. In the debate at the UN, 14 African countries abstained, commenting that ‘there was much resentment over Negro Papuans being handed over to Indonesia. Mr. Zollner, on behalf of Dahomey (Benin), expressed:

“My government cannot endorse an arrangement whereby a people of 700,000 is transferred from one power to another under a bilateral Treaty concluded without previous consultation with the party chiefly concerned, the Papuan people.”³⁰⁰

In October 1962, when the UNTEA began its administration, Indonesia proposed in a memorandum to the UN, that Indonesia is expecting to play a key role in the administration from the start.³⁰¹ Jakarta’s self-assign role however, was not articulated in the New York Agreement, and if the UNTEA’s officials accepted the proposals, they would have violated the spirit of the Agreement which authorised their administration. Indonesia was consistently against the UNTEA’s administration and demanded its early withdrawal, and abandonment of

²⁹⁶ United Nations: Peacemaker. <<https://peacemaker.un.org>>. “The agreement calls for the transfer of authority for the territory from the Netherlands to Indonesia. The document also includes a guarantee that the Papuan people would be allowed an ‘Act of Free Choice’ (referendum) to determine their political status. It provides for a UN Transitional Administration in West New Guinea (West Irian) for the transfer of authority from the Netherlands to Indonesia and the conduct of the act of free choice.”

²⁹⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 19.

²⁹⁸ Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 94.

²⁹⁹ See John Saltford, above n 297, at 43.

³⁰⁰ At 26.

³⁰¹ At 27.

the plan for any eventual act of self-determination.³⁰² Further, Indonesia's Foreign Minister Subandrio suggested that 'new developments in the territory and a speedy integration of West Irian into Indonesia is the best way of facilitating reconstruction and rehabilitation'. The UNTEA's response was ambiguous, stating, "the UNTEA had to operate according to the terms of the Agreement ratified by the UNGA and could not therefore withdraw before 1 May 1963."³⁰³

From 1963 marked the final phase of the UNTEA administration in West Papua. During this period, the Indonesians were determined to raise their flag in West New Guinea, despite initial opposition from the UNTEA.³⁰⁴ Prior to the handover of administration, one of the UNTEA officials was a New Zealander, Gordon Carter, who was a commissioned officer for the central highlands, very strongly supported the a genuine plebiscite and wanted that the UNTEA to be act consistently with the Agreement, particularly the time set for transfer administration to Indonesia.³⁰⁵ The UNTEA officials also condemned Jakarta tactics for acting outside of the Agreement. Paul van der Veur, wrote to Indonesia on the implementation of the act of self-determination as prescribed by the Agreement.³⁰⁶ As mentioned earlier, such is abundant evidence of a superpower backing Indonesia despite damaging international rule of law.

³⁰² John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003), at 31.

³⁰³ At 32.

³⁰⁴ At 47.

³⁰⁵ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 99.

³⁰⁶ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 64.

1.3.3.3. UNTEA to Indonesia

1.3.3.3.1. Indonesian Transitional Periods

On the 1st May 1963, a handover ceremony was held in Hollandia (Capital City of West Papua). The Netherlands, Indonesia and the UNTEA had their own representatives. Narasimhan, the UN representative stood up and read out the message from the Secretary General of the United Nations Mr. U Thant:

“to the people of West Irian”, “As agreed in Article XVI of the New York Agreement, the UN Experts will visit West New Guinea, “as often as may be necessary and spend as much time as may be required to enable them to report fully to me.” “I am confident that the republic of Indonesia will scrupulously observe the terms of the Agreement concluded on 15 August 1962, will ensure the exercise by the population of the territory of their right to express their wishes as to their future”³⁰⁷

Formal transfer of administration to Indonesia with a proviso, that the terms of the New York Agreement had to be fulfilled properly.³⁰⁸ In particular, its provisions for self-determination had to take place before the end of 1969, as set out in article XX of the Agreement.³⁰⁹ However, for Indonesia, this handover was a victory of gaining West New Guinea, and it had predetermined to deny the Papuans their sacred right to self-determination agreed in the Agreement.³¹⁰ For indigenous West Papuans on the other hand, it was the beginning of a catastrophe, a period of administrative chaos, military repression, greed, cultural loss and violation of human rights.³¹¹ All Papuan political parties were totally banned, all political activities were prohibited, and any protest against Indonesians was brutally suppressed. Indonesia military undertook a sustained campaign of violence, intimidating the Papuans.³¹²

During six years of Indonesian control in West Papua, security, economic and political situations had been in decline. Peter Hastings described; “the simple fact is that since the Dutch

³⁰⁷ At 67.

³⁰⁸ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 100.

³⁰⁹ The New York Agreement. Article XX: “The act of self-determination will be completed before the end of 1969”.

³¹⁰ David Webster “Self-determination Abandoned: The Road to the New York Agreement on West New Guinea (Papua), 1969 - 62” (2013) 95 JA 9 at 12.

³¹¹ Jan Pauwer “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH 157 at 166-171.

³¹² At 172.

departed, the Indonesian government has done little or nothing to develop the country or to give the Papuans any substantial economic development projects or any real degree of political participation.”³¹³ He also briefed the Australian government that the territory's basic problem was political and the Papuans felt that they had been sold down the river. He acknowledged the existence of the growing Papuan guerrilla fighters of OPM (Free Papua Movement) as a newly formed organisation to oppose the Indonesian occupation.³¹⁴ A similar assessment was made by Reynders, an American consular official who concluded that; security was a main concern especially in the Northwest Territory where the local Arfak were determined to expel the Indonesians.³¹⁵ This armed resistance continued to exist throughout the periods leading up to the act of self-determination in 1969.

1.3.3.3.2. The Act of Free Choice or the Act of No Choice

The Papuans’ right to self-determination is guaranteed in the New York Agreement.³¹⁶ All parties, including the UN acknowledged this right, and were obliged to respect that right and to ensure that self-determination took place properly in accordance with international practice, as set out in article XVIII of the New York Agreement about the mechanisms.³¹⁷ By virtue of article XX, “the act of self-determination will be completed before the end of 1969.”³¹⁸ In April

³¹³ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 90.

³¹⁴ At 91.

³¹⁵ See John Saltford, above n 313, at 92.

³¹⁶ At 180.

³¹⁷ The New York Agreement 1962. Article XVIII: “Indonesia will make arrangements, with the assistance and participation of the UN Representative and his staff, to give people of the territory the opportunity to exercise freedom of choice. Such arrangements will include: (a) Consultations (Musyawarah) 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 and (c) Formulation of the questions in such a way as to permit the inhabitants to decide (i) whether they wish to remain with Indonesia; or (ii) whether they wish to sever their ties with Indonesia; 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 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.”

³¹⁸ The New York Agreement 1962. art XX.

1968, the UN appointed the Bolivian Diplomat, Fernando Ortiz Sanz as representative to fulfil the duties contained in Article XVIII.³¹⁹ In August 1968, he arrived in West New Guinea to carry out its responsibilities as set out in Article XVII.³²⁰ Ortiz Sanz's legal duty was to implement the parties' commitment in the New York Agreement, which required that the act of self-determination be carried out "in accordance with International practice" which arguably meant "one man, one vote principle."³²¹ Although Ortiz Sanz proposed to Indonesian to carry out the act of self-determination in accordance with the Agreement, his suggestion and his role were not heeded. Upon arrival, he found out that Indonesia had already decided on the method to be used. "There would not be a one person one vote system, the Musyawarah was a preferred method."³²² Musyawarah is the process of consultation towards consensus to secure the people's approval.³²³ Indonesia persuaded the UN representative, arguing:

"Musyawarah would be the most appropriate method for the act of self-determination for the people of the most primitive and undeveloped communities in the World.' Western democratic concepts would therefore be totally inappropriate."³²⁴

It is a clear violation of the principle of self-determination reflected in the New York Agreement. Indigenous Papuans cannot be regarded as primitive and undeveloped people, as it is contrary to the principle of 'the Declaration on the Granting of Independence to Colonial Countries and Peoples' set out in the UN Resolution No. 1514 of 1960.³²⁵ It also contradicts the core principle of substantial and procedural requirements of international law reflected in article XVIII (d) in the New York Agreement.³²⁶

³¹⁹ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 663.

³²⁰ The New York Agreement 1962. Article XVII, Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 688.

³²¹ Danilyn Rutherford "An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua" (2010) 90 IND 173 at 180.

³²² Thomas D. Musgrave "An Analysis of the 1969 Act of Free Choice in West Papua" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 219.

³²³ Stephanie R Lawson "Regionalism and Colonialism in Contemporary Oceania" (2017) 106 RTL 143 at 147.

³²⁴ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 165.

³²⁵ The United Nations General Assembly Resolution UNGA No. 1514 (XV), December 1960. (Paragraph 5). "Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, in order to enable them to enjoy complete independence and freedom"

³²⁶ The New York Agreement 1962, art XVIII (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."

Furthermore, prior to the act of self-determination, Indonesia itself was in a position of temporary administration and had a legal responsibility to prepare the inhabitants (the Papuans) for the Act of Free Choice, in line with the article XV of the New York Agreement.³²⁷ There is also a contrasting narrative with the statement; while Indonesia degraded indigenous Papuans as the most primitive community, in their argument to the UNGA on the implementation of the Act of Free Choice, Indonesia quoted the ‘eloquently fancy speeches’ from those they argued were so primitive in their support to Indonesia during the election.³²⁸ One they quoted was from Mr. John Somar:

“Why the question should have been put at all. Our beloved country is Indonesia, our sacred flag is the Red and White; we will defend and safeguard them until the end of time.”³²⁹

Those statements were believed, in an elaborately stage-managed affair. Nonetheless, the move was in line with the initial objective of imposing the 1962 New York Agreement as a law of colonisation to secure Indonesia’s interest along with the interests of the West.

During the period leading up to the act of self-determination in 1969, Indonesia deployed about 16,000 military personnel in the region under Brigadier Sarwo Edhie.³³⁰ Sudjarwo, in his speech said that, “an Act of Free Choice would take place but there could be no question of their voting for anything other than Indonesia.”³³¹ The Indonesian officials therefore handpicked about 1025 representatives out of nearly one million inhabitants.³³² In July 1969, prior to the act of self-determination, those selected members of assembly had been directed to the isolation camp by Indonesian authorities. All of them were either bribed, threatened, and intimidated by the Indonesian military.³³³ One of the members was Reverend. Hokujoku, who described his experience, “Ali Murtopo warned that those who did would have their accursed tongue” torn out-after long fighting for West Papua, he would not tolerate any Papuan vote against it. Hokujoku continues:

“The man who totally destroyed my self-respect was Brigadier General. Ali Murtopo, publicly acknowledged as being the chief brainwasher. For two hours, this special envoy of President

³²⁷ The New York Agreement 1962, art XV.

³²⁸ See John Saltford, above n 324, at 159.

³²⁹ At 160.

³³⁰ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 688.

³³¹ At 689.

³³² Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 220.

³³³ See Pieter J Drooglever, above n 330, at 158.

Suharto spoke to us. He destroyed any will we may have had to vote against integrating with Indonesia... Jakarta was interested in us as Papuans but in West Irian as a territory. If we want to be independent, he said, laughing scornfully, we had better ask God if He could find us an island in the Pacific where we could emigrate”³³⁴

In a later interview, Hokujoku revealed that “those members of assembly were given the written instructions on what to say. They then rehearsed their speech in front of the Indonesian military. One who refused was allegedly taken away and killed.”³³⁵ Many other witnesses also described that many people were incarcerated during the Act of Free Choice, and that the soldiers were everywhere with their guns.³³⁶ Mama Rosa Tambaib described, “I was coerced to memorise the written text for weeks to vote for Indonesia. We were intimidated on 14 July 1969 in Merauke.”³³⁷

It was under this duress that those 1,025 indoctrinated indigenous Papuans unanimously agreed to be part of Indonesia.³³⁸ At the end, Indonesia released a statement that the entire population of West New Guinea had expressed their wishes to remain united within the republic of Indonesia and rejected the separation.³³⁹ Suharto declared that West Irian was part of Indonesia.³⁴⁰ It was determined from the start that, while deliberately denying the Papuans’ rights, they would be given a chance to vote on the Act of Free Choice, only to show that Indonesia honoured the Treaty.³⁴¹ The fact is that the vote did not take place. The Australian ambassador to Indonesia, Mr. Gordon Jockel, stated:

“Indonesia runs the act of free choice through the process of MUSYAWARAH, which means the process in which the issues are considered and resolved through meetings, consultations. This has a purpose of securing the initial objectives by those who want the outcomes as the process was involved by the most powerful.”³⁴²

³³⁴ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 158.

³³⁵ At 158.

³³⁶ See Pieter J Drooglever, above n 330, at 721.

³³⁷ Mama Rosa Tambaib and Bapak Tambaib. Two of the members of the Assembly who took part in the act of free choice in Merauke, on the 14 July 1969. Testimony: Indonesia intimidated us during the act of free choice or pepera in 1969. Taken from the documentary record. <<https://www.youtube.com/watch?v=W-FHiQ1zRnI>>.

³³⁸ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009), at 722.

³³⁹ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 165.

³⁴⁰ See Pieter J. Drooglever, above 338, at 726.

³⁴¹ David Webster “Self-determination Abandoned: The Road to the New York Agreement on West New Guinea (Papua), 1960 -62” (2013) 95 JA 9 at 21.

³⁴² Kanopy (film) “Land of the Morning Star.” (2015) San Francisco, California, USA. Kanopy Streaming <www.waikato.kanopy.com>.

The Indonesian government took this opportunity to manipulate ordinary indigenous Papuans' desires for independence but also put them under duress.³⁴³ Many described the process as full of intimidation and forced the participants for Indonesia at gunpoint. Nicholas Jouwe, a first leader of Free West Papua Movement described: “Your vote or your life” literally means if you do not vote for integration, your life will end. In the interview by Charles to Danni Tribes, expressed:

“Actually the Papuans did not want integration. They wanted independence. But here (in Wamena) there was manipulation. Indonesia said that if Papuans even mentioned the word “freedom” they would be shot.”³⁴⁴ The British Foreign officers reported; “people of West Irian have no desire to be ruled by the Indonesians who are of an alien Javanese race, and that the process of consultation did not allow a genuinely free choice to be made.”³⁴⁵

Pieter Drooglever’s account revealed three UN ambassadors, who had seen the underlying reality in the Act of Free Choice in three regional councils; Merauke, Wamena and Nabire. They expressed disappointment, quoting what Minister Luns had expressed in The Hague that, “The Act of Free Choice would, at least, be implemented with some dignity. This dignity had been utterly missing. There had been no question of applying the ‘one man, one vote’ system, which could have been done quite easily.”³⁴⁶

It is on these accounts, the historians, academics, professional legal practitioners, including the indigenous West Papuans themselves argue that the ‘genuine Act of Self-Determination did not take place in 1969.’³⁴⁷ The United Nations, however, regarded the implementation of the Act as imperative and peremptory.³⁴⁸ This UN claim can be justified by its involvement with the passing of the General Assembly Resolution 1752 - which brought an end to the conflict in the 1960s.³⁴⁹ However, the legal question of; ‘to what extent the United Nations and Indonesia had succeeded in satisfying the legal requirements set out in the 1962 New York Agreement,

³⁴³ Charles E Farhadian *Christianity, Islam and Nationalism in Indonesia* (Routledge, 2005) at 8.

³⁴⁴ At 9.

³⁴⁵ Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 221.

³⁴⁶ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009), at 725.

³⁴⁷ Annette Culley *State Responsibility in International Law* (Print Express, Victoria, 2017) at 85.

³⁴⁸ See Pieter J Drooglever, above n 346, at 660.

³⁴⁹ The General Assembly, Considering that the government of Indonesia and the Netherlands have solved their problems concerning West New Guinea (West Irian), noting with appreciation the successful efforts of the Acting Secretary-General to bring about this peaceful settlement, A/RES/1752(XVII)-EN. <<https://digitallibrary.un.org>>.

remains problematic. On this basis, the legal argument of re-inscription of West Papua into the UN decolonisation list is legally well grounded.

1.3.3.3. International Correspondence Accounts

The Indonesian press toed the line expressing no criticism for the result, but the Western journalists exposed criticisms. An Australian journalist Joseph Halloway, who was impressed by an audacity of the Papuans who risked themselves simply to make their message for independence heard by foreigners reported that “West Irian expected no justice from Indonesia but did expect [some justice] from the world”.³⁵⁰ According to Hugh Lunn, the Reuters correspondent:

“I expected the UN to hold the Act of Free Choice, a voting system. When I got there, I was surprised that they were selecting people who they would invoke, and only selected around 1025 people in the whole country. All the correspondents who should be in West Irian to preview the act were told to be in Bangkok, Hong Kong, and Taiwan. I was told by officials to stay in Jakarta. It was effectively America who decided to stop anyone from covering the act of free choice so Indonesia can just absorb the places without any written story.”³⁵¹

He also recorded an incident during the election in Manokwari, where a brave resistance group of Papuans pushed the crowd while yelling, ‘sendiri, sendiri’ means (alone, alone or self, self which means self-government) before being dragged away by the Indonesian security forces.³⁵²

In addition to the press, there were many other witnesses, including the staff of the UN diplomats from Burma, West Germany and Australia who received the letter from the Biak resistance leader expressing the systematic indoctrination and bribery of the Assembly members, and the incarceration of more than 100 secondary students prior to the vote. Bill Challis, who was an observer, concluded that “the attitude of the Indonesians is unpleasantly cynical”.³⁵³ An international human right lawyer, Jennifer Robinson notes that even at the time

³⁵⁰ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009), 723.

³⁵¹ See Kanopy (film), above n 342.

³⁵² Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 155.

³⁵³ At 156.

the UN sanctioned the Act of Free Choice, “UN officials admitted in private that 95% of Papuans supported independence” and that the “process of consultation did not allow a genuinely free choice to be made.”³⁵⁴ It is true that despite the resistance from the Papuans, the Washington officials gave no eye and ear to the level of the vast majority of the Papuans.³⁵⁵ It was American and Indonesian hypocrisy, as Taiaiake Alfred described as “hypocritical and pacifying moralities”.³⁵⁶

Despite the opposition over the spurious conduct during the plebiscite, however, the Act of Free Choice was concluded, and Indonesia claimed that the entire population of West New Guinea had expressed their wishes to remain united with Indonesia and rejected the separation.³⁵⁷ With this, the Secretary-General's report to the General Assembly was a final game left. Prior to the UNGA, C. Stavropoulos (UN legal counsel) suggested to U Thant on how to present the report, and to be aware of the potential controversy, this was to avoid accusations that anything was being suppressed. Stavropoulos further suggested that in order to pass this politically awkward requirement, the Secretary-General toned not submit his own comments on the conduct of the Act, so that member states may then reach their own conclusions on how the act of self-determination was conducted.³⁵⁸ This suggests that the US was consistently controlling the process behind the scenes.

1.3.3.3.4. Report to the United Nations

In a report to the UN, there was a concern with self-determination when the UN gave its seal of approval to the integration of Papua into Indonesia in 1969. Lingering efforts were made by a number of African states to see the reality of self-determination exercised. Ghana called for

³⁵⁴ Camellia Webb-Gannon *Morning Star Raising: The Politics of Decolonization in West Papua* (University of Hawai'i, Honolulu, 2021) at 31.

³⁵⁵ See Maire Leadbeater, above n 352, at 155.

³⁵⁶ See Camellia Webb-Gannon, above n 354, at 30.

³⁵⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 165.

³⁵⁸ At 169.

a new Act of Free Choice, which would be submitted to the people by 1975.³⁵⁹ This plan was rejected 60 to 15 (those in favour: Gabon, Ghana, Guyana, Israel, Jamaica, Kenya, Sierra Leone, Togo, Trinidad and Tobago, Uganda, Tanzania, Barbados, Central African Republic, and Dahomey) with 39 abstentions.³⁶⁰ The final vote approved the Act by 84 to zero, but symbolic abstentions in support of the principle of self-determination were made by thirty countries.³⁶¹ Only in the past decades is the international legality of the whole arrangement being reconsidered and questioned.

Ortiz Sanz concluded his job, saying:

“Finally, on the basis of the facts presented in this report and the documents referred to, it can be stated that, with the limitations imposed by the geographical characteristics of the territory and the general political situation in the area an act of free choice has taken place in West Irian in accordance in Indonesian practice, in which the representatives of the population expressed their wish to remain with Indonesia.”³⁶²

In his conclusion, the fundamental issue of self-determination was deliberately avoided. Article XVIII (d) of the 1962 New York Agreement provided two fundamental elements; First, the substantial requirement of eligible participants ‘All adults (Papuan), Male and Female, not representatives’; Second, the procedural requirement or mechanisms ‘in accordance with International practice’. (Self-determination/ One man One Vote System), not musyawarah.³⁶³ The UN failure to fulfil these legal requirements was not even mentioned by Ortiz Sanz, instead he referred to the more vague term the ‘Indonesian Practice (Musyawarah), rather than International Practice (One Man One Vote)’. 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 Resolution 1514 (XV) and 1541 (XV), or the terms of the 1962 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.

³⁵⁹ Powes Parkop, “Re-inscription of West Papua as a Colonised State and People,” <http://www.freewestpapua.org/docs/parkop.htm>, accessed January 24, 2013; Jason MacLeod and Brian Martin, “The legal strategy for West Papua: Will it fly? What Might Help It To?” University of Sydney Centre for Peace and Conflict Studies, 2012, http://sydney.edu.au/arts/peace_conflict/docs/working_papers/WPP%203.pdf, accessed January 29, 2013.

³⁶⁰ General Assembly Official Records, November 13 and November 19, 1962, UN documents A/PV.1810, A/PV.1812, and A/PV.1813.

³⁶¹ GA Res A/PV.1810, A/PV.1812, and A/PV.1813.

³⁶² John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 166.

³⁶³ The New York Agreement 1962, art XVIII (d).

1.4. The Impact of the Colonial Waves

The outside intrusions through colonisation, decolonisation and re-colonisation discussed above is a story of greed, cultural loss, environmental destruction, imperialism and political manoeuvring, injustices resulting from the deprivation of the Papuans rights to self-determination and dispossession of their sacred lands and natural resources, genocide and human rights violations.³⁶⁴

Indigenous West Papuans confronted considerable challenges as Asian immigrants began to invade the coastal areas. J Van Baal commented, “In South New Guinea (SNG), the Papuans have to deal with the double colonial stratum above them. The closest stratum is that of the Pu-anim (‘shooting people’, the Marind term for immigrants, especially Indonesians and Chinese).”³⁶⁵ The Papuans were forced to not oppose the orders of the colonial authorities to remove their customs. For instance, they introduced rice as a civilised food and removed root tubers as their traditional food.³⁶⁶ As the Dutch increased the large number of immigrants from East Indonesia, who had been authorised as the officials’ assistants, trainers and teachers, the local population was forced to break radically in their long practised cultures.³⁶⁷ The indigenous Papuans were affected by the fast spread of venereal disease, as part of the authority’s resultant preventive actions, the traditional house was banned from construction, and all forms of traditional ritual and celebration were prohibited.³⁶⁸ This led to inevitable conflict, war, and also to the depopulation of indigenous Papuans.³⁶⁹

³⁶⁴ Peter Cane and Joanne Conaghan *The New Oxford Companion to Law* (Oxford University Press, London, 2008).

³⁶⁵ Jan Pauwer “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH 157 at 158.

³⁶⁶ At 158.

³⁶⁷ At 162.

³⁶⁸ At 162.

³⁶⁹ At 160.

Further dramatic changes began with the second wave of colonisation by Indonesia,³⁷⁰ after took over West Papua through the controversial Act of Free Choice in 1969,³⁷¹ Asian immigrants settled throughout the Territory. As mentioned earlier, within six decades, they supplanted indigenous Papuans. The Javanese and Asian influence became predominant, with those migrants gaining control of most of the economy through the alienation of the sacred lands. This created even more culturally dominated and suppressed indigenous West Papuans. Stephen Hoadley, describes: “Since West Papua’s integration into Indonesia in 1969, the cards have been stacked against them.”³⁷² From the early invasion, the government systematically eradicated everything connected to West New Guinea, such as schoolbooks, or the symbol of the nation like the morning star flag. It crushed the political parties of West Papua, not allowing Papuans to exercise their right of freedom of speech and freedom of assembly.³⁷³

During the period of 1963-1968, Papuans have been under constant intimidation and terror, tens of thousands of Papuans have already been killed by the state’s bullets.³⁷⁴ West Papua since its annexation into Indonesia³⁷⁵ has experienced a decrease in its Melanesian population, the destruction of their cultures, and the displacement of people as either refugees or as internally displaced peoples (IDPs),³⁷⁶ language extinction, environmental destruction, resource exploitation and other human rights abuses under heavy military occupation over the decades. Experts say that there is evidence that a slow motion genocide has been in progress over the last 60 years of Indonesian occupation of the island.³⁷⁷ Akihisa Matsuno described that:

³⁷⁰ At 179.

³⁷¹ United Nations General Assembly: Twenty Fourth Session - 1812th Plenary Meeting. AGENDA ITEM 98: Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian): report of the Secretary-General regarding the act of self-determination in West Irian.

³⁷² Pacific Media Centre “Vanuatu Steps up UN bid for West Papua Rights, New Referendum” <www.asiapacificreport.nz>.

³⁷³ Catherine Scott & Neles Tebay “The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace” (2006) 94 CJIA 599 at 601.

³⁷⁴ At 601.

³⁷⁵ Johnny Blades “West Papua: The Issues that won’t go Away for Melanesia” Analysis 1 May (2020).

³⁷⁶ Internal Displacement of Indigenous West Papua due to the ongoing conflict. <www.rnz.co.nz/international/pacificnews/396527/indonesian-govt-neglecting-papuans-displaced-by-conflict-researcher>.

³⁷⁷ The Special Rapporteur on the Rights of Indigenous Peoples: West Papua Indigenous People’s Situation under Indonesian Government <https://www.ohchr.org/Documents/Issues/IPeoples/SR/Urban-areas_Submissions/Indigenous_Organisations_Civil_Society/solidarity-for-indigenous-papuans.pdf>.

“What is happening in West Papua amounts to genocide, both physical and cultural? He asserts that, at the very least, it was a crime against humanity in terms of a systematic annihilation of the civilian population that was intentional, widespread and ongoing.”³⁷⁸

From genocide to ecocide and ethnocide, indigenous Papuans are affected by large scale investment projects facilitated by the government. The conversion of rain forests into palm oil plantations, logging and mining areas have led to the loss of ancestral lands by which many indigenous communities are now facing poverty.³⁷⁹ As a consequence, the majority of indigenous communities have become bystanders on their ancestral lands, facing an uncertain future characterised by poverty and loss of cultural roots.³⁸⁰ The most affected by these changes are the indigenous West Papuans who had no voice in their own destiny, or in the alteration of their long-established culture and way of life as a sovereign and independent people.

³⁷⁸ Marni Cordel “Does West Papua have a Publicity Problem?” (2011).

³⁷⁹ Human Rights in West Papua 2017, at 135.

³⁸⁰ At 136.

1.5. Conclusion

It has been discussed that West Papua was a colonial property of the Dutch. The Dutch were therefore entitled, under the (Western based) international norms of the time to complete authority over the territory. With the adoption of the UN Charter that was signed on 26 June 1945,³⁸¹ the Dutch had accountability to comply with the same international legal order over the territory. Hence, the decolonisation process undertaken by the Dutch, was in line with the rubric of the UN Charter,³⁸² and other international regimes adopted to promote decolonisation.³⁸³ Unfortunately, the hope of attaining a nationhood of West Papua was deliberately deflected by the fabricated colonial law of the New York Agreement, without consultation of the Papuans. Consequently, the indigenous Papuans had lost their legitimate place in international law.³⁸⁴ With that being said, through the lens of international law, Indonesia's disputation and re-colonisation of West Papua, may be regarded as 'an act of violating the order of the UN systems' - and its ongoing rule is contrary to the principles of international law.

The current human rights issues that were briefly mentioned above, and will be discussed further in the next chapter, provide additional reasons to support claims of independence. Claims that have their roots in historical wrongs. The first colonisation was in 1828, when the Netherlands took control of the area. In 1944, it was agreed that the West New Guinea Administration (WNGA) would be placed on the list of Non-Self-Governing Territories.³⁸⁵ This occurred in 1960 and the decolonisation process was well underway under the decolonisation regime.³⁸⁶ Imposing the New

³⁸¹ United Nations and a Multilateral Treaty <<https://research.un.org/en/docs/charter>>.

³⁸² Charter of the United Nations, art 73.

³⁸³ United Nations General Assembly Resolutions: GA Res. No 1514 (XV) 1960, regarding "Declaration on the Granting of Independence to Colonial Countries and Peoples" and GA Res. No 1541 (XV) 1960. Regarding "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"

³⁸⁴ Robin Soborne *Indonesia's Secret War: The Guerrilla Struggle in Irian Jaya* (Allen & Unwin Australia Pty, New South Wales, 1985) at 116.

³⁸⁵ The Special Rapporteur on the Rights of Indigenous Peoples: West Papua Indigenous People's Situation under Indonesian Government <https://www.ohchr.org/Documents/Issues/IPeoples/SR/Urban-areas_Submissions/Indigenous_Organisations_Civil_Society/solidarity-for-indigenous-papuans.pdf>.

³⁸⁶ Charter of the United Nations, art 73.

York Agreement as a “new colonial law” ruled out the most genuine principle of international law of decolonisation. Those historical and ongoing violations of international law mean the conflict in West Papua cannot be stopped without a proper decolonisation process, as it clearly suggests that the issue is an unfinished business of the decolonisation, and therefore the United Nations needs to intervene for the rectification of the historical and ongoing wrongs.

2. CHAPTER TWO

IMPLEMENTATION OF INTERNATIONAL LAW AND THE NEW YORK AGREEMENT AND THE LEGAL CONSEQUENCES ON WEST PAPUANS: IN BETWEEN COLONIAL AND DECOLONIAL DEVICES

2.1. Introduction

The previous chapter discussed one of the critical concerns of political events of foreign intrusions through the colonisation, decolonisation and re-colonisation of West Papua, and how indigenous Papuans were legally disadvantaged with the disruption that had led to the re-colonisation of the territory.³⁸⁷ Chapter 2 focuses on the implementation of international laws in the historical context. First part of the chapter discloses the applicable international legal instruments that were initiated to West Papua. The chapter then, looks at the imposition of the 1962 New York Agreement and examines its legal standing and unveils the legal consequences to human rights on West Papuan people.

³⁸⁷ Jan Pouter “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH at 157.

The legal principle of self-determination is reflected in the United Nations Charter.³⁸⁸ Embodiment of that provision, the decolonisation process of West New Guinea began after the Netherlands listed it as a Non-Self-Governing Territory (NSGT).³⁸⁹ The Netherlands were determined to comply with the legal order enumerated in article 73 of the Charter to decolonise the territory,³⁹⁰ but this did not happen following international intervention in the dispute between the Netherlands and Indonesia.³⁹¹ Consequently, genuine self-determination under the UN Charter was replaced by a bilateral treaty, the New York Agreement established in 1962,³⁹² which then framed a different option, the Act of Free Choice.³⁹³ The territory was then incorporated into Indonesia in 1969 and became an entity of the artificial province of Irian Jaya.³⁹⁴

As discussed in chapter 1, the 1962 New York Agreement,³⁹⁵ was a cultural construct of the West (United States) to legitimise (not legalise) Indonesia's rule in West Papua. Some legal commentators framed the American manoeuvres in the Netherlands New Guinea case as a strong example of the US's ongoing vacillations between "adherence to its [the UN's] basic principles and the pursuit of traditional self-interest."³⁹⁶ It is the American colonial way, as Natsu Taylor describes:

"They bring with them a purported sovereign prerogative to establish a new state on someone else's land; to create social, political, legal, and economic institutions intended solely for their own benefit; to determine who may or may not—or must—live within their claimed borders, and exactly how they are to live."³⁹⁷

³⁸⁸ Charter of the United Nations, Chapters XI and XII.

³⁸⁹ Emma Kluge "West Papua and the International History of Decolonization, 1961-69" (2020) 42 IHR 1155 at 1158.

³⁹⁰ Charter of the United Nations, art 73.

³⁹¹ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 74.

³⁹² The New York Agreement 1962: "The agreement calls for the transfer of authority for the territory from the Netherlands to Indonesia. The document also includes a guarantee that the Papuan people would be allowed an 'Act of Free Choice' (referendum) to determine their political status. It provides for a UN Transitional Administration in West New Guinea (West Irian) for the transfer of authority from the Netherlands to Indonesia and the conduct of the act of free choice."

³⁹³ The New York Agreement 1962, art XVIII (d).

³⁹⁴ Patrick Matbob and Evangelia Papoutsaki "West Papua 'Independence' and Papua New Guinea Press" (2006) 12 PJR 87 at 88.

³⁹⁵ The New York Agreement 1962.

³⁹⁶ TM Frack *Nation Against Nation: What Happened to the U.U.Dream and What the US can do about it* (Oxford University Press, Oxford, 1985) at 76.

³⁹⁷ Natsu Taylor Saito *Settler Colonialism, Race and the Law: Why Structural Racism Persists* (New York University Press, New York, 2020) at 51.

This Western cultural construct of the treaty had ruled-out the international law for the decolonisation guaranteed in the UN Charter,³⁹⁸ and other international regimes³⁹⁹ that were well-underway at that time. West Papuans as the people of the territory, were eventually disadvantaged and lost their legitimate place in international law. Today, with that American influence, indigenous Pacific islanders of West Papua are no different to the Native Americans, and the Native Hawaiians, where their dignity and fundamental human rights and other collective rights were considerably impacted politically, economically, and culturally.⁴⁰⁰

This chapter begins by discussing the initial application of international law in decolonising West Papua and provides the fraudulent process of legitimising the recolonisation of territory through the New York Agreement. The chapter also examines detrimental effects of the Agreement to the primary legal instruments (decolonisation regimes) and disseminates what legal impacts had the New York Agreement given rise to - on indigenous West Papuans human rights, politically, economically, culturally and in terms of other collective rights. Through the legal analysis, the chapter substantiates potential legal arguments and illuminates the gaps in international laws that apply to West Papua's situation, particularly in human rights protection. Overall, this chapter asks what law has previously been applied to the people of West Papua? What legal issues has this application given rise to? And where are the gaps in the law, especially in the human rights protections?

³⁹⁸ Charter of the United Nations, art 73.

³⁹⁹ GA Res. No 1514 (XV) and GA Res. No 1541 (XV) 1960.

⁴⁰⁰ Camellia Webb-Gannon and others "What can Australia do to Prevent Human Rights in West Papua" (2021) 26 APJF 54 at 58.

2.2. Previous Application of International Laws

2.2.1. Charter of the United Nations

In examining the question of what international law has previously been applied, it is first necessary to make clear the legal status of West Papua at that time. It has been discussed that, when the Dutch claimed West New Guinea in 1828,⁴⁰¹ it became their colonial possession. The Dutch were therefore entitled to complete authority over the territory until the early second-half of the 20th century.⁴⁰² With the adoption of the United Nations Charter in 1945,⁴⁰³ colonial territories were required to have a Non-Self-Governing Territory status, and those administering powers accepted the principle of a ‘sacred trust’ to deliver a ‘full measure of self-government’ to those territories.⁴⁰⁴ The Dutch were therefore liable under the principle to deliver a self-government. At the same time, with the inclusion of Articles 1 (2) and 55 of the UN Charter,⁴⁰⁵ the notion of self-determination, increasingly became a legal right in international law to eliminate colonial power, and it was increasingly associated with the principle of decolonisation.⁴⁰⁶ This principle is reflected in Charter of the United Nations,⁴⁰⁷ and designated colonial territories into two categories: Non-

⁴⁰¹ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (Routledge, NY, 2002) at 5.

⁴⁰² Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 100.

⁴⁰³ The Charter of the United Nations and the Statute of the International Court of Justice LSA 341.13 U51 (opened for signature 26 June 1945, entered into force 24 October 1945).

⁴⁰⁴ Charter of the United Nations, art 73.

⁴⁰⁵ Charter of the United Nations. Articles 1 (2) & 55. “Art 1 (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,...”; Art 55 “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,...”

⁴⁰⁶ Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 210.

⁴⁰⁷ Charter of the United Nations. Chapters XI; XII and XIII.

Self-Governing Territories (NSGT), addressed in Chapter XI; Trusteeship Territories (TT) governed in Chapters XII and XIII of the UN Charter.⁴⁰⁸

The Dutch, as being the administering power, initially attempted to put the question of West New Guinea to be dealt with either by the United Nations Commission on West New Guinea, or by the International Court of Justice (ICJ) in the 1950s.⁴⁰⁹ Despite the fact that all arguments Indonesia had proposed to the UN, had been based on allegedly legal interpretation,⁴¹⁰ Jakarta bitterly rejected the proposal.⁴¹¹ One could argue why the International Court of Justice did not engage constructively in the legal dispute over the territory.⁴¹²

In 1960 however, the Dutch considered West New Guinea for the decolonisation process, through the General Assembly Resolution A/Res/448 (V).⁴¹³ Subsequently, the United Nations declared West Papua as a Non-Self Governing Territory (NSGT).⁴¹⁴ Being considered as NSGT in the UN system, the provisions of Article 73 of the Charter, became legitimately applicable to West Papua.⁴¹⁵ Under this provision, those UN member states who administer such territories have a legal responsibility to deliver a full measure of self-government, as enumerated in article 73(b), that the administering powers are required:

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

⁴⁰⁸ Charter of the United Nations. Chapters XII and XIII.

⁴⁰⁹ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (1st ed, Springe Singapore Pte, Singapore, 2021) at 80.

⁴¹⁰ United Nations General Assembly: On the Ninth Session. First Committee, 726th Meeting. Agenda Item 61 on the Question of the West Irian (West New Guinea) (A/2694, A/C.1/L.109) (1954) at 397.

⁴¹¹ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 326.

⁴¹² Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 214.

⁴¹³ GA Res A/Res/448 (V). Noting the communication dated 29 June 1950 from the Government of the Netherlands in which it is stated that the Netherlands will no longer present a report pursuant to Article 73 e on Indonesia with the exception of West New Guinea. <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/46/PDF/NR006046.pdf?OpenElement>>.

⁴¹⁴ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 180.

⁴¹⁵ Thomas D. Musgrave *Self-determination and National Minorities* (Oxford University Press, London, 1997) at 69 - 70.

particular circumstances of each territory and its peoples and their varying stages of advancement;”⁴¹⁶

In the fulfilment of this legal order, the Dutch, determined a ten-year period as a decade of decolonisation process for eventual independence, which was to be achieved by 1970.⁴¹⁷ They began preparing the territory for self-rules and broke a New Deal to promote the ‘Papuanisation’ aiming to accelerate educational, economic, health and social and political development.⁴¹⁸ While putting all the resources to meet the UN requirements,⁴¹⁹ the Dutch also, voluntarily submitting annual reports to the United Nations as required under article 73(e).⁴²⁰ The report includes information on the political development of indigenous peoples of West New Guinea.⁴²¹ The final report was made in 1961, describing how:

“The institution of the New Guinea Council has had a catalytic effect on the political awakening of the population of the Territory with the population resolved: (1), to call themselves Papuans and to refer to their country as West Papua; (2), to design a flag of their own (the design of which was laid down by ordinance) and; (3), to adopt a national anthem to be played on official occasions after the Netherlands national anthem”⁴²²

Those developments suggest that, the Dutch as being the administering power, genuinely preparing towards implementing a full measure of self-government,⁴²³ in compliance with Chapter XI of the United Nations Charter.⁴²⁴

However, the decolonisation process was diverted after the West (America) became involved in the secret negotiations with the United Nations and Indonesia.⁴²⁵ In consequence, the interest of the inhabitants (West Papuans) in what was considered of paramount importance, and accepted as

⁴¹⁶ Art 73b.

⁴¹⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 10.

⁴¹⁸ Jan Pauwer “The Colonisation, Decolonization and Recolonization of West New Guinea” (2008) 34 JPH 157 at 166-167.

⁴¹⁹ Emma Kluge “West Papua and the International History of Decolonization, 1961 -69” (2020) 42 IHR 1155 at 1158.

⁴²⁰ Charter of the United Nations, art 73 (e).

⁴²¹ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 83.

⁴²² Julian McKinlay King “A Soul Divided: The UN’s Misconduct over West Papua” (2019) 16 UTS ePress 59 at 63.

⁴²³ Julian Mackinlay King with Andrew Johnson “West Papua Exposed: Non-Self-Governing Territory or Trust Territory” (2018) 6 GJLHD 70 at 76.

⁴²⁴ Jaarsma, S. A “An Ethnographer’s Tale: Ethnographic Research in the Netherlands (West New Guinea 1950-1962)” (1991) 62 Oceania 128 at 130.

⁴²⁵ See John Saltford, above n 417, at 12.

a sacred trust - and the universal value of equal rights and self-determination of all peoples, guaranteed in the UN Charter was deliberately violated.⁴²⁶ Ultimately, indigenous West Papuans did not acquire the benefit of international law.⁴²⁷ It was the beginning of the destruction of the Papuans' integrity and their total humanity, perpetuated by those involved. The Dutch Foreign Minister Luns, describes it as "a necessary evil, intended to avoid antagonising the Americans any further and to get them on side in the long run."⁴²⁸ With its successful deflection from the decolonisation process, America then took a dominant role to establish a bilateral Treaty of the New York Agreement, as a means to acquire its own interest and the interest of Indonesia.⁴²⁹

2.2.2. The New York Agreement 1962: Formalising Re-colonisation

2.2.2.1. Establishment of New York Agreement

In chapter 1, it was argued that the New York Agreement⁴³⁰ was a colonial law, consciously constructed to overshadow the primary legal instrument to perpetuate further colonisation. Among other evidence, this contention can be justified in the maintenance of the basic architecture of American domination under Kennedy's administration, who appointed Ellsworth Bunker to take the role to negotiate the Agreement on behalf of the United Nations.⁴³¹ Upon the contrasting arguments between the Netherlands and Indonesia, Bunker formulated a very dodgy integration:

⁴²⁶ Charter of the United Nations, Chapter 1: Purposes and Principles.

⁴²⁷ Charter of the United Nations, Chapter XI Articles 73 and 74, Chapter XII Article 75 - 85.

⁴²⁸ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 464.

⁴²⁹ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 82.

⁴³⁰ GA Res A/RES/1752/ (XVII). Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

⁴³¹ See John Saltford, above n 417, at 12.

“He took the Dutch idea (the Lun’s Plan) of transfer to the United Nations; then, grafted onto Indonesia’s request (Subandrio’s notion) that one or two years of interim administration would be acceptable; accepted Jakarta’s adamant demand that transfer the territory to Indonesia; and retained the Dutch desire for an eventual act of self-determination, but, putting transfer to Indonesia first and then self-determination comes after.”⁴³²

These American tactics formalised the Agreement to recolonise West Papua. Pieter Drooglever criticises that:

“Bunker formulated the New York Agreement, in such a way as a means to require the Dutch officials and troops out from their administering territory, and legitimising Indonesia officials and troops in, after the UN interim administration.”⁴³³

This is very evidence that the plan favoured Indonesia because the word ‘referendum’ or ‘plebiscite’ did not spell out in the draft.⁴³⁴ This was done in a deliberate manner, suggesting that the transfer of administration from one hand to another hand would take place without the participation or approval of indigenous Papuans, whose rights were guaranteed in international treaty and international customary law.⁴³⁵ Some countries objected to the draft Agreement. Such as Mr. Zollner, a Benin then (Dahomey) diplomat who described that: “people of 700,000 are transferred from one Power to another without previous consultation with the party chiefly concerned, the Papuan people.”⁴³⁶ Nonetheless, in the face of the Cold War and America’s pressures, the Netherlands grudgingly approved the proposal at no point to consult indigenous Papuans into the negotiation.⁴³⁷ This was another betrayal of the Papuan people.

⁴³² David Webster "Regimes in Motion: The Kennedy’s Administration and Indonesia’s New Frontier, 1960-1962” (2009) 33 DH 95 at 119.

⁴³³ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 468.

⁴³⁴ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 13.

⁴³⁵ General Assembly resolution 1514 (XV).

⁴³⁶ Julian McKinlay King “A Soul Divided: The UN’s Misconduct over West Papua” (2019) 16 UTS ePress 59 at 63. (General Assembly Plenary Meeting 1127: at 242–243).

⁴³⁷ David Webster "Regimes in Motion: The Kennedy’s Administration and Indonesia’s New Frontier, 1960 - 1962” (2009) 33 DH 95 at 96.

2.2.2.2. Legal Standing of the New York Agreement

As the New York Agreement was a product of two UN member states (the Kingdom of the Netherlands and the Republic of Indonesia), it is legally required to go through to the UN mechanism. Under Article 85 of the Charter, such an Agreement required the approval and it should be exercised by the General Assembly.⁴³⁸ However, the UN-Secretary General did not present the treaty draft to the General Assembly for approval,⁴³⁹ the draft Agreement was omitted and did not open for debate or discussion⁴⁴⁰ as required under Articles 83 and 85 of the UN Charter.⁴⁴¹ At Plenary Meeting 1127 of 21 September 1962:

“The President of the General Assembly effectively blocked discussion of the draft resolution to enable the General Assembly to deal with this matter expeditiously. Then the President proposes to call first on the sponsors of the draft resolution and then, if the General Assembly agrees, to proceed to the vote.”⁴⁴²

The draft of the Agreement was then only voted on and adopted as a General Assembly Resolution 1752 (XVII).⁴⁴³ In this resolution, there were only three points relating to the New York Agreement covered; (1) ‘*takes note* of the Agreement’; (2) ‘*acknowledges* the role conferred upon the Secretary-General in the Agreement’; and (3) ‘*authorises* the Secretary-General to carry out the tasks entrusted to him in the Agreement’.⁴⁴⁴ By ‘taking note’ the legal status of West Papua logically remained as a Non-Self-Governing Territory. Otherwise it could have shifted to the UN

⁴³⁸ Charter of the United Nations, art 85 (1). “The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly”

⁴³⁹ Julian McKinlay King with Andrew Johnson “West Papua Exposed: Non-Self-Governing Territory or Trust Territory” (2018) 6 GJLHD 70 at 79.

⁴⁴⁰ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), GA Res 1752(XVII), UN Doc A/RES/1752 (21 September 1962) para 171.

⁴⁴¹ Charter of the United Nations, articles 83 and 85.

⁴⁴² Julian McKinlay King “A Soul Divided: The UN’s Misconduct over West Papua” (2019) 16 UTS ePress 59 at 64.

⁴⁴³ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) GA Res 1752, S-XVII, A/RES/1752(XVII) (1963).

⁴⁴⁴ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) GA Res 1752, S-XVII, A/RES/1752(XVII) (1963). The General Assembly. Having taken cognizance of the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) (1) “Take Note” of the Agreement.

Trusteeship Territory (UNTT).⁴⁴⁵ Because ‘takes note’ according to the UN is a neutral term, which means neither approved nor disapproved.⁴⁴⁶

It is clear to contend that the adoption of the UN General Assembly Resolution 1752 (XVII) regarding the New York Agreement possessed no approval. Perhaps, the third point of the Resolution, which ‘authorises the Secretary-General to carry out the tasks entrusted to him in the Agreement’ and therefore approves only those duties to be carried out by the Secretary-General within the terms of the New York Agreement. Therefore, under the UN Charter, the New York Agreement appeared to have no valid ground. While the Agreement is recorded in the UN Treaty Series (UNTS) Volume 437,⁴⁴⁷ a disclaimer its Secretariat stated; “the terms ‘Treaty’ and ‘International Agreement’ have not been defined either in the Charter or in the regulations, and the Secretariat follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration.”⁴⁴⁸ Thus, the legal status of the New York Agreement appears to be undefined.

2.2.2.3. Legal Requirements in the Agreement

The New York Agreement in its undefined grounds, however, contains some fundamental legal requirements. In pursuance to articles V and IX, the Agreement mandated that the United Nations, temporarily administer the territory under the UNTEA until the 1st of May 1963.⁴⁴⁹ The UN was also to ‘advise, assist and participate’ in arrangements for an Act of Free Choice, taking into

⁴⁴⁵ See Julian McKinlay King, above n 442, at 63.

⁴⁴⁶ At 80.

⁴⁴⁷ Treaty Series of the United Nations, Vol. 437 at 273. Agreement (with annex) concerning West New Guinea (West Irian). Signed at the Headquarters of the United Nations, New York, on 15 August 1962.

⁴⁴⁸ Note by the Secretariat, Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations <<https://treaties.un.org/doc/Publication/UNTS/Volume%20437/v437.pdf>>.

⁴⁴⁹ Emmanuel Akwei, UN Representative for Ghana, United Nations General Assembly, 24th Session. 1812 Plenary Meeting, 19 November 1969. Agenda Item 98, ‘Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) Report of the Secretary - General regarding the act of self-determination in West Irian’. <<https://www.undocs.org/A/PV.1812>>.

account the interests and welfare of indigenous Papuans which were to be implemented by the end of 1969.⁴⁵⁰ The Agreement required these actions be carried out in three stages: (i) for the five-year period before the Act of Free Choice was to be undertaken, the number of UN experts were to remain in the territory after the transfer of responsibility to Indonesia. Their role was to advise and assist in the preparations;⁴⁵¹ (ii) the UN representative and his advisers were to carry out the Secretary-General's responsibilities of advising, assisting and participating in the preparation of the arrangements according to article XVIII; and (iii), to assist and participate in implementing these arrangements and the Act of Free Choice.⁴⁵² In a breach of the Agreement, Indonesia did not allow any UN officials to remain in the territory.

Similarly, following the hand-over of full administration to Indonesia, among other things, the New York Agreement required Indonesia to make arrangements with the 'assistance and participation' of the UN representative and his staff to give the Papuans the opportunity to exercise their lawful right.⁴⁵³ This right was affirmed in article XVIII (d), which guaranteed:

“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.”⁴⁵⁴

This provision contained two fundamental principles.

First, *Substantial Requirement*. It is affirmed that “all adults, men and women were entitled their right to vote.”⁴⁵⁵ Second, *the Procedural Requirement*. This principle required that “The Act of Self-Determination must be carried out in accordance with international practice.” With the signing of the Agreement, Indonesia, including the United Nations were bound to the terms of the Agreement. However, these entire binding requirements were deliberately violated by Indonesia,

⁴⁵⁰ The New York Agreement 1962, art XVII.

⁴⁵¹ The New York Agreement 1962, art XVI.

⁴⁵² United Nations General Assembly, 24th Session. 1812 Plenary Meeting, 19 November 1969. Agenda Item 98, 'Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) Report of the Secretary-General regarding the act of self-determination in West Irian' at 3.

⁴⁵³ United Nations Treaty Series No. 6311: The New York Agreement 1962. Articles XIV, XV and XVIII at 278.

⁴⁵⁴ The New York Agreement 1962, art XVIII (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”

⁴⁵⁵ Danilyn Rutherford “An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua” (2010) 90 IND 173 at 180.

and consciously tolerated by the UN. In the end, West Papua's universally acknowledged rights reflected in the Agreement were denied ever since.

All the terms of the Agreement were violated immediately after Indonesia's taking over the administration in 1963.⁴⁵⁶ Sukarno had declared that West Irian had been an integral part of Indonesia's sovereignty and there would be no act of self-determination,⁴⁵⁷ which was contrary to the terms of the Agreement.⁴⁵⁸ In the breach of the New York Agreement, Indonesia banned existing Papuan political parties, brutally suppressed the Papuans in exercising their freedom of expression. Indonesia military conducted a sustained campaign of violence, conditioning and intimidation against the Papuans.⁴⁵⁹ The UNTEA, withdrew on the date the minimum period had completed on 1st May 1963, and Indonesia overtook full control over West New Guinea.⁴⁶⁰ With that, the UN had been given no capacity, the only exception was for the UN to be involved pursuant to Article XVI where the UN experts were to be designated to remain in the territory after its withdrawal to fill the required gaps of their expertise.⁴⁶¹ But Indonesia had been far less interested in fulfilling the terms of Article XVI.⁴⁶² Since then Indonesia fully controlled the territory.

⁴⁵⁶ John Saltford "United Nations Involvement with the Act of Self-Determination in West Irian (Indonesian West New Guinea) 1968 to 1969" (2000) 69 IND 71, at 61.

⁴⁵⁷ Julian McKinlay King "A Soul Divided: The UN's Misconduct over West Papua" (2019) 16 UTS ePress 59 at 68.

⁴⁵⁸ Danilyn Rutherford "An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua" (2010) 90 IND 173 at 175.

⁴⁵⁹ Thomas D. Musgrave "An Analysis of the 1969 Act of Free Choice in West Papua" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 219.

⁴⁶⁰ John Saltford "United Nations Involvement with the Act of Self-Determination in West Irian (Indonesian West New Guinea) 1968 to 1969" (2000) 69 IND 71, at 73.

⁴⁶¹ United Nations Treaty Series No. 6311: The New York Agreement 1962. Article XVI at 281.

⁴⁶² Pieter J Drooglever *an Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 661.

2.3. The Implications of the New York Agreement

2.3.1. Legal Impact on International Human Rights Framework

2.3.1.1. Charter of the United Nations

Imposition of the 1962 New York Agreement not only affects the human rights of indigenous Papuans, but also undermines the primary instrument of international laws. As discussed earlier, West Papua was recognised as a Non-Self-Governing Territory NSGT for the purpose of the decolonisation process.⁴⁶³ It possessed the legal status of the territory under international law.⁴⁶⁴ The Dutch as colonial power began to fulfil this legal obligation to implement the provision of Article 73 of the Charter.⁴⁶⁵ When the New York Agreement was imposed in 1962, the legal status of West Papua that existed as a Non-Self-Governing Territory had been subverted. The Agreement did not assign a legal status to the territory. The only condition was a ‘responsibility of administration.’⁴⁶⁶

There are a number of legal arguments to be made under the Charter of the United Nations. First, the international status of West Papua should have been shifted from a NSGT to a Trusteeship Territory. Under the UN’s temporary administration over the territory in 1962, and then under Indonesia until 1969, West Papua should have had the status of a Trust Territory, as such, article 81 of the UN Charter should have been applied.⁴⁶⁷ Because the New York Agreement entrusted both the UNTEA and Indonesia as ‘administering authorities’ of the territory. Also, with the transfer of West Papua from the Dutch to the United Nations in 1962, through the New York Agreement, this Agreement should have been a ‘Trusteeship Agreement’ shifting the territory’s

⁴⁶³ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 180.

⁴⁶⁴ Julian McKinlay King “A Soul Divided: The UN’s Misconduct over West Papua” (2019) 16 UTS ePress 59 at 68.

⁴⁶⁵ Charter of the United Nations, art 73.

⁴⁶⁶ The New York Agreement, art XIV.

⁴⁶⁷ Charter of the United Nations, art 81.

legal status from a NSGT of the Netherlands, to a Trust Territory of the United Nations.⁴⁶⁸ As such, the United Nations via the Trusteeship Council was, and remains, responsible to ensure that indigenous West Papuans attain self-government as required under Article 76(b) of the Charter.⁴⁶⁹ The other reason is that when the New York Agreement was imposed, and its mandate to the UN temporary responsibility and then to Indonesia,⁴⁷⁰ West Papua's legal status should legally remain as either a NSGT and or as a Trust Territory. As such, the provisions of Chapters XI, XII and XIII of the UN Charter remain applicable to West Papua.⁴⁷¹

However, the possibility of designating the lawful international status of West Papua within the system of the UN Charter had been completely left out by imposing the New York Agreement in 1962. In consequence, the indigenous West Papuans' best chance to exercise their legal right through decolonisation regimes set out in Chapters XI, XII and XIII of the Charter was eventually missed out, and that's how the New York Agreement affects the UN Charter, the primary instrument of international law.

⁴⁶⁸ Julian Mackinlay King with Andrew Johnson "West Papua Exposed: Non-Self-Governing Territory or Trust Territory" (2018) 6 GJLHD 70 at 70.

⁴⁶⁹ Charter of the United Nations, art 76 (b).

⁴⁷⁰ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 67.

⁴⁷¹ Charter of the United Nations, chapters XI - XIII; Regarding Non-Self-Governing Territories and Trust Territories.

2.3.1.2. The United Nations General Assembly Resolutions

2.3.1.2.1. Resolution 1514 (XV)

For further manifestation of the universal principles of equal rights and self-determination for all peoples, the UN adopted Resolution 1514 (XV) on 14 December 1960.⁴⁷² The Resolution was titled the Declaration on the Granting of Independence to colonial countries and peoples, also known as ‘the declaration on decolonization.’⁴⁷³ Both the Netherlands and Indonesia were parties.⁴⁷⁴ Significantly, West Papua had legal recognition as a Non-Self-Governing Territory by the UN in 1960, and a Resolution 1514 (XV) recognised the right of such peoples to self-determination.⁴⁷⁵ Therefore, this provision is applicable to the legal issue of West Papua.

The resolution recognises a more direct legal right of colonised peoples to determine their own destiny. It equated self-determination with decolonisation, as articulated in the first articles in which ‘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 cooperation.’⁴⁷⁶ Resolution 1514 recognised ‘people’s right to self-determination under art 2, which stated that; “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.”⁴⁷⁷ Since the legal notion of self-determination included in art 2 of resolution 1514, it could have been a legal ground to pursue an external self-determination for recognised Non-Self-Governing Territory of West Papua.

⁴⁷² GA Res 1514 (XV): Declaration on the Granting Independence to Colonial Countries and Peoples.

⁴⁷³ The United Nations and Decolonization. <<https://www.un.org>>.

⁴⁷⁴ Dusan J Djonovich “United Nations Resolutions Series I: Resolutions Adopted by the General Assembly, VIII: 1960 - 1962 (Dobbs Ferry, New York: Oceania Publications, 1974), at 21 & 38.

⁴⁷⁵ See John Saltford, above n 470, at 180.

⁴⁷⁶ Camellia Webb-Gannon *Morning Star Raising: The Politics of Decolonization in West Papua* (University of Hawai’i, Honolulu, 2021) at 30.

⁴⁷⁷ GA Res 1514 (XV), art 2.

In the preamble of resolution 1514 reaffirmed that ‘the necessity of bringing to a speedy and unconditional end of colonialism in all its forms and manifestations.’ In this regard, further elaboration was made in the further articles. Article 5 required administering powers to:

“Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom”.⁴⁷⁸

Furthermore, the granting of independence to NSGT was not to be delayed, as required under art 3 that; “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”⁴⁷⁹

Given the fact that West Papua was legally recognized by the United Nations as a NSGT, this resolution is therefore legally applicable. As the British official asserted; ‘West Irian has been a plenary item since its inscription, although listed as a non-self-governing territory until UNTEA took over in 1962. It is not clear why, when Indonesia took over the administration in 1963, it was not required to submit transmissions under article 73e of the Charter, or for that matter, or why West Irian did not, once again, appear on the list of non-self-governing territories.’⁴⁸⁰ This also serves as further evidence that imposing the New York Agreement prevented further the legal rights of West Papuans to gain the benefit of international law.

⁴⁷⁸ GA Res 1514 (XV), art 5.

⁴⁷⁹ GA Res 1514 (XV), art 3.

⁴⁸⁰ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 174.

2.3.1.2.2. Resolution 1541 (XV)

The indigenous Papuans had also been disadvantaged from gaining the benefit of the provision of the United Nations resolution 1541 (XV) in 1960, which laid down the principles in dismantling colonialism in connection to Article 73 of the UN Charter.⁴⁸¹ Twelve principles were set out in this resolution. The first principle stipulated that ‘Chapter XI of the UN Charter would be applicable to territories which were known to be of the colonial type’.⁴⁸² The administering powers were obliged to recognise self-government for Non-Self-Governing Territories in three scenarios, namely; emergence as a sovereign independent State, free association with an independent State; or integration with an independent State.⁴⁸³ Emergence as a sovereign state was the most acceptable and legal way of achieving independence, while the other two types were seen as a derogatory option. For example, some states considered integration with an independent state to be irreversible.⁴⁸⁴ However, even if integration occurred, “The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.” as determined in principle IX.⁴⁸⁵ During the vote for the adoption of resolution 1541 (XV), the Netherlands abstained and Indonesia voted for the resolution.⁴⁸⁶

As discussed earlier, the decolonisation process of West Papua was in place during this period, and the provision of these resolutions could have been applicable to the legal issue of West Papua

⁴⁸¹ GA Res 1541 (XV) of 1960.

⁴⁸² GA Res 1541 (XV) of 1960.

⁴⁸³ General Assembly Resolution 1541 (XV) of 1960 Principle VI: United Nations and Decolonisation <<https://www.un.org>>.

⁴⁸⁴ Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 212.

⁴⁸⁵ GA Res 1541 (XV).

⁴⁸⁶ Dusan J Djonovich “United Nations Resolutions Series I: Resolutions Adopted by the General Assembly, VIII: 1960 - 1962 (Dobbs Ferry, New York: Oceania Publications, 1974), at 22 & 40.

with the potential positive outcome. Nevertheless, the United States' attempts to impose the New York Agreement on West Papuans was clear evidence that America violated not only the United Nations Charter but also the recent development of the 1960's resolutions 1514 ((XV) and 1541 (XV).⁴⁸⁷ On the other hand; since the Declaration on Granting Independence to Colonial Countries and Peoples, (Resolution 1514 (XV)) was adopted in 1960, the Dutch should have been creating a 'self-government' of West Papua. Given the fact that, the Dutch had been in the position of the administering power, and therefore, it should not have delayed granting independence as required under articles 3 and 5 of the Resolution 1514 (XV).⁴⁸⁸ If the Dutch had proceeded in applying from Article 73 of the UN Charter - to Articles 3 and 5 of the UN Resolution 1514 (XV), it could have prevented the US interference, and West Papua could have a different story today.

⁴⁸⁷ Tudor Margot "Gatekeepers to Decolonisation: Recentering the UN Peacekeepers on the Frontline of West Papua's Recolonisation, 1962 -3" (2021) 0 ICH 1 at 3.

⁴⁸⁸ GA Res 1514 (XV), articles 3 and 5.

2.4. Some Legal Arguments

West Papua was legally considered by the UN General Assembly in 1960 as a Non-Self-Governing Territory, and its inhabitants were dependent.⁴⁸⁹ Therefore, the only legal regimes capable to determine final status of the territory should have been through article 73 of the UN Charter,⁴⁹⁰ and the 1960's followed-up adoption of the UNGA Resolutions 1514 (XV)⁴⁹¹ and 1541 (XV).⁴⁹² In line with the Vienna Convention and an ICJ's Opinion, any state has no competence to modify a Non-Self-Governing Territory status of West Papua, except an Advisory Opinion of the International Court of Justice, and the UN regulations that impose decolonization under the UN Charter.⁴⁹³ The Indonesian military aggression in 1961 can be regarded as an act of invalidating the New York Agreement, because its armed action was against the principle of the UN Charter Article 103,⁴⁹⁴ and contrary to Article 53 of Vienna Convention which articulated; "treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law."⁴⁹⁵

Indigenous West Papuans, as the central party of the dispute, deliberately excluded from the treaty making, causing many members of the UN questioning the legality of its existence;⁴⁹⁶ The Secretary General did not present the draft Agreement to the members of the General Assembly for approval as required under article 102 of the UN Charter,⁴⁹⁷ Resulting the Resolution 1752 (XVII) did not seek approval by the General Assembly, but instead only 'takes note' which legally neither approves or disapproves.⁴⁹⁸ As such, the UN member states should have opposed the

⁴⁸⁹ GA Res A/Res/448 (V).

⁴⁹⁰ Charter of the United Nations, art 37.

⁴⁹¹ GA Res 1514 (XV): Declaration on the Granting Independence to Colonial Countries and Peoples. <<https://www.ohchr.org>>.

⁴⁹² GA Res 1541 (XV) 1960.

⁴⁹³ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 84.

⁴⁹⁴ Charter of the United Nations, art 103; "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. (UN Charter)"

⁴⁹⁵ Vienna Convention, Article 53 on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

⁴⁹⁶ Julian McKinlay King "A Soul Divided: The UN's Misconduct over West Papua" (2019) 16 UTS ePress 59 at 65.

⁴⁹⁷ Charter of the United Nations, art 102.

⁴⁹⁸ See Julian McKinlay King, above n 496, at 64.

‘taking note’ process of the New York Agreement, in line with the Vienna Convention and an ICJ’s Opinion.⁴⁹⁹

Furthermore, the language used in the formulation of the questions for a plebiscite framed differently from the universally acknowledged type of questions under the Principle VI of the resolution 1541 (XV), which specified that in obtaining a full measure of self-government it should apply three ways; (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.⁵⁰⁰ However, in the New York Agreement, the questions were restricted only to two; (i) whether to remain with Indonesia, or (ii) sever ties with Indonesia.⁵⁰¹

In the breach of the requirement of article XVIII of the Agreement, Indonesia deliberately refused to apply the “international practice of One Man, One Vote” system, for self-determination. Jakarta imposed ‘Musyawarah’ which was contrary to its commitment to the Agreement.⁵⁰² Even in the implementation of Musyawarah, those assembly members were selected by Indonesia with the majority of them having been the members of pro-Indonesian movement.⁵⁰³ Moreover, from those selected members of 1025 Papuans were restricted to vote. Indonesia only appointed 175 members to speak (read out) on behalf of the rest of the members.⁵⁰⁴ These speakers were carefully trained what to say, and those who were not had also been instructed to stand up to indicate their approval. This event was held under heavy military pressure, intimidation, coercion, bribery and indoctrination.⁵⁰⁵

Finally, in the report to the General Assembly on the 6th of November 1969, the Secretary General had used one sided language with his representative Ortiz Sanz, to make no mention of the

⁴⁹⁹ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 84.

⁵⁰⁰ GA Res 1541 (XV) 1960, principle VI

⁵⁰¹ The New York Agreement 1962, art XVIII (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 (6) whether they wish to sever their ties with Indonesia.

⁵⁰² Danilyn Rutherford “An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua” (2010) 90 IND 173 at 180.

⁵⁰³ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 164.

⁵⁰⁴ Julian Mackinlay King with Andrew Johnson “West Papua Exposed: Non-Self-Governing Territory or Trust Territory” (2018) 6 GJLHD 70 at 72.

⁵⁰⁵ Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 157.

deliberate transgression of international law.⁵⁰⁶ In protest during the (plenary meetings 1810, 1811, 1812 and 1813 - 1969),⁵⁰⁷ Some members of the General Assembly rejected the report with great concern over the numerous breaches of the terms of the Agreement, and proposed an amendment to carry out the plebiscite appropriately according to international practice of referendum.⁵⁰⁸ Ghana and other African countries had detailed many breaches of the Agreement saying it makes:

“A mockery of the democratic process and a breach of the principle of self-determination, a principle so clearly enshrined in the Charter of the United Nations and proposed a new act of self-determination in accordance with international practice (General Assembly Plenary Meeting 1812, 1969: para 15-44).”⁵⁰⁹

Those African countries were not convinced by the Indonesian arguments of, ‘Papuan primitiveness, stone age peoples and uncivilised society’,⁵¹⁰ and presented a compelling argument, saying:

“No society can be said to be so primitive and no terrain so geographically difficult in the modern world that the vital exercise of democratic government should be indefinitely denied to its peoples. Adult and school education, road engineering and aerial communications comprise a few of the techniques that can be used to eliminate these obstacles towards fully representative government.”⁵¹¹

Similar to Resolution 1752 (XVII) of 1962 concerning the New York Agreement, Resolution 2504 (XXIV) concerning the Secretary-General's report on the Act of Free Choice was ‘take note of its result.’⁵¹² As defined by the United Nations Secretariat, the wording “take notes of” and “notes”

⁵⁰⁶ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 172.

⁵⁰⁷ United Nations General Assembly Plenary Meeting 1810, 1969: Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian): report of the Secretary-General regarding the act of self-determination in West Irian (A/1723 and Corr.1).

⁵⁰⁸ Mr. AKWEI, UN Representative for Ghana, United Nations General Assembly, 24th Session. 1812 Plenary Meeting, 19 November 1969. Agenda Item 98, ‘Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) Report of the Secretary-General regarding the act of self-determination in West Irian’ at 5. <<https://www.undocs.org/A/PV.1812>>.

⁵⁰⁹ Julian Mackinlay King with Andrew Johnson “West Papua Exposed: Non-Self-Governing Territory or Trust Territory” (2018) 6 GJLHD 70 at 74.

⁵¹⁰ See John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal*, above n 506, at 174.

⁵¹¹ Davidson Nicol, UN Representative for Sierra Leone, United Nations General Assembly, 24th Session. 1812 Plenary Meeting, 19 November 1969. Agenda Item 98, ‘Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) Report of the Secretary-General regarding the act of self-determination in West Irian’ at 1. <<https://www.undocs.org/A/PV.1812>>.

⁵¹² See John Saltford, above n 506, at 175.

are neutral terms that constitute neither approval nor disapproval.⁵¹³ This is to suggest that, while echoing the views of the Act of Free Choice ‘as a sham’ by some UN member states, (mostly African States) during the 1812th Plenary Meeting,⁵¹⁴ the General Assembly did not approve the contents of the report. It means, the legitimate conclusion is to argue that Indonesia's claim of the UN Resolution 2504 (XXIV) as a final - and its claim of territorial integrity over West Papua has no valid ground under the rules of procedure of the Assembly, and thus, cannot be justified under the international law. On the contrary, accumulating the legal contentions raised above, West Papuan people and their legal claims gaining a justifiable and a respectable position in the contexts of historical and the contemporary development of the international rule of law and human rights.

⁵¹³ General Assembly Resolutions and Decisions, 55/488 (in A/55/49 (Vol. III), at 92). Fifty-fifth Session: on the definition of the expressions “takes note of” and “notes”.
24 December 2000 - 10 September 2001: General Assembly Official Record. Fifty-fifth Session. Supplement No. 49 (A/55/49/Vol. III).

⁵¹⁴ United Nations General Assembly, 24th Session. 1812 Plenary Meeting, 19 November 1969. Agenda Item 98, ‘Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) Report of the Secretary-General regarding the act of self-determination in West Irian’. <<https://www.undocs.org/A/PV.1812>>.

2.5. Gaps within International Laws

As discussed earlier, West Papua was legally recognised by the United Nations as Non-Self-Governing Territory through the United Nations General Assembly (UNGA) Resolution A/Res/448 (V).⁵¹⁵ It requires that the international laws that developed to decolonise such territory are considered as peremptory norms, suggesting that West Papua was on its best place in international law.⁵¹⁶ The Dutch, as the administering power, began to implement this principle, particularly the provision of article 73 of the UN Charter.⁵¹⁷ However, it was disrupted when the United States became involved in the secret negotiations with the UN and Indonesia, in which the New York Agreement was ultimately conceived in 1962.⁵¹⁸ Consequently, West Papuans best place to exercise their legal rights under the peremptory norms of decolonisation had been forfeited ever since.⁵¹⁹

With that basis, it can be argued that West Papua's international status remains as a 'Non-Self-Governing Territory under the colonial administration of Indonesia.' This is to suggest that the scope of international law that had been disposed of, is required to be restored - as it was an act of historical violation of international law that also inflicted ongoing human rights calamities towards West Papuans. In order to restore that historical violation, West Papuans should be given their rightful place amongst nations and peoples with continuing rights to decolonisation as guaranteed in article 73 of the United Nations Charter;⁵²⁰ the 1960's United Nations General Assembly Resolutions No 1514 (XV)⁵²¹ and 1541 (XV).⁵²² These regimes are required to be employed for the rectification of historical and ongoing violations of human rights.

⁵¹⁵ GA Res A/Res/448 (V).

⁵¹⁶ Thomas D. Musgrave *Self-determination and National Minorities* (Oxford University Press, London, 1997) at 69 - 70.

⁵¹⁷ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 83.

⁵¹⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 12.

⁵¹⁹ Melinda Janki "West Papua and the Rights to Self-Determination under International Law" (2010) 34 WILJ at 4.

⁵²⁰ The Charter of the United Nations, art 73.

⁵²¹ GA Res. No 1514 (XV) 1960.

⁵²² GA Res. No 1541 (XV) 1960.

Further denial of the legal rights of the Papuans guaranteed in the New York Agreement,⁵²³ also affirms that Indonesia's claim over West Papua is legally invalid and historically unjustified. Melinda Janki argued:

“Indonesia’s claim of sovereignty over West Papua is valid only if two conditions are met. First, “indigenous Papuans must have substantive legal right to self-determination, and they should have genuinely voted for integration through self-determination exercised in accordance with the procedural requirements of international law, at the time of the Act of Free Choice in 1969.”⁵²⁴

Therefore, Indonesia’s presence in West Papua is illegal under international law, because substantive legal rights of West Papuans had been deliberately denied and the procedural requirements of international law were largely ignored.⁵²⁵ It suggests West Papua’s best place in international laws remains unfulfilled properly, requiring the proper implementation of decolonisation regimes.

Decades of excessive violations of human rights towards the Papuans, also create more room for the necessity of the contemporary international human rights regimes to be applied. Including the provision of the indigenous rights regime of the United Nations Declaration on the Rights of Indigenous People (the declaration or UNDRIP).⁵²⁶ This international human rights instrument is significantly important for indigenous Pacific islanders of West Papua. Because the legal nature of its exclusivity provides the best place in international law for the protection of indigenous rights, which also guarantees the notion of self-determination⁵²⁷ that is grounded in the broad idea of human rights protection.⁵²⁸ With the growing demand of the indigenous West Papuans in seeking the best place in international law, the international community can also play an important role towards achieving this goal, not only for indigenous West Papuans but also for all people who have lost their place in international law. As the ICJ stated in relation to the Namibian peoples: “All States should bear in mind that the injured entity is a people which must look to the

⁵²³ L.E. *Avoiding Another East-Timor Atrocity: The Fight for Indigenous Sovereignty and Self-Determination in West Papua* (Springer International Publishing, New York, 2019) at ch 212.

⁵²⁴ See Melinda Janki, above n 519, at 30.

⁵²⁵ At 33.

⁵²⁶ The United Nations Declaration on the Rights of Indigenous People (UNDRIP) the Declaration. <<https://www.un.org>>.

⁵²⁷ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 3.

⁵²⁸ Charter of the United Nations, articles 1 (2) and 55; UNGA Res, No 1514 (XV), para 2; ICCPR Article 2 (1, 3) and ICESCR Article 2 (2).

international community for assistance in its progress towards the goal for which the sacred trust was instituted.”⁵²⁹

2.6. Human Rights Impacts on the People of West Papua

2.6.1. Civil and Political Rights in West Papua

This part will provide a response to the question of ‘what human rights issues had the New York Agreement given raise to, to the people of West Papua’. As was argued in chapter one, the imposition of the Agreement inevitably placed the indigenous Pacific islanders of West Papua under Asian imperialism. It has been 59 years of Indonesia's ongoing rule, since the succession of the territory in 1963.⁵³⁰ Being under someone else’s government has meant repression, displacement, dispossession and exploitation. As Patricia Campbell critics that:

“Colonialism proved to be very cruel towards indigenous peoples, bringing about slavery, brutality, and death.” Further, it brought “the impacts of colonialism were similar, regardless of the specific coloniser: disease; destruction of indigenous social, political, and economic structures; repression; exploitation; land displacement; and land degradation.”⁵³¹

Because colonialism by nature has been negative not only in the far distant past, but continues to exist in the 21st Century, these impacts also continue. Particularly indigenous peoples who have suffered from historical injustices, resulting from deprivation of their right to self-determination and the dispossession of their lands, territories and natural resources.⁵³²

⁵²⁹ International Court of Justice “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Security Council Resolution 276 (1970)” <<https://www.icj-cij.org>>.

⁵³⁰ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 67.

⁵³¹ Campbell PJ, Aran MacKinnon and Christy RS an *Introduction to Global Studies* (Somerset, Wiley-Blackwell, 2010) at 36.

⁵³² Peter Cane and Joanne Conaghan *The New Oxford Companion to Law* (Oxford University Press, London, 2008).

The situation of civil and political rights in West Papua, largely remains distressing. Data collected by the International Coalition for Papua (ICP)⁵³³ concluded that the political space in West Papua is rapidly shrinking.⁵³⁴ The right to freedom of expression, freedom of peaceful assembly and association are universal human rights,⁵³⁵ grounded in articles 19 and 20 of the Universal Declaration of Human Rights (UDHR), which stipulates:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵³⁶

These rights were further guaranteed in article 19 of the 1966 International Covenant on Civil and Political Rights (ICCPR).⁵³⁷ Indonesia has ratified the Covenant in 2006, and thus is a party to it.⁵³⁸ As a State party, Indonesia has a legal obligation to respect human rights without any discrimination, as required under article 2 of ICCPR.⁵³⁹ The obligation to ‘respect’ indicates the traditional duty of states to refrain from restricting its citizens from exercising freedom of expression and of assembly that is guaranteed in the civil and political rights.

However, the Indonesian government severely restricted the freedom of assembly and freedom of expression for indigenous West Papuans with the issuance of an edict in 2016. This was an attempt to deter democratic space for Papuans, and to criminalise the members of the pro-independence movement.⁵⁴⁰ The international spokesperson for the National Committee of West Papua (KNPB), Victor Yeimo was arrested in July 2021 and is now facing charges of treason, simply due to leading a peaceful protest in 2019 against a racist slurs by Indonesian towards indigenous Papuans.⁵⁴¹ Yeimo’s arrests attracted international attention, including from the UN Human Rights Committee

⁵³³ The International Coalition for Papua (ICP) is an international coalition of faith-based and civil society organisations (the Coalition) addressing the serious human rights condition in West Papua and supporting a peaceful solution to the conflict.

⁵³⁴ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 8.

⁵³⁵ Jan Oster *Media Freedom as a Fundamental Right* (Cambridge University Press, Cambridge, 2015) at 147.

⁵³⁶ Universal Declaration of Human Rights, Articles 19 and 20.

⁵³⁷ ICCPR, art 19.

⁵³⁸ United Nations Human Rights Treaty Bodies: UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

⁵³⁹ ICCPR, art 2.

⁵⁴⁰ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 23.

⁵⁴¹ Amnesty International. Indonesia: Release Peaceful Anti-Racism Protest Victor Yeimo. <<https://action.amnesty.org.au>>.

(UNHRC) and from international NGOs such as Amnesty International, which conducted a petition calling for his immediate release.⁵⁴² In July 2021, in response to the urgent demand made by the solidarity group of West Papua Action Aotearoa New Zealand, the New Zealand government also expressed concerns over the arrest through their Minister of Foreign Affairs and Trade, Nanaia Mahuta.⁵⁴³

In 2020, in a second periodic report on Indonesia, the UN Human Rights Committee expressed concerns over restrictions imposed by the Indonesian government. These concerns were about developments such as the imposition of increasing constraints on opinions expressed in the context of ‘academic debates, political engagement or similar activity, including the prohibition of certain research topics in higher education institutions, such as issues relating to West Papua.’⁵⁴⁴ The Committee has also demanded reports on the denial of the right to information following a partial Internet shutdown in the provinces of Papua and West Papua in August and September 2019. The government responded that “the shutdown was imposed partially in small areas due to emergencies, specifically on the assessment that the spread of hoax and false information may escalate ongoing violence.”⁵⁴⁵ This claim cannot be justified in the context of ongoing political instability and relentless human rights situations in the region since 1963.

The Human Rights Committee also responded to complaints, on reports of excessive use of force to disperse peaceful assemblies, including protests in August and September 2019 in Surabaya, Malang and cities across West Papua.⁵⁴⁶ Indonesia, in its response, contended that “persons that have allegedly committed misconduct during the incidents have undergone appropriate investigations and due process of law.”⁵⁴⁷ While noting that, unlike in other provinces, protesters in West Papua are not required to obtain a permit from the police before holding demonstrations,

⁵⁴² Amnesty International. Indonesia.

⁵⁴³ Letter from Hon. Nanaia Mahuta (Minister of Foreign Affairs and Trade of New Zealand) to Members of West Papua Action Aotearoa, Regarding an Urgent Demand for Human Rights Concerns of West Papua. (17 August 2021).

⁵⁴⁴ United Nations Human Rights Committee on International Covenant on Civil and Political Rights: CCPR/C/IDN/QPR/2. Distr: General 2 September 2020, at 5. <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/OptionalReporting.aspx>.

⁵⁴⁵ United Nations Human Rights Committee on International Covenant on Civil and Political Rights: CCPR/C/IDN/QPR/2. Distr: General 2 September 2020, at 28. <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/OptionalReporting.aspx>.

⁵⁴⁶ At 5.

⁵⁴⁷ United Nations Human Rights Committee on International Covenant on Civil and Political Rights: Replies of Indonesia to the list of issues in relation to its second periodic report CCPR/C/IDN/2. 29 July 2021, at 29.

the Committee remains concerned at undue restrictions of the freedom of assembly and expression by protesters.⁵⁴⁸ The growing political activity amongst indigenous Papuans and increasing number of peaceful mass demonstrations were characterised by more mass arrests, and committed by police forces or the Police Mobile Brigade (Brimob).⁵⁴⁹

As a state party to International Covenant on Civil and Political Rights (ICCPR), Indonesia must uphold rights to freedom of peaceful assembly and protection from harassment, intimidation and violence that are guaranteed in this human rights treaty is not being applied properly in West Papua, and is an ongoing concern for indigenous Papuans.⁵⁵⁰ This is clearly incompatible to the spirit of article 19 of the Universal Declaration of Human Rights (UDHR),⁵⁵¹ and contrary to the state's obligation mentioned in articles 2 and 19(2) of ICCPR which affirmed the right to freedom of expression.⁵⁵²

The strong limitations on freedom of assembly discussed above have led to the number of political arrests. According to the Papua Behind Bars (PBB) report, there were 245 new political prisoners between January 2019 and September 2020; 103 treason cases; 129 Non-treason cases and 12 unknown cases.⁵⁵³ In its annual overview from the period of October 2020 to September 2021 recorded 418 new political prisoners.⁵⁵⁴ The Tapol and International Coalition for Papua (NGO) have reported a long list of extra-judicial and arbitrary executions committed by the security forces and Police personnel.⁵⁵⁵ Just within the years 2015 and 2016, there were sixteen cases of extra-judicial and arbitrary executions, causing the death of at least twenty victims.⁵⁵⁶

⁵⁴⁸ United Nations Human Rights Committee on ICCPR. CCPR/C/IDN/CO/1. At 8. <<https://tbinternet.ohchr.org>>.

⁵⁴⁹ At 48.

⁵⁵⁰ United Nations Human Rights Committee on International Covenant on Civil and Political Rights: CCPR/C/IDN/QPR/2. Dist.: General 2 September 2020.

⁵⁵¹ Universal Declaration of Human Rights, art 19.

⁵⁵² ICCPR, art 19 (2).

⁵⁵³ Papua Behind Bars: Prisoner Update: Jan 2019 – Sept 2020.

<www.papuansbehindbars.org/?p=4613>.

⁵⁵⁴ Papua Behind Bars: Annual Overview of the period October 2020 to September 2021 <www.papuansbehindbars.org/?p=4613>.

⁵⁵⁵ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 33.

⁵⁵⁶ At 34.

Meanwhile, between 2017 and 2018, human rights groups reported a total number of 21 cases of extra-judicial killings resulting in the death of 33 victims.⁵⁵⁷ Mr. Ra'ad Al Hussein, UN High Commissioner for Human Rights in 2018, expressed his concern saying; "I am concerned about increasing reports of the excessive use of force by security forces, harassment, arbitrary arrests and detentions in Papua."⁵⁵⁸ Human rights defenders are also vulnerable and under intimidation, attacks and obstruction, due to their work reporting on arrests, torture, ill-treatment and extra-judicial killings, such as the killing of Robert Jitmau in 2016.⁵⁵⁹ In 2019, the UN High Commissioner for Human Rights, Michelle Bachelet, engaged with Indonesian authorities on the issue of West Papua and requested access to the region, yet, again, there is no positive response from the Indonesian government under Joko Widodo's presidency.⁵⁶⁰

Indonesian government agencies also made a strict prohibition to report on human rights-related or political issues to media, particularly international journalists.⁵⁶¹ Media freedom is considered as one of the fundamental human rights in a democratic society.⁵⁶² As guaranteed in article 19 of ICCPR, affirming that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."⁵⁶³ The Human Rights Committee acknowledged that freedom of opinion and freedom of expression 'are indispensable conditions for the full development of the persons' and constitute the cornerstones in any free and democratic society.⁵⁶⁴ The Committee regularly reaffirmed that the right to freedom of expression is of paramount importance, and equally important for journalists and media in a democratic society.⁵⁶⁵

⁵⁵⁷ International Coalition for Papua and the West Papua-Netzwerk "Human Rights and Conflict Escalation in West Papua" ICP (January 2020) at 115. <<https://www.ulmwp.org/wp-content/uploads/2020/09/HumanRightsPapua2019-ICP.pdf>>.

⁵⁵⁸ Statements: Office of the High Commissioner for Human Rights <<https://www.ohchr.org/en/statements/2018/02/opening-remarks-un-high-commissioner-human-rights-zeid-raad-al-hussein-press-0>>.

⁵⁵⁹ International Coalition for Papua *Human Rights in West Papua 2017* at 30.

⁵⁶⁰ At 5.

⁵⁶¹ Human Rights Watch "Something to Hide? Indonesia's Restrictions on Media Freedom and Rights Monitoring in Papua" (2015) at 14.

⁵⁶² Jan Oster *Media Freedom as a Fundamental Right* (Cambridge University Press, Cambridge, 2015) at 147.

⁵⁶³ ICCPR, art 19 (2).

⁵⁶⁴ General Comment No 34, para. 2.

⁵⁶⁵ See Jan Oster, above n 562, at 32.

Indonesia is a democratic country, as it's often claimed in international fora. However, its failure to ensure media freedom in West Papua remains concerning. In 2015, Indonesian President Joko Widodo publicly announced free access for foreign journalists. However, the President's statement was never enforced through a government regulation.⁵⁶⁶ Due to the media restriction, the international community is not aware of serious human rights violations taking place in West Papua.⁵⁶⁷ The authorities also banned human rights organisations and observers as well as foreign diplomats, with British, Canadian and New Zealand officials denied entry.⁵⁶⁸ Civil and political rights in West Papua discussed indicate that despite a few positive trends fundamental human rights and freedoms still remain deep concerns. The government under President Joko Widodo continues to control the long-standing political conflict in West Papua through a military-based approach while pushing economic development and infrastructure projects.⁵⁶⁹ This has resulted not only in the aggravation of a violent conflict but also in the deterioration of civil and political rights, in which the majority of victims are indigenous West Papuans.

Over decades, these multifaceted human rights issues in West Papua have remained a great concern. The concerns had been raised by domestic and international human rights organisations.⁵⁷⁰ However, the Indonesian government appears to have no good-will and thus there also remains a situation of no progress. Recommendations of the UN human rights bodies are routinely ignored and the recommendations had been dismissive.⁵⁷¹ In the comment on Indonesia's implementation of ICCPR in 2013, the Indonesian National Human Rights Commission (Komnas HAM), citing the unresolved serious human rights violations of Wasior, Wamena and Abepura

⁵⁶⁶ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 30.

⁵⁶⁷ Nadhya A Abrar "West Papuan Journalists Today: An Alternative Human Rights Perspective from Indonesia" (2020) 26 *PJR* 123 at 23.

⁵⁶⁸ David Robbie "Key Melanesian Media Freedom Challenges: Climate Crisis, Internet Freedoms, Fake News and West Papua" (2020) 26 *PJR* 15 at 25.

⁵⁶⁹ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 22.

⁵⁷⁰ Amnesty International Indonesia: Indonesia: Civil and political rights' violations In Papua and West Papua: List of issues prior to reporting (LOIPR) for Indonesia CCPR Session 129, June-July 2020. (Index: ASA 21/2445/2020).

⁵⁷¹ The United Nations News: Indonesia: Shocking abuses against indigenous Papuans, rights experts report. 1 March 2022.

<https://news.un.org/en/story/2022/03/1113062?utm_source=UN+News+-+Newsletter&utm_campaign=48be703963-EMAIL_CAMPAIGN_2022_03_02_01_00&utm_medium=email&utm_term=0_fdbf1af606-48be703963-107560917>.

concluded that crimes against humanity were committed and allegedly perpetrated by the police but the government is making little progress to address.⁵⁷²

2.6.2. Economic, Social and Cultural Right in West Papua

Economic, Social and Cultural aspects are recognised as the universal human rights that are covered; the rights to adequate health, adequate education, housing, to food, social security, to take part in cultural life, to water and sanitation, and to work.⁵⁷³ These rights are generally guaranteed in the 1948 Universal Declaration of Human Rights (UDHR).⁵⁷⁴ After the Cold War, the economic, social and cultural rights were specifically guaranteed further through the legally binding instrument of International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.⁵⁷⁵ As legally binding treaties, states parties are to comply with the ‘State’s Obligations’ under the Covenant.

Indonesia became a State Party with its ratification of the Covenant in 2006.⁵⁷⁶ Being a state party to the Covenant, Indonesia is legally bound to the requirement enumerated in article 2 (1) of the ICESCR, which requires to:

“Undertake steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁵⁷⁷

⁵⁷² The Indonesian National Human Rights Commission on Indonesia’s Compliance with the International Covenant on Civil and Political Rights. <<https://tbinternet.ohchr.org>>.

⁵⁷³ International Covenant on Economic, Social and Cultural Rights.

⁵⁷⁴ Universal Declaration of Human Rights 1948, articles 22 - 27.

⁵⁷⁵ Office of the High Commission for Human Rights: ICESCR. General Assembly Resolution 2200A (XXI) <www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

⁵⁷⁶ United Nations Human Rights Treaty Bodies: UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

⁵⁷⁷ ICESCR, art 2 (1).

To fulfil its state obligation, Indonesia had endorsed the ICESCR through Law No 11 of 2005.⁵⁷⁸ In its preamble, the State recognised that:

“Human rights are basic rights that naturally attached to humans, are universal and lasting, and therefore, must be protected, respected, maintained, and should not be ignored, reduced, or confiscated by anyone;”⁵⁷⁹

This means that the economic, social and cultural rights mentioned in ESCRs are guaranteed and therefore, Indonesia has a legal duty to protect, respect and promote those rights.

Over 59 years of Indonesian rule in West Papua, however, indigenous Papuans rights on Economic, Social and Cultural Rights are mostly dominated by violation of the right to health, the right to education, the right to food and labour rights.⁵⁸⁰ Basic health care is neglected. Infant mortality rate in West Papua is more than twice and maternal mortality rates are three times greater than the rest of Indonesia.⁵⁸¹ The spread of HIV/AIDS reached an alarming level. As the provincial Office for Health reported, “about 1018 cases of HIV/AIDS in West Papua—382 people affected by AIDS and 636 people living with HIV.”⁵⁸² Life expectancy of indigenous Papuans is lowest, only 50.3 years compared to 60.7 years in other parts of Indonesia.⁵⁸³

In 2018, health officials reported many of pre-school children in Papua province have died from malnutrition and measles, confirming the death of 59 toddlers in Asmat regency, one of the regions with scarce medical services and a severe shortage of doctors.⁵⁸⁴ A similar incident occurred in 2016, with the deaths of at least 51 children and 3 adults due to Pertussis (whooping cough) in Nduga Regency.⁵⁸⁵ As the government did not respond to the serious situation of malnutrition and

⁵⁷⁸ Undang-Undang No 11 Tahun 2005, Tentang Pengesahan International Covenant on Economic, Social and Cultural Rights (Kovenan Internasional Tentang Hak-hak Ekonomi, Sosial dan Budaya). <<https://jdih.bumn.go.id/lihat/UU%20Nomor%2011%20Tahun%202005>>.

⁵⁷⁹ Undang-Undang No 11 Tahun 2005, (Preamble).

⁵⁸⁰ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 80.

⁵⁸¹ Toru Hisada “Indigenous Development and Self-determination in West Papua: A Case Study of the Socio-Political and Economic Impacts of Mining upon the Amungme and Kamoro Communities of West Papua” (2007) at 43.

⁵⁸² Catherine Scott & Neles Tebay “The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace” (2006) 94 CJIA 599 at 604.

⁵⁸³ See Toru Hisada, above n 581, at 43.

⁵⁸⁴ Radio New Zealand: Dozens of Papuan Children Die Due to Malnutrition. (January 2018) <<https://www.rnz.co.nz/international/pacific-news/348361/dozens-of-papuan-children-die-due-to-malnutrition>>.

⁵⁸⁵ International Coalition for Papua: Human Rights and Peace for Papua (16 February 2016) <<https://humanrightspapua.org/news/2016/urgent-appeal-health-crisis-in-nduga-regency/>>.

harsh weather conditions in the affected area, many children died of otherwise manageable infections. These are the result of the negligence that the Indonesia government has failed to fulfil its ‘Obligations’ to protect the health and life of indigenous West Papuans guaranteed in articles 11 and 12 of ICESCR.⁵⁸⁶ It is also failing to provide the right to a standard of living adequate for the health and well-being mentioned in article 25 (1) of Universal Declaration of Human Rights (UDHR).⁵⁸⁷

In the field of education, the government has achieved some progress through the employment of more teachers and building new schools.⁵⁸⁸ However, persistent core problems in the education system in West Papua appear to remain unresolved. In five decades of being under Jakarta's rule, Papua province has the lowest literacy rate in Indonesia at 75.8% in 2017, far below the national average of 95.92%.⁵⁸⁹ Similar to the health sector, the quality of education in the remote areas of West Papua is much lower than in the large cities.⁵⁹⁰ This suggests, the government duty to promote education rights remains negligible. The most recent instances in 2022, indigenous West Papuan students who are studying overseas with the 30% fund allocated for the education sector under the Special Autonomy law,⁵⁹¹ have been ordered home, as the result of the enactment of law No. 2 of 2021, Regarding the second amendment to law No. 21 of 2001, Concerning Special Autonomy for Papua Province,⁵⁹² and Government Regulation No. 107 of 2021,⁵⁹³ which resulted in the cessation of several programs of the Papua Provincial Government (PPG) to a halt, including education, economic empowerment and health.

At the time of writing, hundreds of indigenous Papuan students in the US, Canada, Russia, Japan, Germany, New Zealand and Australia are making an appeal to President Joko Widodo, to discuss about their education right that has been affected by his political policy imposed to West Papua,

⁵⁸⁶ ICESCR, art 12.

⁵⁸⁷ Universal Declaration of Human Rights, art 25 (1).

⁵⁸⁸ Zaw, Htet Thiha and others “Teacher Training and Textbook Distribution Improve Early Grade Reading: Evidence from Papua and West Papua” (2021) 65 CER 691 at 703.

⁵⁸⁹ International Coalition for Papua and the West Papua-Netzwerk “Human Rights and Conflict Escalation in West Papua” ICP (January 2020) at 115.

⁵⁹⁰ At 115.

⁵⁹¹ Special Autonomy Law No. 21 of 2001, art 36 (2).

⁵⁹² Undang-Undang Republik Indonesia Nomor 2 Tahun 2022 Tentang Perubahan Kedua Atas Undang-Undang Nomor 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua <<https://peraturan.bpk.go.id>>.

⁵⁹³ Peraturan Pemerintah (PP) Nomor 107 Tahun 2021 <<https://peraturan.bpk.go.id/Home/Details/184672/pp-no-107-tahun-2021#:~:text=PP%20No.%20107%20Tahun%202021,Provinsi%20Papua%20%5BJDIH%20BPK%20RI%5D>>.

yet, the government consistently ignored the students' demand.⁵⁹⁴ The students through their body of International Alliance of Papuan Students Association Overseas (IAPSAO), in a press release, accused Indonesia for failing to comply with its international obligation for education rights enumerated in art 13 (1) of ICESCR.⁵⁹⁵ This is a clear example of ongoing human rights issues in West Papua. The students had expressed their concern:

“We view that the termination and diversion of overseas scholarship funds managed by the Papua provincial government is an assassination of human resource investment for the future of Papua through education.”⁵⁹⁶

With the political nature of ongoing conflicts since the 1960s, it is suspected that the Indonesian government at some point agitated with the Papuan Students present in diaspora. Nevertheless, for whatever reason it may be, education right guaranteed in articles 13 and 14 of ICESCR,⁵⁹⁷ and the provision of article 26 of the UDHR,⁵⁹⁸ should not be violated in a deliberate manner.

Another human rights concern is poverty. Although West Papua is rich in natural resources, indigenous Papuans have not benefited from these abundant natural resources.⁵⁹⁹ Most of the natural resources such as the largest gold mining of Freeport McMoran;⁶⁰⁰ Liquid Natural Gas of British Petroleum (LNG - BP);⁶⁰¹ logging companies; oil plantation companies (OPC) and others are extracting resources and taken out from West Papua,⁶⁰² leaving the region as one of the poorest provinces in Indonesia with 40% of indigenous West Papuans living in poverty.⁶⁰³

⁵⁹⁴ Matthew Scott “Indonesia cuts off funding for Papuan students in New Zealand” (February 2022) Newsroom <<https://www.newsroom.co.nz/indonesia-cuts-off-funding-for-papuan-students-in-new-zealand>>.

⁵⁹⁵ ICESCR, art 13 (1). “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”

⁵⁹⁶ International Alliance of Papuan Students Association Overseas “Demands to Indonesian President” (Press Release, 27 January 2022).

⁵⁹⁷ ICESCR, articles 13 and 14.

⁵⁹⁸ Universal Declaration of Human Rights, art 26 (1-2).

⁵⁹⁹ At 43.

⁶⁰⁰ Freeport-McMoRan of Indonesia <<https://www.fcx.com/operations/indonesia>>.

⁶⁰¹ Tangguh-LNG of British Petroleum <https://www.bp.com/en_id/indonesia/home/who-we-are/tangguh-lng.html>.

⁶⁰² Kjell Anderson “Colonialism and Cold Genocide: The Case of West Papua” (2015) 9 JSPIJ 10 at 13.

⁶⁰³ Toru Hisada “Indigenous Development and Self-determination in West Papua: A Case Study of the Socio-Political and Economic Impacts of Mining upon the Amungme and Kamoro Communities of West Papua” (2007) at 43.

Indonesia is constantly promoting its long-term policy targeting indigenous Papuans to use Indonesia's language rather than using native language, and this being supported through transmigration programs.⁶⁰⁴ The government used education policy to denigrate indigenous culture, it considered 'uncivilised'. Indigenous language, culture replaced by Indonesia's language, cultural traditions and education have been replaced through a centralised curriculum that neglects local cultures and identities. This results in the alienation of native schoolchildren, who are prohibited from singing in a local language. The traditional names of the mountains, towns and rivers were replaced when Indonesia took over the territory.⁶⁰⁵ The Committee on ESCR, recommends that the State party pursue efforts aimed at the preservation of endangered languages, including by promoting their use and by documenting them. In this regard, the Committee recommends that the State party invest resources for the effective implementation of Ministry of Education and Culture Regulation 81 A of 2013 on implementation of curriculum for the inclusion of the teaching of local languages in the primary school curricula, especially as it pertains to endangered languages.⁶⁰⁶

Violations of the right to food in West Papua are evident in agriculture and mining activities driven by government programs, interfering with food security and economic growth. Palm oil plantations, especially, are a growing threat to tropical rain forests which serve indigenous groups as a source of livelihood and cultural identity. The conversion of forest into plantations has led to the destruction of sago stocks and hunting grounds. If traditional food sources are no longer available, indigenous households develop a dependency on commercial food products.⁶⁰⁷

Labour rights violations are often overlooked. Many companies follow discriminatory practices during the recruitment of new labourers due to prejudice against indigenous Papuans. One of the villagers describes:

“For us as indigenous Papuans, if we want to work for the company, we have to pass through several steps and meet various conditions, such as bringing a letter from the village head, from the

⁶⁰⁴ At 48.

⁶⁰⁵ At 603.

⁶⁰⁶ UN Committee on Economic, Social and Cultural Rights. Concluding observations (2014) E/C.12/IDN/CO/1. At 4 or para 40.

⁶⁰⁷ International Coalition for Papua and the West Papua-Netzwerk “Human Rights and Conflict Escalation in West Papua” ICP (January 2020) at 115.

clan chief, school certificates and identity card, and only then will the human resource department take you on, but non-Papuans, can arrive at the plantation one day and work the next day.”⁶⁰⁸

Such practice is against international human rights law affirmed in General Comment of Committee on Economic, Social and Cultural Rights, regarding non-discrimination, stating that:

“Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation”⁶⁰⁹

Most cases of labour rights violations occur in the extractive industry, such as the 2017 and 2018 cases involving the giant gold mining company of PT Freeport Indonesia,⁶¹⁰ where approximately 12,000 permanent workers and 20,000 contract workers were laid off. Another 4,200 employees were fired for participating in a strike. The Ministry of Manpower and Transmigration has failed to reprimand PT Freeport Indonesia and hold the company accountable.⁶¹¹

These accounts indicate that the Indonesian is not fulfilling its state obligations under the ICESCR. As Gerry Van Klinken noted:

“Indonesia has failed to present itself in the form of primary school teachers who lead the children of the hinterlands into the future. Indonesia has failed to bring in compassionate and devoted paramedics and doctors.”⁶¹²

In the UN News Daily Wrap, UN human rights experts expressed serious concerns about the deteriorating human rights situation in the Indonesian provinces of Papua and West Papua.⁶¹³ Citing shocking abuses against indigenous Papuans, including child killings, disappearances, torture and large number of Internally Displaced People (IDP), following the military attack in several regions. UN experts called for urgent humanitarian access to the region, and urged the Indonesian government to conduct full and independent investigations into abuses against the

⁶⁰⁸ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 100.

⁶⁰⁹ Committee on Economic, Social and Cultural Rights: General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights. (E/C.12/GC/20).

⁶¹⁰ International Coalition for Papua and the West Papua-Netzwerk “Human Rights and Conflict Escalation in West Papua” ICP (January 2020) at 141.

⁶¹¹ At 115.

⁶¹² Gerry Van Klinken. “Three Books on Papua.” *Bijdragen tot de taal-, land- en volkenkunde* (2010) 166 RNISACS 529 at 531.

⁶¹³ OHCHR, Indonesia: UN Experts Sounds Alarm on Serious Papua Abuses Call for Urgent Aid. <www.ohchr.org/en/press-releases/2022/03/indonesia-un-experts-sound-alarm-serious-papua-abuses-call-urgent-aid>.

indigenous peoples. "Between April and November 2021, we have received allegations indicating several instances of extrajudicial killings, including of young children, enforced disappearance, torture and inhuman treatment and the forced displacement of at least 5,000 indigenous Papuans by security forces."⁶¹⁴ They said estimates put the overall number of displaced, since the escalation of violence in December 2018, at between 60,000 to 100,000 people.⁶¹⁵

The central government allocates considerably large funds as part of the 'Special Autonomy Law' to the provincial governments of Papua to improve infrastructure and prosperity.⁶¹⁶ While the infrastructure projects like the Trans-Papua highway are being initiated, the Special Autonomy fund has not brought about meaningful change in the field of economic, social and cultural rights for the indigenous population.⁶¹⁷ There is a strong imbalance in the fulfilment of minimum standards in terms of health, education, food and labour rights between the urban areas and the remote inland areas, where the majority of the local populations consists of indigenous Papuans.⁶¹⁸

For 59 years, Indonesia has appeared conspicuously in forms ranging from military posts, violence, injustice, the marginalisation of indigenous Papuans, and the failure of development, to a whole history of denial of the fundamental rights of indigenous Papuans.⁶¹⁹ Indonesia has failed to present itself in the form of primary school teachers who lead the children of the hinterlands into the future. Indonesia has failed to bring in compassionate and devoted paramedics and doctors. Indonesia has failed to provide a sense of security and comfort to indigenous Papuans so they can live peaceful and decent lives in their own land.

⁶¹⁴ See OHCHR, above n 613.

⁶¹⁵ See OHCHR, above n 613.

⁶¹⁶ Tamberan YW and others "The Allocation of Special Autonomy Funds and Their Impact on Regional Economic Inequality in Papua Province" (2020) 473 EES at 5.

⁶¹⁷ Cahyaningsih and others "The Impact of Asymmetric Fiscal Decentralisation on Education and Health Outcomes: Evidence From Papua Province, Indonesia" (2019) 12 ESJ 48 at 58.

⁶¹⁸ International Coalition for Papua and the West Papua-Netzwerk "Human Rights and Conflict Escalation in West Papua" ICP (January 2020) at 114.

⁶¹⁹ Gerry Van Klinken. "Three Books on Papua." *Bijdragen tot de taal-, land- en volkenkunde* (2010) 166 RNISACS 529 at 530.

2.6.3. Rights on the Land, Territories and Natural Resources

International framework for the collective rights of indigenous peoples to lands, territories and resources are explicitly embedded in articles 3 and 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁶²⁰ as well as in the International Labour Organisation's Indigenous and Tribal Peoples Convention No. 169 (ILO).⁶²¹ Although, a universal human right to land, has not been provided in an explicit way in international human rights law, international instruments make reference to land, such as article 11, paragraph 2 of the ICESCR,⁶²² and article 14, paragraph 2 (g) of the Convention on the Elimination of All Forms of Discrimination Against Women, which makes explicit reference to land in relation to the right to food and the rights of rural women.⁶²³

It means, the regulation of most land issues is left to regulate within domestic jurisdiction.⁶²⁴ Under Indonesia's domestic instrument, traditional customary rights to the land, territories and natural resources are recognized and protected under article 18(2) of 1945 Indonesia's constitution.⁶²⁵ However, the constitution also affirmed in article 33 that the land, waters and natural resources should be under the state control.⁶²⁶ Although the Constitutional Court (CC) has ruled that customary forest lands cannot be State Forest land and that the government's past claims to vast areas of forests were and are invalid, the constitution remains unchanged.⁶²⁷ As a result of such conflicting rule causing West Papua's lands became the target of companies and investors

⁶²⁰ United Nations Declaration on the Rights of Indigenous Peoples, articles 3 and 26.

⁶²¹ International Labour Organisation on Indigenous and Tribal Peoples Convention, 1989 (No. 169) <https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.16_Indigenous%20and%20Tribal%20Peoples%20Convention.pdf>.

⁶²² ICESCR, art 11 (2).

⁶²³ CEDAW, art 14 (2) g.

⁶²⁴ Olivier De Schutter "The Emerging Human Right to Land" (2010) 12 ICLR at 305.

⁶²⁵ Indonesia's Constitution of 1945, Article 18 (2).

⁶²⁶ Article 33 (3). "The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people."

⁶²⁷ Constitutional Court Decision 35/PUU-X/2012, reviewing Law 41 of 1999 on Forestry, issued 20 March 2013 (*Traditional Forest Community case (2012)*) as reviewed in Simon Butt "Traditional Land Rights Before the Indonesian Constitutional Court" (2014) 98 LEJ at 1.

operating in the context of palm oil plantations, the timber industry as well as mining and forest concessions.

Large-scale investment projects in West Papua have multiple adverse impacts on the environment and on the land rights. The conversion of forest areas into palm oil plantations or logging and mining areas have led to the loss of ancestral lands of many indigenous communities.⁶²⁸ Land seizures occur systematically carried out by private companies, and often facilitated by national programs which have been designed and implemented by the government.⁶²⁹ For instance, ‘the Master Plan for the Acceleration and Expansion of Indonesian Economic Development’ (MP3EI), is one of the most ambitious government programs in West Papua, intended to be the production centre for food, fishery, energy and national mining.⁶³⁰ Expansion of the rice cultivation project in Merauke called the Merauke Integrated Food and Energy Estate (MIFEE), which caused the loss of over one million hectares of forest for agricultural production, and again this has been supported through military involvement to secure companies' operation.⁶³¹

From 2011-2015, approximately six plantation companies have converted forest to palm oil plantations. In South Sorong. Two new palm oil plantations which caused the conflicts between the clans.⁶³² Majority of these companies are commonly ignored to apply proper principles of Free, Prior and Informed Consent (FPIC).⁶³³ Such practice often leads to tribal conflict among indigenous communities and between the landowners and the companies. West Papua untouched forests cover about 41.5 Million hectares, half of them have been taken by companies.⁶³⁴ As a consequence, the majority of indigenous communities become bystanders on their ancestral lands, facing an uncertain future characterised by poverty and loss of cultural roots.⁶³⁵

⁶²⁸ Andreas Harsono *Race, Islam and Power: Ethnic and Religious Violence in Post-Suharto Indonesia* (Monash University Publishing, Victoria, 2019) at 201.

⁶²⁹ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 135.

⁶³⁰ The government under former president SBY introduced the term MP3EI. Jokowi's government doesn't use the term, probably because many of the social movements which supported him.

⁶³¹ See International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, above n 629, at 139.

⁶³² At 138.

⁶³³ At 136.

⁶³⁴ Catherine Scott & Neles Tebay “The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace” (2006) 94 CJIA 599 at 604.

⁶³⁵ At 136.

These ongoing land grabbing indicates that Indonesia is not fully adhering to international and domestic human rights instruments, particularly the requirement of applying appropriate measures of Free Prior and Informed Consent. In 2014, the Committee on ESCR in its concluding observation urged Indonesia to define strong mechanisms for ensuring the respect of their free, prior and informed consent on decisions affecting indigenous peoples and their resources, as well as adequate compensation and effective remedies in case of violation.⁶³⁶ The issues remained unresolved.

2.6.4. Other Human Rights Issues

2.6.4.1. Deforestation

Deforestation is typically considered as the process of conversion of forested land into another land-based category, and because of its ecologically destructive tendencies it is described as ‘inherently ecocidal’.⁶³⁷ While the environmental impacts are an obvious universal concern, deforestation in West Papua is also highly correlated with human rights violations.⁶³⁸ Notably the dispossession of the collective rights of Indigenous West Papuans customary lands and resources, threats and violence, as well as loss of access to food, clean water and traditional medicines and knowledge, destruction of culture and spirituality and devaluation of the indigenous Papuans as self-determined people. In addition, when seeking to defend their rights, communities as well as human rights and environmental defenders supporting them are often subjected to multiple forms

⁶³⁶ UN Committee on Economic, Social and Cultural Rights. Concluding observations (2014) E/C.12/IDN/CO/1. At 11 para 38.

⁶³⁷ John E. McDonnell “The Merauke Integrated Food and Energy Estate (MIFEE): An Ecologically Induced Genocide of the Malind Anim” (2021) 23 JGR 257 at 169.

⁶³⁸ At 277 - 278.

of violence, including intimidation, harassment, criminalization, physical and sexual violence, as well as killings.⁶³⁹

West Papua lost 748,640 hectares (1.85 million acres), or 2% of its old-growth forest, between 2001 and 2019, according to the study published in the journal *Biological Conservation*.⁶⁴⁰ This was largely due to the growth of plantations, primarily oil palms, and the government's push for infrastructure development in the region.⁶⁴¹ Oil palm and pulpwood plantations accounted for 208,223 hectares (514,500 acres) of the deforestation during those periods, or 28% of total deforestation.⁶⁴² A study, by the Indonesian Forum for the Environment (WALHI) Wahana Lingkungan Hidup Indonesia, an NGO, attributes 22,009 hectares (54,400 acres) of forest loss between 2001 and 2019 due to the construction of Trans-Papua Highway. The Road passes nearby at least seven conservation zones, including Lorentz National Park, a UNESCO World Heritage Site,⁶⁴³ causing the loss of the function of protected areas as the support system of their surrounding ecosystems. It notes that 22% of this deforestation in an area of 4,906 hectares (12,100 acres), occurred in protected conservation zones.⁶⁴⁴ According to spatial analysis by the NGO Auriga Nusantara, Lorentz lost 7,644 hectares (18,888 acres) of forests in the past two decades, with an increasing deforestation rate.⁶⁴⁵

A 202-km (126-mi) stretch of the highway that's built through the national park has devastated parts of the protected area. Among the species living in the national park is the endangered dingiso tree-kangaroo (*Dendrolagus mbaiso*).⁶⁴⁶ In July 2021, the UNESCO World Heritage Committee meeting in Fuzhou, China urged the Indonesian government to shut down constructing the Trans Papua Road in West Papua. The call released after the organisation highlighted the highway

⁶³⁹ Anouska Perram and Norman Jiwon "Human Rights Violations Connected with Deforestation – Emerging and Diverging Approaches to Human Rights Due Diligence" (2023) 8 BHRJ 110 at 110.

⁶⁴⁰ David LA Gaveau and others "Forest Loss in Indonesian New Guinea (2001-2019): Trends, Drivers and Outlook" (2021) 261 *Biological Conservation* at 5.

⁶⁴¹ Sophie Chao "In the Shadow of the Palm: Dispersed Ontologies among Marind, West Papua" (2018) 33 CA 621 at 622.

⁶⁴² See David LA Gaveau and others, above n 640, at 5.

⁶⁴³ United Nation Educational Scientific and Cultural Organisation (UNESCO) "Lorentz National Park" <<https://whc.unesco.org>>.

⁶⁴⁴ Wahana Lingkungan Hidup Indonesia or Friend of the Earth. <<https://www.foei.org>>.

⁶⁴⁵ Hans Nicholas Jong "UNESCO Calls for Closure of Road Running through World Heritage Park in Papua" (2021) <<https://whc.unesco.org>>.

⁶⁴⁶ See David LA Gaveau and others, above n 640, at 7.

construction damaged the flora and fauna ecosystem in Lorentz National Park.⁶⁴⁷ Extraction industries, particularly palm oil plantations and mining projects remain a major threat to indigenous peoples and the ecosystem in West Papua.⁶⁴⁸ The environmental destruction has occurred through the economic interests of both Indonesia and foreign companies.⁶⁴⁹ Besides losing natives land, the presence of these companies are causing negative outcomes, such as flooding and landslides.⁶⁵⁰

Many Papuans are threatened with huge tracts of land that have been granted as concession to timber companies.⁶⁵¹ These companies were established in the early 1980s, and increased rapidly in palm oil production sites during the recent years, which is now considered a major cause of deforestation, and linked to the human rights concern affecting indigenous Papuans living nearby plantations.⁶⁵² The presence of these companies remains the biggest threat to primary rainforests in West Papua, and thus to West Papua's ability to thrive and continue their culture and way of life, that is to determine their own destiny. While organised genocide will be discussed later in the chapter, as mentioned previously, destroying a people's physical environment is a form of at least cultural genocide and carries a very real threat of physical genocide as well.

⁶⁴⁷ UNESCO WORLD HERITAGE COMMITTEE: Convention Concerning the Protection of the World Cultural and the Natural Heritage. WHC/21/44.COM/18 <<https://whc.unesco.org>>.

⁶⁴⁸ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 141.

⁶⁴⁹ Toru Hisada "Indigenous Development and Self-determination in West Papua: A Case Study of the Socio-Political and Economic Impacts of Mining upon the Amungme and Kamoro Communities of West Papua" (2007) at 48.

⁶⁵⁰ Human Rights in West Papua 2017, at 136.

⁶⁵¹ Australia West Papua Association, Sidney 'West Papua Information Kit' <www.cs.utexas.edu>.

⁶⁵² Sophie Chao "In the Shadow of the Palm: Dispersed Ontologies among Marind, West Papua" (2018) 33 CA 621 at 630.

2.6.4.2. Mining Companies

With larger extant tracts of rainforest; vast oil and gas reserves, and the world's largest deposit of gold and copper, West Papua is considered to be the richest region in the World.⁶⁵³ Freeport is one of the biggest gold mining companies in the world, and believed to be one of the primary factors of ongoing conflicts, and Indonesia's occupation as it provides the biggest national GDP.⁶⁵⁴ The Freeport mining operation over the years has undoubtedly caused environmental degradation. Letih studies found that Ertsberg, at the height of its operations, ‘‘was discharging 25,000 tons per day of tailings into the local river system, and dumping twice that amount of overburden into the alpine valleys.’’⁶⁵⁵ The company's greatest environmental problem is tailings that had been dumped into the river for decades, causing the river to silt. They are responsible for widespread destruction in the lowlands, the physical destruction to the land and flora and fauna, and reducing the quality of the river.⁶⁵⁶ Freeport tailings had already polluted 84,158 ha (336.6 square miles) off-shore and 35,820 ha (143.3 square miles) onshore, with such pollution spreading to the Lorentz National Park. The potential for an ecological disaster within the marine and estuary environment is huge.⁶⁵⁷

Apart from the Freeport, there are also a huge number of small scales of mining extractions, particularly in the central highlands. Such as Block Wabu, gold mining in Paniai regency of Degeuwo, Nifasi mining in Nabire regency, in which some foreign companies also operate, such as Australia-based Company West Wits Mining.⁶⁵⁸ All these gold mining activities have caused severe damage to the environment. Deforestation, River contamination by chemicals and surrounding tribes like the Mee, Wolani and Moni who utilise the river for cooking and drinking

⁶⁵³ Jim Elmslie ‘‘The Great Divide: West Papuan Demographics Revisited; Settlers Dominate Coastal Regions but the Highlands Still Overwhelmingly Papuan’’ in: *The Asia-Pacific Journal: Japan Focus* (January 2017).

⁶⁵⁴ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at, 195.

⁶⁵⁵ P A Rifai-Hasan ‘‘Development, Power and the Mining Industry in Papua: A Study of Freeport Indonesia’’ (2010) 89 *JBE* 129 at 133.

⁶⁵⁶ See Maire Leadbeater, above n 654, at 199.

⁶⁵⁷ See P A Rifai-Hasan, above no 655, at 133.

⁶⁵⁸ See International Coalition for Papua, above n 648, at 149.

seriously jeopardise their health. The Freeport and other mining companies are implicated in the atrocities and killing towards indigenous Papuans who attempted to protect their sacred mountains.⁶⁵⁹ These executions, tortures and disappearances committed by the Special Forces to protect the companies since early occupation.⁶⁶⁰ Jago Wadley, a senior forest campaigner for the Environmental Investigation Agency, states that:

“if the rapid rate of mineral extraction continues, West Papua will lose millions of hectares of forests and be stripped of valuable resources without the benefits of value-adding industries to create wealth and jobs locally” and “will see an influx of millions of migrants from other parts of Indonesia, likely limiting indigenous Papuans to a tiny minority in their own land.”⁶⁶¹

The Committee on ESCR, expresses concern at violations of human rights in the mining and plantation sectors, including the right to livelihood, the right to food, the right to water, labour rights and cultural rights. It is also concerned that the free, prior and informed consent of affected communities is not always sought in these projects, including under Law 25/2007 on Investment.⁶⁶² Moreover, even in cases where consultations of affected communities have taken place, their informed decisions have not been guaranteed.⁶⁶³

⁶⁵⁹ See Maire Leadbeater, above no 654, at 196.

⁶⁶⁰ Robin Osborne *Indonesia's Secret War: the Guerrilla Struggle in Irian Jaya*. (Sydney Print: Allen & Unwin, 1985) at 104.

⁶⁶¹ Frank Jacob *Genocide and Mass Violence in Asia: An Introductory Reader* (De Gruyter Oldenbourg, 2019) at 168.

⁶⁶² Indonesian Law No. 25 of 2007 on Capital Investment (Investment Law) <<https://www.indonesia-investments.com/business/foreign-investment/investment-law-indonesia/item8322#:~:text=Article%2025,provisions%20of%20law%20and%20regulations.>>.

⁶⁶³ UN Committee on Economic, Social and Cultural Rights. Concluding observations (2014) E/C.12/IDN/CO/1. At 9.

2.6.4.3. Demographic Changes and Migrants

A significant demographic change occurred when Indonesia invaded the Territory in 1963, injecting mainly Javanese into the territory to dominate the economy.⁶⁶⁴ Non-indigenous Papuans have been outnumbered, and the indigenous customary lands are constitutionalised to be owned by no one, but under the State control,⁶⁶⁵ to not only relocate the Javanese migrants but also to exploit its natural rich resources.⁶⁶⁶ West Papua continued to be the land of transmigration involving military units through ‘Operation Clean Sweep’ (OCS) by security forces, where a number of massacres and killings have been reported to clear the traditional land for migrant settlement.⁶⁶⁷

The 1971 census, indigenous Papuans made up 96% from the total population of 923,000, and 4% non-indigenous.⁶⁶⁸ The Indonesian government accelerated the migration program on a large scale, which led to the alteration of demography with the total number of migrants from 1987 to 2004 reaching 70%.⁶⁶⁹ Based on the 2010 Indonesian census, Jim Elmslie analysed the Melanesian Ethnic Papuans (MEP) increased from 887,000 in 1971 to 1,505,405 million in 2000 with 1.84% growth per year. Meanwhile, the Indonesian Migrants (IM) rose from 36,000 in 1971 to 708,425 people in 2000, with an average annual growth rate of 10.82%. Based on this analysis, Elmslie predicted the indigenous Papuans will reach 1.7 million in 2010.⁶⁷⁰ Admittedly, his prediction came true. The Central Statistical Agency of Papua Province (BPS) figures on the 2010 Indonesian census shows that the indigenous population made up 1,730,336 (47.89%), and non-indigenous

⁶⁶⁴ Gregory Copley (ed) “Inclusion, Exclusion, Seclusion. Defence and Foreign Affairs Strategic Policy; Alexandria. (2017) 45 at 4-8.

⁶⁶⁵ Constitution of the Republic of Indonesia 1945, art 33 (3). “The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.”

⁶⁶⁶ Tracey Banivanua-Mar “A Thousand Miles of Cannibal Lands: Imagining a Way Genocide in the Re-colonization of West Papua” (2008) 10 JGR 583 at 585.

⁶⁶⁷ At 591.

⁶⁶⁸ West Papua: Genocide, Demographic Change, the Issue of ‘Intent’ and the Australia-Indonesia Security treaty, Australia Institute of International Affairs, Adelaide.

⁶⁶⁹ Catherine Scott & Neles Tebay “The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace” (2006) 94 CJIA 599 at 604.

⁶⁷⁰ Jim Elmslie “West Papua Demographic Transition and the 2010 Indonesian Census: Slow Motion Genocide or Not?” (Paper presented to a Comprehending West Papua Conference, Sydney University, and February 2011).

1,882,517 (52.10%).⁶⁷¹ It suggests that within five decades, the population growth rates were consistent with (1.84%) of indigenous Papuans and (10.82%) non-indigenous.

The 2020 census result did not provide ethnicity-based data. The BPS Papua only recorded a total population of 4.30 million. Increased by 1.7 million people from 2010.⁶⁷² It seems, the government wittingly ignored providing ethnic-based figures. The governor of Papua, Mr. Lukas Enembe, separately claimed that Melanesian ethnic Papuan had grown to 2.3 million in 2020, however this figure is not based on the census.⁶⁷³ This figure is nonetheless close to Elmslie's prediction of the Papuans figures for 2020, assuming the Papuan Population (PP) of 1.7 million in 2010, continues to increase to 2.1 million, at the similar annual rate of (1.84%) and it had assumed that if the Indonesian migrants stay consistent with its annual growth of (10.82%), there will be 5.1 million in 2020, which would make up 71.01% and Indigenous Papuans 28.99%.⁶⁷⁴ This is a great concern of the growing domination of non-indigenous, where the figures overturned from being an overwhelming majority of 96.09% in 1971, to 28.99% in five decades.

Comparing the population growth between West Papua and Papua New Guinea in the 1960s, PNG had grown from two million people in 1962 to 5.3 million in 2000, with an annual growth of 4.3%.⁶⁷⁵ Meanwhile, in West Papua a combined population with the Melanesian Papuan ethnic majority increased slightly from over 800,000 to 1.5 million, with 2,8%, at the same periods.⁶⁷⁶ Today, the World Bank data shows, the population growth in PNG has rocketed to 8,776 million people in 2019.⁶⁷⁷ Meanwhile, indigenous Papuans had increased to about 2.3 million in the same period.⁶⁷⁸ This is a concerning indication that indigenous population is sinking overtime under the colonial yoke. Geographers described that, 'West New Guinea is the world's largest invasion,' the

⁶⁷¹ See International Coalition for Papua, above no 648 at 121.

⁶⁷² Badan Pusat Statistik/ BPS (Central Statistical Agency of Papua Province) "Essential Indicators of Papua Province" (30th August 2021) Catalogue Number 1103009.94 at [4].

⁶⁷³ Governor Office of Papua Province "Jumlah Orang Asli Papua" or "the Population of Indigenous Papua" 2020 <<https://www.papua.go.id>>.

⁶⁷⁴ Andreas Harsono *Race, Islam and Power: Ethnic and Religious Violence in Post-Suharto Indonesia* (Monash University Publishing, Victoria, 2019) at 201.

⁶⁷⁵ National Statistic Office of Papua New Guinea: 2000 National Census <<https://www.nso.gov.pg/statistics/population/>>.

⁶⁷⁶ At 199.

⁶⁷⁷ World Bank Data Population Growth Papua New Guinea. <<https://data.worldbank.org>>.

⁶⁷⁸ See Governor Office of Papua Province, above n 673.

major consequence of transmigration is the displacement from their traditional lands.⁶⁷⁹ In the 1980s, Rene Wilson from the New Zealand embassy in Jakarta described:

“There is very little local acceptance of transmigration. What many Indigenous Papuans see is their land being taken away, their forests and gardens being cleared, their hunting grounds disturbed they see strangers being given land, houses and special services.”⁶⁸⁰

This has resulted in the marginalisation of indigenous Papuans and becoming ethnic minority.⁶⁸¹ An ongoing transmigration is indeed a key factor of indigenous Papuans becoming a minority, marginalised and losing their ancestral land.⁶⁸²

2.6.4.4. Genocide

Genocide has a strong correlation to colonisation. Patrick Wolfe, describes, “The colonial settlement is an indication of wider genocide processes economically, socially, politically and ideologically.”⁶⁸³ West Papua, since its incorporation into Indonesia, became an imperial hunting ground. One of the New Zealand long standing and prominent activists, Maire Leadbeater in her recent book entitled “See No Evil: New Zealand’s Betrayal of the People of West Papua” describes West Papua as; “Indonesia’s killing fields”⁶⁸⁴

During the 1970s and 1980s, the Indonesian security forces declared war targeting indigenous Papuans, with the aim of cracking the separatist movement in several regions under the various Military Operations (MO).⁶⁸⁵ The operations cost thousands of indigenous West Papuans lives.

⁶⁷⁹ Toru Hisada “Indigenous Development and Self-determination in West Papua: A Case Study of the Socio-Political and Economic Impacts of Mining upon the Amungme and Kamoro Communities of West Papua” (2007) at 44.

⁶⁸⁰ Maire Leadbeater *See No Evil: New Zealand’s Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 188.

⁶⁸¹ See Toru Hisada, above n 679, at 46.

⁶⁸² Australia West Papua Association, Sidney ‘West Papua Information Kit’ <www.cs.utexas.edu>.

⁶⁸³ Tracey Banivanua-Mar “A Thousand Miles of Cannibal Lands: Imagining a Way Genocide in the Re-colonization of West Papua” (2008) 10 JGR 583 at 584.

⁶⁸⁴ See Maire Leadbeater, above n 680, at 116.

⁶⁸⁵ See Tracey Banivanua-Mar, above n 683, at 591.

Amnesty International estimates that at least 100,000 Papuans have been slain since occupation.⁶⁸⁶ The indigenous Papuans themselves claimed that the death toll as a result of Indonesia's occupation of the territory since 1962 is estimated to be as many as 500,000 Papuans.⁶⁸⁷ Many studies have concluded that, West Papua is the place of evolving genocide,⁶⁸⁸ including a study by the Yale Law School, which argued that the Indonesian government is responsible for genocide against indigenous West Papuans.⁶⁸⁹

One of the worst cases is the displacement and killing of thousands of people to make way for the giant American- and British-owned Freeport mine, the largest gold mine in the world, which has reduced a sacred mountain to a crater and poisoned the local river system.⁶⁹⁰ Tim Groser, New Zealand Ambassador to Indonesia expects international attention to the killings in settlements close to Freeport by Indonesia military.⁶⁹¹ Extra judicial killing in West Papua has been an ongoing issue since the 1960s.⁶⁹² The most recent cases occurred in July 2018, in Alguru village of Nduga Regency, two Papuans were shot dead and many others injured through a military helicopter bombing attack. According to an independent investigation, at least there were 206 deaths within twelve months from 2018-2019.⁶⁹³

Egianus Kogeya, a commander of guerrilla fighters, confirmed that, "The Indonesian military helicopters fired the bombs four times with a huge explosion through air strikes at Alguru village. As a result of this attack, the gardens and houses of the people in Alguru's village are flattened with the ground."⁶⁹⁴ On the 5th October 2018, Radio New Zealand reported that seven West

⁶⁸⁶ Catherine Scott & Neles Tebay "The West Papua Conflict and its Consequences for the Island of New Guinea: Root Causes and the Campaign for Papua, Land of Peace" (2006) 94 CJIA 599 at 604.

⁶⁸⁷ L.E. *Avoiding another East-Timor Atrocity: The Fight for Indigenous Sovereignty and Self-Determination in West Papua* (Springer International Publishing, New York, 2019) at ch 213.

⁶⁸⁸ J. Elmslie and C. Webb-Gannon "A Slow-Motion Genocide: Indonesian Rule in West Papua" (2013) 1:2 GJL-HD 56-69.

⁶⁸⁹ Camellia Webb-Gannon, Michael Westaway and Others "What can Australia do to Prevent Human Rights in West Papua" (2021) 26 APJF 354 at 354.

⁶⁹⁰ Egret and others "West Papua: Silent Genocide as Corporations Profit" (2017) at 14. (September 12. Greenleft)

⁶⁹¹ See Maire Leadbeater, above n 680, at 199.

⁶⁹² C.J. Irons Magallanes "West Papuan Self-determination: New Indigenous Rights or Old-fashioned Genocide?", in S. Linton, G. and W. A. Schabas (eds.), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S Clark* (Brill Nijhoff, 2015) 235 at 239.

⁶⁹³ Hipolitus R Wangge and Camellia Webb-Gannon "Civilian Resistance and the Failure of Indonesia Counterinsurgency Campaign in Nduga, West Papua" (2020) 42 CSA at 276.

⁶⁹⁴ Asia Pacific Report "Traumatized Papuan Villagers Flee Indonesian military in Nduga" <www.asiapacificreport.nz>.

Papuans have been killed in a military operation in a remote area of Puncak Jaya regency. Five civilians, and two members of the liberation army, including two children were shot dead in separate villages in a military mounted land and air attack in Tingginambut District.⁶⁹⁵ There is no end to the military operation in West Papua. In the last three years from 2018-2021, huge number of military deployment into West Papua causing the mass displacement of civilians from Nduga, Intan Jaya, Deiyai, Dogiyai, Puncak Jaya, Yahukimo and more recently was in August 2021 in Maybrat Sorong.⁶⁹⁶ Many reports are indicating that people are dying from starvation, disease, and cold weather. Others fled to neighbouring regencies for safety, facing difficulties as no humanitarian aids came in from the state, and instead the government deployed more heavy military personnel in the name of national security.⁶⁹⁷

The UN Special Rapporteur was concerned over the deployment of military personnel in the context of outbreaks of disease, and a lack of trust in the health services available and ethnic Papuans experiencing stigmatisation and discrimination in health-care settings.⁶⁹⁸ For 59 years since 1963, Indonesia has appeared conspicuously in forms ranging from military posts, violence, injustice, the marginalisation, and the failure of human rights development, to a whole history of denial of the fundamental rights of indigenous Papuans.⁶⁹⁹ These are the direct consequences of the New York Agreement that was unilaterally imposed without proper procedures,⁷⁰⁰ and further deliberate violation of its application in 1969 Act of Free Choice.⁷⁰¹

⁶⁹⁵ Radio New Zealand “Seven Papuans Killed in Indonesian Military Operation” (Podcast, 5 October 2018) Pacific/ West Papua <www.radionz.co.nz>.

⁶⁹⁶ Radio New Zealand International: Pacific/ West Papua. “Thousands Displaced in Latest West Papua Violence: Priest. Reported on the 8th September 2021.

⁶⁹⁷ Budi Hernawan “Papua” (2019) 31 CP 536 at 537.

⁶⁹⁸ United Nations Human Rights Council Thirty-Eighth Session: A/HRC/38/36/Add.1. <<https://digitallibrary.un.org/record/1483921?ln=en>>.

⁶⁹⁹ Gerry Van Klinken. “Three Books on Papua.” *Bijdragen tot de taal-, land- en volkenkunde* (2010) 166 RNISACS 529 at 530.

⁷⁰⁰ Pieter J Drooglever *an Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 468.

⁷⁰¹ Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 219.

2.7. Conclusion

The international laws that required benefiting human rights for all peoples, had largely been affected by imposing a bilateral treaty of the New York Agreement in 1962.⁷⁰² In chapter one argued that the New York Agreement was a colonial cultural construct deliberately imposed to legitimise (not legalise) the re-colonisation process of West Papua to Indonesia. This chapter has identified two legal implications of the Agreement. (i) The impacts of the New York Agreement to international laws (the decolonisation regimes) and (ii) its impacts on human rights violations towards indigenous Papuans. It has revealed that, indigenous people of West Papua had been disadvantaged from historical denial of their rightful place in international law. The legitimate process under the decolonisation regime of the UN Charter, had been overruled by the Western backed bilateral Treaty of the New York Agreement, which inevitably prevented further the UN General Assembly Resolution No 1514 (XV) regarding the ‘Declaration on the Granting of Independence to Colonial Countries and Peoples,’ and the Resolution No 1541 (XV). As a result, people of West Papua did not experience the benefits of their human rights that were guaranteed in international laws.

It has assessed that this historical violation of international law had left a gap that must be rectified. This could be achieved through the legal-historical re-examinations which have a real possibility to lead to appropriate plebiscite. It has also discussed that the diversion of international law with the New York Agreement created decades of human rights violations in the region. The impact of the Agreement to indigenous West Papuans Civil and Political Rights; Economic, Social and Cultural Rights and other collective rights have been disseminated, and they posed great concerns of serious human rights violations. This chapter concludes that the deliberate thwarting and

⁷⁰² David Webster "Regimes in Motion: The Kennedy's Administration and Indonesia's New Frontier, 1960-1962" (2009) 33 DH 95 at 100.

avoidance of international laws,⁷⁰³ and misapplication of the New York Agreement,⁷⁰⁴ remain a live legal issue that requires international law to redress.

⁷⁰³ Charter of the United Nations, Chapters XI - XIII; GA Res 1514 (XV) and GA Res 1541 (XV).

⁷⁰⁴ GA Res A/RES/1752/ (XVII).

3. CHAPTER THREE

THE RELEVANT INTERNATIONAL LEGAL FRAMEWORKS FOR SELF-DETERMINATION

3.1. Introduction

The critical legal issues outlined in the previous chapters include; the historical and ongoing human rights issues, as by-products of deliberate violations of international laws⁷⁰⁵ and terms of the 1962 New York Agreement.⁷⁰⁶ On that premise, it has argued that the Indonesian occupation in West Papua is a colonial type, and thus its legality remains a legal matter to be redressed. The significant challenge is, however, that the territory has been recognised as part of Indonesia by the international community since 1969, which legitimises the Indonesian claim of sovereignty.⁷⁰⁷ While Indonesia' claim rests on international recognition over the territory, indigenous Papuans' human rights have been violated and continue to be violated as discussed in the previous chapter. The thesis contends that West Papuans, as the human rights holders, such fantasy of state's

⁷⁰⁵ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 74.

⁷⁰⁶ Danilyn Rutherford "An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua" (2010) 90 IND 173 at 180.

⁷⁰⁷ Charter of the United Nations, art 2 (7).

sovereignty cannot dictate the legal notion of granting independence to colonial countries and peoples.⁷⁰⁸

It contends that this narrative is no longer relevant to the principles of international human rights laws,⁷⁰⁹ particularly the contemporary development of indigenous rights regime.⁷¹⁰ It also argues that, in light of the critical historical and ongoing concerns of alleged violations of human rights towards the Papuans, the external self-determination is considered as a legal remedial necessity. In an attempt to provide a legal framework as guidelines to acquire the growing demands by the indigenous West Papuans to pursue their legal right of self-determination, this chapter explores the provision of relevant international laws, examining the notion of self-determination.

The notion of self-determination already became a core principle of international law,⁷¹¹ arising from customary international law, but also recognized as a general principle of law, which enshrined in several international treaties.⁷¹² Self-determination is also generally embraced as a legal right for all peoples,⁷¹³ which was grounded from the broader system of the protection of human rights in the Charter of the United Nations, under the condition of equality.⁷¹⁴ Brownlie and Espiell, considered self-determination to be *jus cogens*, a peremptory norm. Meaning, although self-determination operates as a norm of international law beyond the decolonisation context has been a matter of much controversy, it is frequently held that self-determination is a generally applicable norm of the highest order within the international system.⁷¹⁵ On these basis, the international human rights law throughout its development proclaimed that all forms of colonialism should end, as the subjection of peoples to alien subjugation, domination and

⁷⁰⁸ *Resolution on Declaration on the granting of independence to colonial countries and peoples* GA Res 1514, XV (1960).

⁷⁰⁹ Charter of the United Nations (Decolonisation Regimes).

⁷¹⁰ The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), which was adopted on 13th September 2007.

⁷¹¹ Marc Weller *Escaping the Self-Determination Trap* (BRILL, Leiden Boston, 2009) at 14.

⁷¹² Montserrat Guibernau "Self-Determination in the Twenty-First Century" (2015) 14 FGRE 540 at 540.

⁷¹³ Robert McCorquodale *Self-Determination in International Law: The Library of Essays in International Law* (3rd ed, Dartmouth, Burlington USA, Singapore, Sidney, 2000) at 141.

⁷¹⁴ Charter of the United Nations, art 1(2) "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;"

⁷¹⁵ S James Anaya "A Contemporary Definition of the International Norm of Self-Determination" (1993) 3 TLCP 131 at 132.

exploitation constitutes a denial of fundamental human rights, and it is contrary to the Charter of the United Nations.⁷¹⁶

The United Nations recognition on West Papua's legal status as a Non-Self-Governing Territory,⁷¹⁷ and subsequent denial of the legal right to self-determination, suggests that it was the act of deliberate violations of the universal principle of human rights. It is this failure that created a deep frustration with the ongoing human rights violations towards the Papuan people, and therefore, West Papua's human rights issue is an international problem that requires an international solution through the international law.

This chapter provides international regimes that are relevant to the situation like in West Papua. Specifically focussed on human rights protection, including the legal right to self-determination. It focuses on the broad principles of international human rights law, and the specific legal framework that focuses on indigenous people's rights, that provides the protection of social, political, economic and cultural rights, including the affirmation of the legal right to self-determination. In doing so, the author argues that the indigenous Papuans are legitimately entitled to self-determination.

⁷¹⁶ GA Res 1514 (XV) Article 1 of the Declaration on the Granting of Independence to colonial countries and Peoples.

⁷¹⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 180.

3.2. Self-Determination

3.2.1. Defining Self-Determination

The notion of Self-determination through its inclusion in international legal discourse, is defined as a right of all peoples. Yet, the principle of self-determination is taken out with different interpretations to some, thus, remains a subject of controversy in international law.⁷¹⁸ However, President Woodrow Wilson's concept of self-determination gained much weight in international law and politics, with his prelude to Four Points address of 1918, publicly uttering the phrase “only self-determination.”⁷¹⁹ This was more than mere phrase and argued that the principle of self-determination was a crucial principle of action, which statesmen can't afford to ignore except at the loss of their own political legacy. Wilson's manifestation of self-determination can be made out from his articulation that “National aspirations must be respected; peoples now may be dominated and governed by their own consent.”⁷²⁰ Woodrow Wilson insisted that:

“International peace requires that no one nation seeks to dominate another, but every people should be left to determine their own form of government, their own path of development, “unhindered, unthreatened, unafraid, the little along with the great and powerful.”⁷²¹

Lenin defined the principle of national self-determination as the right of peoples to secede from tyrannical regimes thereby undermining the capitalist imperialist world order.⁷²² Therefore, this concept of self-determination included the idea of self-government of peoples. In its broad sense, the term meant the break-up of colonial dominion that was a critical point in the advancement towards world revolution that still remains true today.

⁷¹⁸ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 73.

⁷¹⁹ Nawaz M.K “The Meaning and Range of the Principle of Self-Determination” (1965) 1965 DLJ 82 at 83.

⁷²⁰ Shrinkhal Rashwet “Indigenous sovereignty” and right to self-determination in international law: a critical appraisal” (2021) 17 IJIP 71 at 75.

⁷²¹ Erez Manela *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press, London, 2007) at 24.

⁷²² At 25.

Other commentators such as Kurt Rahl, similarly said, “viewed in historical perspective, the doctrine of the 'right of self-determination' has evolved to mean that no people must be forced to live under foreign domination or under a constitutional system which it does not agree to. Every person has the right to live within its own territory in external freedom and internal liberty.”⁷²³ According to Wehmeyer, self-determination refers to “volitional actions that enable one to act as the primary causal agent in one’s life and to maintain and improve one’s quality of life.”⁷²⁴ Wehmeyer's view suggests that the process of self-determination involves a free choice making in the situation of disagreement to achieve a certain goal by people involved. Philosopher Emmanuel Kant, who pioneered the theory of self-determination, argued that “the imposition of external morality on other individuals, people should not be guided by other people’s standards. But, should rather act according to a process of self-determination in which they follow a universal law that emanated from inside them. Only by choosing of their own free will to follow this inner law could individuals follow the path of virtue.”⁷²⁵

Therefore, the right to self-determination of peoples is a fundamental principle of international law.⁷²⁶ This principle enshrined in articles 1 and 55 of the Charter of the United Nations;⁷²⁷ article 1 of the International Covenant on Civil and Political Right (ICCPR);⁷²⁸ article 1 of the International Covenant on Economic, Social and Cultural Right (ICESCR);⁷²⁹ as well as in other international human rights instruments. It was a continued result of the first and second World Wars, which gave rise to the United Nations, and ‘Self-determination of peoples’ as a ‘right’ of all peoples, held out by the international human rights covenants.⁷³⁰ Although the concept of self-determination is largely constructed upon the world reality of the Western colonialism, this principle applies to any places where colonialism still exists, such as Indonesian colonial rule in West Papua.

⁷²³ Nawaz M.K “The Meaning and Range of the Principle of Self-Determination” (1965) 1965 DLJ 82, at 84.

⁷²⁴ Michael L Wehmeyer “Self-Determination and Individuals with Severe Disabilities: Re-Examining Meanings and Misinterpretations” (2005) 30 CA SAGE 113 at 117.

⁷²⁵ James Summers *Peoples and International Laws* (2nd ed, Brill Nijhoff, Leiden, 2013) at 39.

⁷²⁶ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 75.

⁷²⁷ Charter of the United Nations, articles 1 and 55.

⁷²⁸ ICCPR, art 1.

⁷²⁹ ICESCR, art 1.

⁷³⁰ S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, USA - OSO, 1996) at 76.

3.2.2. External and Internal Self-Determination

Contemporary notion of self-determination can be distinguished between ‘internal’ and ‘external’ self-determination.⁷³¹ Suggesting that ‘self-determination’ exists on a spectrum, where internal self-determination may refer to various political, social and economic rights within the existing state; by contrast, external self-determination refers to full legal independence/ secession for the given people from the larger politico-legal state.⁷³² An international law Professor, James Anaya distinguishes between the internal and external self-determination as two discrete domains; one having to do with matters entirely internal to a people, such as right to a political participation; and the other having to do exclusively with a people’s status of dealing vis-a-vis other people, such as freedom from alien rule.⁷³³ Anaya views; self-determination as a ‘human right’ and when self-determination is denied, a breach occurs, requiring a remedy. This remedial form of self-determination is proportionate to the nature of the breach or violation.⁷³⁴ Following this reasoning, external self-determination would only be invoked when the nature of the violation was so great that external self-determination is the only adequate remedy.⁷³⁵

Drawing from Anaya’s perspective, the claim to external self-determination for indigenous West Papuans is justified by both historical and ongoing harmful actions committed by administering power (Indonesia); where the right to self-determination was denied,⁷³⁶ and the consequences of that denial, indigenous Papuans continue to experience great human rights encroachments since the 1960s.⁷³⁷ This great nature of harmful actions had been expressed by many. Including the UN

⁷³¹ Valmaine Toki “Maori Seeking Self-Determination or Tino Rangatiratanga? A note” (2017) University of Auckland at 136-137.

⁷³² Montserrat Guibernau “Self-Determination in the Twenty-First Century” (2015) 14 FGRE 540 at 540.

⁷³³ See S James Anaya, above n 730, at 81.

⁷³⁴ At 189.

⁷³⁵ See Valmaine Toki, above n 731, at 136.

⁷³⁶ Julian McKinlay King “A Soul Divided: The UN’s Misconduct over West Papua” (2019) 16 UTS ePress 59 at 72.

⁷³⁷ Leontine Visser *Governing New Guinea: An Oral History of Papuan Administrators, 1950-1990* (KITLV Press, the Netherlands, 2012) at 3.

High Commissioner for Human Rights,⁷³⁸ the regional governmental levels,⁷³⁹ NGOs,⁷⁴⁰ civil organisations from all over the world, including New Zealand and Australia.⁷⁴¹ These suggest that, when gross human rights violations occur, the external self-determination could potentially become applicable. Therefore, it should be viewed as a harmful action that external self-determination can only be a justified remedy, as it is also in line with the growing demand by indigenous Papuans themselves.⁷⁴²

The internal self-determination operates within the boundary of the existing state's legal framework, and can be seen as the right for people to freely determine their own political, economic, social and cultural regime.⁷⁴³ This concept is in line with the broad principle of self-determination enshrined in international law, that; "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 (paragraph 2)."⁷⁴⁴ In an exclusive framework, internal self-determination is articulated in article 4 of UNDRIP that:

"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."⁷⁴⁵

The Declaration provides for indigenous peoples the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State and to participate in all decisions affecting them.⁷⁴⁶ Throughout history, the people of West Papua had largely been ignored in socio-

⁷³⁸ United Nations Human Rights: Comment by UN High Commissioner for Human Rights Michelle Bachelet on Indonesia (Papua and West Papua) <www.ohchr.org>.

⁷³⁹ Pacific Islands Forum: "The chair of the Pacific Islands Forum (PIF), Tuvalu Prime Minister Kausea Natano, has written to the United Nations High Commissioner for Human Rights Michelle Bachelet seeking support for the forum's request to send a mission to West Papua to assess the human rights situation there". <www.forumsec.org/west-papua>.

⁷⁴⁰ Amnesty International Indonesia: Amnesty International publishes new report – Human rights situation in West Papua shows no improvement. <www.humanrightspapua.org>.

⁷⁴¹ Free West Papua Campaign. <www.freewestpapua.org>.

⁷⁴² International Coalition for Papua and the West Papua-Netzwerk "Human Rights and Conflict Escalation in West Papua" ICP (January 2020) at 1. <<https://www.ulmwp.org/wp-content/uploads/2020/09/HumanRightsPapua2019-ICP.pdf>>.

⁷⁴³ Antonio Cassese *Self Determination of Peoples* (Cambridge University Press, Cambridge, 1995) at 101.

⁷⁴⁴ GA Res 1514, XV (1960), para 6.

⁷⁴⁵ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 4

⁷⁴⁶ Valmaine Toki "Maori Seeking Self-Determination or Tino Rangatiratanga? A note" (2017) University of Auckland, at 137.

political, economic and cultural development since Indonesia's occupation in 1963.⁷⁴⁷ Such a discriminatory treatment had paved the way to the collective demands by indigenous West Papuans for external self-determination.

3.2.3. Special Autonomy for Papua: Internal Self-Determination Model?

The Special Autonomy for Papua was introduced in 2001, through law No 21,⁷⁴⁸ for the duration of twenty years.⁷⁴⁹ In one sense, granting the special status is viewed as the state's political policy imposed, in response to the growing demands for external self-determination by indigenous Papuans.⁷⁵⁰ In another sense, it can be seen as an example of an internal self-determination model. This view shall be expected with greater positive outcomes, where indigenous Papuans are recognised and guaranteed the authority to form and run self-government by themselves, and fulfil their own internal affairs in economic, social and cultural development within the boundary of Indonesian state.⁷⁵¹ Two decades after its implementation, however, there had been no significant development in the region.⁷⁵² Many studies have concluded that the implementation of the special autonomy model continues to fail.⁷⁵³ Many are blaming the government for failing to accommodate the imagination of Papuanness within the frame of Indonesianness.⁷⁵⁴

⁷⁴⁷ Emir Chairullah *Indonesia's Failure in Papua: The Role of Elites in Designing, Implementing and Undermining Special Autonomy* (Routledge, London, 2021) at 60.

⁷⁴⁸ Special Autonomy Law for Papua Province 2001 (21).

⁷⁴⁹ Katharina Riris "Deliberative Formulation of Papua Special Autonomy Policy" (2017) 24 BBJ 69 at 71.

⁷⁵⁰ See Emir Chairullah, above n 747, at 2.

⁷⁵¹ Special Autonomy Law for Papua Province 2001 (21), art 1 (b). "Special Autonomy is a special authority that is recognized and granted to the Provinces Papua to regulate and manage the interests of the local community according to own initiative based on the aspirations and basic rights of the Papuan people;"

⁷⁵² Purwoko Aji Prabowo and others "Special autonomy policy evaluation to improve community welfare in Papua province Indonesia" (2021) 2 IJIG 24 at 27.

⁷⁵³ See Emir Chairullah, above n 747, at 5.

⁷⁵⁴ Gerry Van Klinken. "Three Books on Papua." *Bijdragen tot de taal-, land- en volkenkunde* (2010) 166 RNISACS 529 at 530.

As the term of the special autonomy law came to an end in 2021, the Papuans collectively rejected Jakarta's plan to renew it through Papuan People Petition PRP, which was supported by more than 700,000 peoples, and 112 civil organisations.⁷⁵⁵ Arguing that Twenty years of its implementation amplified a long pain of grievances of Papuans, which created a strong mistrust to the Indonesian government.⁷⁵⁶ The indigenous Papuans believed that the special autonomy was not the solution, but a further threat to their survival with a view that this autonomy pack is deliberately and unilaterally imposed to reduce the growing demands for independence, and the Papuans are consistently demanding the government to carry out a fair referendum under international supervision.⁷⁵⁷ Jakarta however, once again accelerated re-extension of the special autonomy law through the enactment of Law No. 2 of 2021,⁷⁵⁸ regarding the second amendment to Law No 21 of 2001, concerning Special Autonomy for Papua Province, for further 20 years until 2041,⁷⁵⁹ without the Papuans' consent. This has been rejected by the majority of indigenous West Papuans through Papuan People's Assembly or Majelis Rakyat Papua (MRP), including from the Papuan provincial government officials.⁷⁶⁰

Jakarta is consciously violating article 77 of law No. 21 of 2001 itself, which required, proposals for amendments should be submitted by the Papuan people, through the Papuan People's Assembly (MRP) and Papuan People's Representative Council (DPRP) to the Government of Indonesia.⁷⁶¹ The Indonesian authority, through the House of Representatives unilaterally agreed to the bill on the establishment of three new provinces in Papua region which will bring the total

⁷⁵⁵ Asia Pacific Report "714,000 Papuans, 112 organisations oppose 'failed' special autonomy law" (19 July 2021) Asia Pacific Report <<https://asiapacificreport.nz/2021/07/19/714000-papuans-112-organisations-oppose-failed-special-autonomy-law/>>.

⁷⁵⁶ International Coalition for Papua *Human Rights in West Papua 2017: The Fifth Report of the International Coalition for Papua (ICP) Covering Event from January 2015 to December 2016*, (2017) at 130.

⁷⁵⁷ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 164.

⁷⁵⁸ Special Autonomy Law for Papua Province 2021 (2) Concerning the Second Amendment to Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua. (Undang-Undang Republik Indonesia Nomor 2 Tahun 2021 Tentang Perubahan Kedua Atas Undang-Undang Nomor 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua). <<https://jdih.setkab.go.id>>.

⁷⁵⁹ Undang-Undang Republik Indonesia Nomor 2 Tahun 2022 Tentang Perubahan Kedua Atas Undang-Undang Nomor 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua <<https://peraturan.bpk.go.id>>.

⁷⁶⁰ Asia Pacific Report "West Papuans reject Jakarta plan for extension of special autonomy" (25 February 2021) Asia Pacific Report <<https://asiapacificreport.nz/2021/02/25/west-papuans-reject-jakarta-plan-for-extension-of-special-autonomy/>>.

⁷⁶¹ Special Autonomy Law for Papua Province 2001 (21) article 77. Proposals for amendments to this Law may be submitted by the people of the Papua Province through the MRP and DPRP to the DPR or the Government in accordance with statutory regulations.

number of provinces on the island to five.⁷⁶² This unilateral decision is again, the government is knowingly violating the provision of article 76 of the Special Autonomy law, which stated that:

”The expansion of the Papua Province into provinces shall be carried out with the approval of the MRP and the DPRP giving close attention to the social-cultural unity, the readiness of the human resources, and the economic ability and development in the future.”⁷⁶³

The government is deliberately ignoring the constitutional and legal procedures in forcing these policies, and this is a denial of the constitutional promise guaranteed by the special autonomy law itself. With its first two decades of failure, it has a potential to bring another twenty years of threat for indigenous West Papuan.

The Indonesian government should have interpreted the special autonomy initiative as the best approach for internal self-determination, but imposing its policies towards West Papua, always been not genuine and political. In the end, the Papuans have been given no constitutional authority to govern themselves.⁷⁶⁴ This is a deliberate and systematic denial of indigenous Papuans constitutional and legal rights. Consequently, the mistrust and conflict between the indigenous Papuans and Indonesia had been inevitable, which ultimately increased the demands for external self-determination.⁷⁶⁵ As long as Indonesia consistently stays away from the human right approach, the conflicts will also remain, and its ambition through economic development in the region will not negate the indigenous Papuans aspiration for an external self-determination. Because the core issue is rooted by the historical denial of self-determination that has not been remedied, and thus, this special autonomy cannot be seen as a remedial model that is required under the international instruments.⁷⁶⁶

⁷⁶² Yustinus Paat “Three New Provinces to be Established in Papua” (09 April 2022) Jakarta Globe <<https://jakartaglobe.id/news/three-new-provinces-to-be-established-in-papua/>>.

⁷⁶³ Special Autonomy Law for Papua Province 2001 (21) article 76.

⁷⁶⁴ Muridan S Widjojo “Papua” (2014) 26 CPJ 506 at 507.

⁷⁶⁵ E L “Avoiding another East-Timor Atrocity: The Fight for Indigenous Sovereignty and Self-Determination in West Papua” (2019) 9 MMCDR 211 at 213.

⁷⁶⁶ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 38.

3.3. Self-Determination in International Law

3.3.1. Broad Human Rights Regimes

3.3.1.1. Charter of the United Nations

The United Nations has adopted a number of legal frameworks in the forms of declarations and instruments. Self-determination was accepted as one of the fundamental human rights included in international laws.⁷⁶⁷ Beginning from a multilateral treaty of the United Nations Charter, in the first article 1 (2) and article 55, which affirmed ‘respect for the principle of equal rights and self-determination of peoples,’⁷⁶⁸ article 55 which states that; “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”⁷⁶⁹ It suggests that the foundation of the United Nations, an ultimate goal and the duty of the World Organisation was that decolonisation should take place in a peaceful fashion.⁷⁷⁰ Although the term self-determination is not expressly utilising in the Charter of the United Nations, its nexus is reflected in Chapters XI, XII and XIII⁷⁷¹ of the Charter, where the right to self-determination is associated with the principle of decolonisation.⁷⁷² Particularly, article 73 of the Charter, as a specific regime for the decolonisation, in which it requires the UN member states who have or assume responsibilities for the administration of territories whose peoples have not yet attained a self-

⁷⁶⁷ Rhona K. M. Smith *International Human Rights Law* (8th ed, Oxford University Press, London, 2018) at 35.

⁷⁶⁸ Charter of the United Nations art 1 (2).

⁷⁶⁹ Charter of the United Nations, art 55.

⁷⁷⁰ Article 55; “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”

⁷⁷¹ Charter of the United Nations. Chapters XI; XII and XIII.

⁷⁷² Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 210.

government, recognize the principle that the interests of the inhabitants are paramount, and accept it as a sacred trust.⁷⁷³

In relation to West Papua, this theory argument that exists under article 73 of the Charter, one way or another, is relevant. Article 73, provided the requirements that the UN member States, who are the colonial powers, are obligated to advance self-governance for the people within that territory.⁷⁷⁴ Furthermore, under the practice that developed, that process included the obligation to offer the choice; either, emergence as an independent state, free association under the treaty with that state, or integration within the large political entity of the state.⁷⁷⁵ This choice should be offered to all people, subject to colonial administration. In West Papua, these legal requirements of the decolonisation had been tampered with the imposition of the New York Agreement.⁷⁷⁶ As argued in the previous chapters, the 1969 Act of Free Choice cannot be regarded as a remedial act, because first; Indonesia had violated the substantial and procedural requirements set out in the New York Agreement.⁷⁷⁷ Secondly, the New York Agreement was constructed and signed without the Papuan people's consent.⁷⁷⁸ Furthermore, the question of whether or not the applicability of article 73 of the Charter, relies on the argument that West Papuans were historically betrayed their legitimate place in international law to form their own political institution through the decolonisation regime.

Above mentioned historical factuality served as a justifiable ground to contest that the legality of Indonesia's rule in West Papua today is legally invalid, and historically unjustified. Therefore, Indonesia's present is considered a coloniser. On that basis, the decolonisation regime under article 73 of the UN Charter is relevant to apply. Because the historical denial of West Papuans interest to develop self-political institutions through the decolonisation regime remains an issue of the unfinished decolonisation process.⁷⁷⁹ This contention is to affirm further, the argument that West Papua's international legal status as a colonial territory remains, and the legal requirement of

⁷⁷³ Charter of the United Nations, art 73.

⁷⁷⁴ Charter of the United Nations, art 73 (b).

⁷⁷⁵ GA Res 1541, XV (1960), principle VI.

⁷⁷⁶ Resolution A/RES/1752/(XVII)

⁷⁷⁷ New York Agreement, art XVIII (d).

⁷⁷⁸ Julian McKinlay King "A Soul Divided: The UN's Misconduct over West Papua" (2019) 16 UTS ePress 59 at 63. (General Assembly Plenary Meeting 1127: at 242–243).

⁷⁷⁹ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 73.

article 73 of the Charter has not yet taken place.⁷⁸⁰ It is also relevant, in relation to an argument, that the need to ‘take due account of the growing political aspirations’ of West Papuan people's demand for the decolonisation process.

3.3.1.2. The United Nations General Assembly Resolutions

In 1960, the United Nations adopted resolutions 1514 (XV)⁷⁸¹ and 1541 (XV),⁷⁸² as the culmination of other series of resolutions, such as; GA Res: 9 (I), 421 (V), 545 (VI), 637 (VII), 837(IX), 1314 (XIII), which recommended the administering powers to uphold self-government and the right to self-determination to be held for the people of Non-Self-Governing Territories.⁷⁸³

3.3.1.2.1. Resolution 1514 (XV)

Resolution 1514 (XV) was declared on the 14th of December 1960, entitled ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’, requiring the UN member states to accelerate the decolonisation process to NSGT and Trust Territories.⁷⁸⁴ With the capacity to abolish alien rules, the adoption of this resolution was a significant development in the

⁷⁸⁰ Charter of the United Nations, art 73.

⁷⁸¹ *Resolution on Declaration on the granting of independence to colonial countries and peoples* GA Res 1514, XV (1960).

⁷⁸² *Resolution on Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter* GA Res 1541, XV (1960).

⁷⁸³ Melinda Janki “West Papua and the Rights to Self-Determination under International Law” (2010) 34 WILJ at 6.

⁷⁸⁴ GA Res 1514, XV (1960).

international legal framework for human rights. Particularly, the right to self-determination. This can be seen in its condemnation in paragraph 1 which articulated that:

“The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation”⁷⁸⁵

In the recognition of the legal rights of colonial peoples, the resolution has affirmed in paragraph 2 that: “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”⁷⁸⁶

Indonesia often maintains its argument on the basis of paragraph 6 of the resolution, where it prohibits that, “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.”⁷⁸⁷ This claim can be valid only, if West Papua had already been part of the unitary state of Indonesia republic since its formal independence in 1949. Indonesia cannot rely on paragraph 6, because resolution 1514 (XV) was adopted on the 14th of December 1960,⁷⁸⁸ and West Papua still existed as Netherlands New Guinea under the Dutch administration at that time. In another word, West Papua existed outside the Indonesia territorial boundary. This fact therefore, legally invalidates Indonesia’s claim of territorial integrity under paragraph 6 of the resolution. The resolution, instead, is favourable to West Papuans’ claim for decolonisation - upon the view that Indonesia is a colonial power occupying West Papua.

Recognising West Papua as being under an ongoing illegal colonial rule under Indonesian since 1963,⁷⁸⁹ the indigenous inhabitants of West Papua have a legitimate place under this resolution. Indonesia’s military based approach in retaining the territory should come an end, as required in para 4, that:

⁷⁸⁵ GA Res 1514 (XV), para 1.

⁷⁸⁶ GA Res 1514 (XV), para 2.

⁷⁸⁷ GA Res 1514, XV (1960), para 6.

⁷⁸⁸ GA Res 1514, XV (1960).

⁷⁸⁹ John Saltford “United Nations Involvement with the Act of Self-Determination in West Irian (Indonesian West New Guinea) 1968 to 1969” (2000) 69 IND 71, at 61.

“All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.”⁷⁹⁰

This provision is required that “independence should not be delayed on the basis of inadequacy of political, economic, social or educational preparedness.”⁷⁹¹ Paragraph 5 affirmed further that:

“Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, in order to enable them to enjoy complete independence and freedom.”⁷⁹²

West Papua is a dependent territory to Indonesia, and hence, it clearly stands as a ‘not yet attained independent state.’ Therefore, West Papua and its inhabitants are legitimately entitled under resolution 1514 (XV), to ‘self-determination’ and Indonesia as administering power, who also endorsed the resolution,⁷⁹³ should take some obligatory steps to transfer all powers to the people of West Papua so that they can enjoy complete freedom in their own affairs.

3.3.1.2.2. Resolution 1541 (XV)

The General Assembly also adopted Resolution 1541 (XV) on 15 December 1960,⁷⁹⁴ by a vote of sixty-nine majority of the UN member States in favour,⁷⁹⁵ Indonesia had voted for the resolution.⁷⁹⁶ The Resolution 1541 (XV), laid down twelve principles in dismantling colonialism

⁷⁹⁰ GA Res 1514, XV (1960), para 4.

⁷⁹¹ GA Res 1514, XV (1960), para 3.

⁷⁹² GA Res 1514, XV (1960), para 5.

⁷⁹³ Dusan J Djonovich *United Nations Resolutions Series I: Resolutions Adopted by the General Assembly, VIII: 1960-1962* (Dobbs Ferry, New York: Oceania Publications, 1974), at 21 & 38.

⁷⁹⁴ *Resolution on Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter* GA Res 1541, XV (1960).

⁷⁹⁵ Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) 109 at 213.

⁷⁹⁶ Dusan J Djonovich *United Nations Resolutions Series I: Resolutions Adopted by the General Assembly, VIII: 1960-1962* (Dobbs Ferry, New York: Oceania Publications, 1974), at 22 & 40.

in connection to Article 73 of the UN Charter.⁷⁹⁷ The Resolution was to assess specific criteria such as geographical separateness, racial and cultural distinctiveness. This is to determine if the requirement of Chapter XI of the UN Charter is met.⁷⁹⁸ Principle one stipulated that ‘Chapter XI of the Charter would be applicable to territories which are known to be of the colonial type’.⁷⁹⁹ Under this principle, the formation of a self-government of West Papua as a colonial Territory, should have been eventuated.

Principles IV and V required: “Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”⁸⁰⁰ This provision is legitimately applied to West Papua in both; geographical terms and ethnic distinction. There are two relevant arguments in relation to this principle; in historical context, Indonesia has failed to fulfil its obligation to transmit information to the General Assembly, for nearly nine years of its temporary administration from 1963 to 1969.⁸⁰¹ In a current context, with its geographical separateness and indigenous West Papuans as being the Pacific islanders of Melanesian descent, principle IV of this resolution is applicable. Principle V provides:

“Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.”⁸⁰²

It is plausible that, West Papua is legally entitled for eventual independence by reasoning all those specific criteria outlined in the Resolution 1541 (XV), which are relevant to the territory whereby West Papua is geographically located in the Pacific,⁸⁰³ and ethnically and culturally has no

⁷⁹⁷ GA Res 1541, XV (1960).

⁷⁹⁸ Annette Culley *State Responsibility in International Law* (Print Express, Victoria, 2017) at 89.

⁷⁹⁹ General Assembly Resolution 1541 (XV) of 1960 Principle I: United Nations and Decolonisation <<https://www.un.org>>.

⁸⁰⁰ GA Res 1541, XV (1960), principle IV.

⁸⁰¹ The New York Agreement 1962, art 15.

⁸⁰² GA Res 1541, XV (1960), principle V.

⁸⁰³ Gregory Copley (ed) “Inclusion, Exclusion, Seclusion. Defence and Foreign Affairs Strategic Policy; Alexandria. (2017) 45 at 4-8.

connection to the rest of Indonesia.⁸⁰⁴ Furthermore, the historical nature discussed in the previous chapters, West Papua's plight for eventual independence is historically well-grounded.

Although these General Assembly Resolutions are not legally binding, the declarations are the statements of general rules of international law and evidence of emerging legal rules.⁸⁰⁵ As Brownlie considers, "The Declaration regards the principle of self-determination as a part of the obligations stemming from the Charter, and is not a 'recommendation' but is in the form of an authoritative interpretation of the Charter."⁸⁰⁶ His view is aligned with para 1 of the Declaration, which states:

"The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to world peace and cooperation."⁸⁰⁷

In result, most of the administering powers had complied with the resolutions 1514 (XV) and 1541 (XV) resulting in many dependent Territories becoming independent within a decade from the adoption of the declaration in 1960 to 1970.⁸⁰⁸ West Papua was and is an occupied territory, and therefore entitled to independence. The notion around secession of breaking up an existing state is considered as an old narrative or trite law.⁸⁰⁹ As Emerson noted, "the transition from colonial status to independence is not regarded as secession, whether or not it is achieved by force of arms, but rather as the "restoration" of a rightful sovereignty of which the people have been illegitimately denied."⁸¹⁰ The Papuans' legal right to determine their own sovereign state had been denied, and Indonesia's presence in West Papua is a colonial continuation that has to be abolished as required by the Resolutions.

⁸⁰⁴ Vincent Kuitenbrouwer "Beyond the 'Trauma of Decolonisation': Dutch Cultural Diplomacy during the West New Guinea Question (1950-62)" (2016) 44 JICH 306 at 312.

⁸⁰⁵ Melinda Janki "West Papua and the Rights to Self-Determination under International Law" (2010) 34 WILJ at 5.

⁸⁰⁶ Brownlie I *Principles of Public International Law* (7th ed, Oxford University Press, London, 2008) at 9.

⁸⁰⁷ GA Res 1514, XV (1960), para 1.

⁸⁰⁸ See Melinda Janki, above n 805, at 6.

⁸⁰⁹ Knop "Diversity and Self-Determination in International Law" (2007) 47 LIL at 75.

⁸¹⁰ See Melinda Janki, above n 805, at 4.

3.3.2. The United Nations Human Rights Treaties

Indonesia is a party to most of the ten core UN human rights treaties.⁸¹¹ Include the identical International Covenants of Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR),⁸¹² and International Convention on the Elimination of All Forms of Racial Discrimination CERD.⁸¹³ Other than the UN human rights declarations discussed above, these are a series of human rights treaties established by the UN, which are binding on the states that formally subscribed to them. These human rights treaties did not specifically mention indigenous peoples, but within their respective topics of concern, are in some way relevant to indigenous individuals and peoples, just as they are relevant to other individuals.⁸¹⁴

3.3.2.1. International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights

Both International Covenant on Civil and Political Rights (ICCPR),⁸¹⁵ and International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸¹⁶ are multilateral treaties, adopted by the

⁸¹¹ United Nations Human Rights Treaty Bodies: UN Treaty Body Database

<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

⁸¹² ICCPR and ICESCR. Indonesia had ratified both Treaties on the 23rd February 2006.

⁸¹³ International Convention on the Elimination of All Forms of Racial Discrimination. Ratified on the 25th June 1999.

⁸¹⁴ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 185.

⁸¹⁵ International Covenant on Civil and Political Rights 2200A (XXI) (opened for signature 16 December 1966, entered into force 23 March 1976), in accordance with Article 49.

⁸¹⁶ International Covenant on Economic Social and Cultural Rights 2200A (XXI) (opened for signature 16 December 1966, entered into force 3 January 1976), in accordance with article 27.

UNGA in December 1966. The treaties affirmed that self-determination is a ‘right of all peoples.’ In part I article 1, both treaties affirmed; “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.”⁸¹⁷

Both Treaties explicitly required the State parties to take appropriate measures to secure the rights enumerated in the covenants, including the States obligations to promote the realisation of the ‘right of self-determination’, and respect that right in conformity with the provisions of the Charter of the United Nations.⁸¹⁸ In the Human Rights Committee’s General Comment, on paragraph 3, in the Committee’s opinion, is particularly important that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. It follows that all States parties to the Covenant should take positive action to facilitate realisation of and respect for the right of peoples to self-determination, and should be consistent with the States’ obligations under the UN Charter and international law.⁸¹⁹ In relation to West Papua’s historical violation of international law, Indonesia has a legal duty to promote the realisation of the right to self-determination, in compliance with article 1 (3) of ICCPR.⁸²⁰

The International Covenants have become increasingly important for indigenous communities. The UN Human Rights Committee weighed in favour of applying article 1 for the benefit of indigenous peoples⁸²¹ in its comments on Canada’s 1999 Periodic Report under the CCPR, stating that article 1 protects indigenous peoples in their enjoyment of rights over traditional lands, among other aspects of their lives, and it recommended that, in relation to the First Nation Peoples of Canada (FNPC), “the practice of extinguishing inherent indigenous rights be abandoned as

⁸¹⁷ ICESCR, art 1.

⁸¹⁸ ICCPR Article 2 (1, 3) and ICESCR Article 2 (2).

⁸¹⁹ General Comment No. 12 of the Human Rights Committee: Article 1 (The Right to Self-Determination of Peoples), UN Doc HRI/GEN/1/Rev.9 (Vol. I).

⁸²⁰ ICCPR Article 1 (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

⁸²¹ S James Anaya, and Robert A William “STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE: Indigenous Peoples Law and Policy Program. The University of Arizona, James E. Rogers College of Law” (2015), at 7.

incompatible with article 1 of the Covenant.”⁸²² Since then, the Committee often examined the situations of indigenous peoples in reviewing the periodic reports by State Parties to the Covenant.

Article 1 of CCPR applies to indigenous Papuans, as a people. In the third cycle of Universal Periodic Review, the High Commissioner for Human Rights urged Indonesia to protect indigenous West Papuans by “Ensuring that there is no impunity for human rights violation through independent and impartial investigation of such violations that occurred in Papua and West Papua provinces.”⁸²³ In 2014, the Committee on Economic, Social and Cultural Rights (ESCR) on its concluding observation, urged Indonesia to define strong mechanisms for ensuring the respect of their free, prior and informed consent on decisions affecting indigenous peoples of West Papua and their resources, as well as adequate compensation and effective remedies in case of violation.⁸²⁴ To date, however, there is no development for the implementations of recommendations of both the third cycle of UPR and the Committee on ESCR. In the fourth cycle of UPR on Indonesia, concluded in March 2023, Indonesia claims that:

“Development had been accelerated and welfare improved in Papua through specific development programmes, a master plan, legal reform and the allocation of special autonomy funds. Indonesia was committed to providing immediate reparation for past human rights abuses and delivering justice to the victims and their families”.⁸²⁵

However, the realisation of these claims are hardly seen in West Papua. Even if there is a development acceleration, they are not for the benefit of the Papuan people. In terms of legal reform, it often goes without a proper consultation of indigenous Papuans as promised by the constitution and other legal arrangements. The obvious example can be seen in the 2022 amendment of the Special Autonomy Law No 21 of 2001 discussed in chapter one.⁸²⁶

⁸²² Concluding observations and recommendations of the Human Rights Committee: Canada, UN Doc. CCPR/C/79/Add.105 (1999), paragraph 8.

⁸²³ Letter from Zeid Ra’ad Al Hussein (High Commissioner for Human Rights) to H.E. Mrs. Retno L.P Marsudi (Minister of Foreign Affairs Indonesia) regarding the follow-up of the Third Cycle of the Universal Periodic Review (UPR) of Indonesia (23 October 2017).

⁸²⁴ UN Committee on Economic, Social and Cultural Rights. Concluding observations (2014) E/C.12/IDN/CO/1. At 11 para 38.

⁸²⁵ *Report of the Working Group on the Universal Periodic Review of Indonesia* LII A/HRC/52/8 (2023) at 3.

⁸²⁶ Special Autonomy Law for Papua Province 2001 (21) article 77. Proposals for amendments to this Law may be submitted by the people of the Papua Province through the MRP and DPRP to the DPR or the Government in accordance with statutory regulations.

The protection for the ethnic, religion and language minority groups, mentioned in art 27 of ICCPR, which affirmed that; “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group.”⁸²⁷ In the Human Rights Committee’s General Comment on article 27, the Committee held that this provision of the Covenant established affirmative obligations on the part of States with regard to indigenous peoples in particular, and it interpreted art 27 as covering all aspects of minority group’s survival as a distinct culture, include economic or political institutions, land use, as well as language and religious practices.⁸²⁸ Therefore, art 27 of the Covenant, protects all aspects of indigenous West Papuans as an ethnic minority group with their distinct diverse identity, within Indonesian larger ethnic groups.⁸²⁹

The Human Rights Committee continues to express concerns over the human rights situations in West Papua. Particularly the strict restriction on the freedom of assembly and expression, related to the demand for the right to self-determination.⁸³⁰ The Committee urged Indonesia to be in line with the Committee’s General Comment No. 34 articles 19.⁸³¹ Similarly, the Committee on Economic Social and Cultural Rights CESCR, expressed concerns for the lack of effective legal protection framework of the rights of Indigenous peoples of West Papua, due to inconsistencies in relevant legislative provisions. Referring to Indonesia’s statement that it would make use of relevant principles contained in the UNDRIP, the Committee urges the State to expedite the adoption of the draft law on the rights of indigenous communities and ensure that it: defines indigenous communities, provides for the principle of self-identification, and effectively guarantees their inalienable right to own, develop, control and use their customary lands and resources.⁸³² The Committee also recommended Indonesia to ratify the ILO Convention on Indigenous and Tribal Populations (CITP), 1989 (No. 169).⁸³³ Furthermore, the Committee also concerned that the minimum essential levels of Economic, Social and Cultural Rights are not

⁸²⁷ ICCPR Article 27

⁸²⁸ Human Rights Committee, General Comment no. 23 (1994), Article 27 (rights of minorities), UN doc. HRI/GEN/1/Rev.9 (vol. I) 207–210. At 7.

⁸²⁹ Stephanie Lawson “West Papua, Indonesia and the Melanesian Spearhead Group: Competing Logics in Regional and International Politics” (2016) 70 AJIA 506 at 515.

⁸³⁰ United Nations Human Rights Committee on ICCPR. CCPR/C/IDN/CO/1. At 8. <<https://tbinternet.ohchr.org>>.

⁸³¹ UN Human Rights Committee on ICCPR: Committee’s General Comment No. 34

⁸³² UN Committee on Economic, Social and Cultural Rights. Concluding observations (2014) E/C.12/IDN/CO/1. At 11 para 38.

⁸³³ At 11 para 38.

guaranteed in West Papua, and expressed concern at the lack of access to remedies for violations of human rights and at the lack of comprehensive knowledge of the human rights situation.⁸³⁴

Historical and systemic denial of the human rights of indigenous West Papuans, is a violation of the universal principle of 'equality before the law' therefore, legally entitled to remedy for the historical breaches of the law and entitled for the attainment of equal treatment and protection of the law, in line with art 7 of the UDHR, which affirmed that:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁸³⁵

3.3.2.2. International Convention on Elimination of All Forms of Racial Discriminations (ICERD)

Indonesia had ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 25 June 1999.⁸³⁶ CERD, the treaty-monitoring body that promotes compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, has also regularly considered issues of indigenous peoples. It has done so within the general framework of the non-discrimination norm running throughout that Convention, and not usually in connection with any particular article of the Convention, which like other relevant

⁸³⁴ UN Committee on Economic, Social and Cultural Rights. Concluding observations (2014) E/C.12/IDN/CO/1. At 4.

⁸³⁵ UDHR, art 7.

⁸³⁶ United Nations Human Rights Treaty Bodies: Ratification of CERD. <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

human rights treaties nowhere specifically mentions indigenous groups or individuals.⁸³⁷ In its General Recommendation on indigenous peoples, CERD identifies indigenous peoples as vulnerable to patterns of discrimination that have deprived them, as groups, of the enjoyment of their property and distinct ways of life; and it hence calls upon the State parties to take special measures to protect indigenous cultural patterns and traditional land tenure.⁸³⁸

The International Convention on Elimination of All Forms of Racial Discrimination (CERD) applied this understanding of the non-discrimination norm in relation to indigenous peoples in West Papua, calling upon Indonesia ‘to ensure that activities carried out in areas of spiritual and cultural significance to Indigenous Papuans do not have a negative impact on the enjoyment of their rights under the Convention.’⁸³⁹ The Committee of CERD, recommended Indonesia as a State party to provide information on the implementation of the Papua Special Autonomy Law No. 21 of 2001, as well as on measures adopted to ensure the enjoyment by Papuans of their human rights without any discrimination.⁸⁴⁰ There is a slow progress of Indonesia in providing the Committee’s request, and often responded with the claim that the development of the region is accelerating under the framework of the Special Autonomy Law.⁸⁴¹

⁸³⁷ See S James Anaya, Robert A. William “STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE: Indigenous Peoples Law and Policy Program. The University of Arizona, James E. Rogers College of Law”, above n 821, at 9.

⁸³⁸ General Recommendation no. 23 (1997), on the rights of indigenous peoples, UN Doc. HRI/ GEN/1/Rev.9 (vol. II), pp. 285–286.

⁸³⁹ Concluding observations of the Committee on the Elimination of Racial Discrimination: Indonesia UN Doc: A/62/18, para. 365, (2007).

⁸⁴⁰ UN Committee on the Elimination of Racial Discrimination: Concluding observations (2007) A/62/18. Para. At 73 para 364.

⁸⁴¹ *Report of the Working Group on the Universal Periodic Review of Indonesia* LII A/HRC/52/8 (2023) at 3.

3.3.3. Specific Indigenous Rights Regimes within International Law: The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

James Anaya framed that, “the discussions of indigenous people’s rights under international law is incomplete without a discussion of self-determination, which in the contemporary international systems hold as a principle of highest order.”⁸⁴² That principle affirmed in the United Nations Charter,⁸⁴³ and other international human rights instruments that are discussed above.⁸⁴⁴ International law concerns indigenous peoples, including indigenous Papuans, arise today primarily within the international program to promote human rights.⁸⁴⁵ International instruments that are currently articulated in a number of sources build upon general human rights principles with attention to the common set of challenges indigenous peoples characteristically have faced and to the significance of their communal bonds. These standards respond to historical and ongoing violations against indigenous peoples. Like those committed against West Papuans, and therefore they mark the parameters of required remedial measures and the duty of States to implement them.⁸⁴⁶

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁸⁴⁷ is the most prominent articulation of indigenous peoples’ rights, within the contemporary international human rights framework, adopted in September 2007.⁸⁴⁸ Drawing from international human rights law, the Declaration comprehensively articulated the full range of indigenous people’s rights on

⁸⁴² S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2000) at 75.

⁸⁴³ Charter of the United Nations Articles 1 (2) and 55.

⁸⁴⁴ ICCPR, art 1; ICESCR art 1; and the UNGA Resolution 1514 (XV). Self-determination is mentioned.

⁸⁴⁵ S James Anaya *International Human Rights and Indigenous Peoples* (Wolters Kluwer/Aspen Publishers 2009); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing 2002).

⁸⁴⁶ S James Anaya, “The Human Rights of Indigenous Peoples: United Nations Developments,” *University of Hawai’i Law Review*, 39 (2013) at 983; S. James Anaya, “The Human Rights of Indigenous Peoples,” in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (2nd ed, Abo Akademi University Institute for Human Rights, 2012) at 301.

⁸⁴⁷ GA Res 61/295, A/Res/61/295 (2007) [the Declaration].

⁸⁴⁸ See S James Anaya and Robert A. William “STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE: Indigenous Peoples Law and Policy Program. The University of Arizona, James E. Rogers College of Law”, above n 821, at 4.

property, civil, political, economic, social, cultural, religious, and environmental.⁸⁴⁹ It defines the individual and collective rights of all indigenous peoples across the globe, and provides legal guidelines for the States.⁸⁵⁰

The Declaration provides specific acknowledgement of indigenous people's right for self-determination.⁸⁵¹ This right is mentioned in article 3 of the declaration, affirming that:

“Indigenous 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.”⁸⁵²

This clause has a distinct attribution, particularly through the lens of indigenous peoples, because it provides the legal certainty to their main claims for self-determination. With this thinking, article 3 is viewed as “the heart of the Declaration; cornerstone; the pillar upon which all other provisions of the Declaration rest, and the prerequisite for the full enjoyment of all human rights of indigenous peoples.”⁸⁵³

The challenge, however, is that the notion of ‘indigenous peoples’ with right of ‘self-determination’ has been dragged into conflicting views during the negotiations preceding its adoption.⁸⁵⁴ It is lamentable that this central claim of indigenous people's rights remains one of the most contested notions in international law.⁸⁵⁵ Particularly with the preservation of territorial integrity mentioned in article 46 of UNDRIP itself,⁸⁵⁶ which tempered the central promise of the declaration that affirmed indigenous peoples' right of self-determination. Notwithstanding, the adoption of the Declaration is a significant achievement, as it is the only international instrument

⁸⁴⁹ Echo-Hawk, Walter R *In the Light of Justice : the Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Golden, Colorado: Fulcrum, 2013) at 3.

⁸⁵⁰ Elvira Pulitano and Dr. Elvira Pulitano *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, London, 2012) at 1.

⁸⁵¹ S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2000) at 86.

⁸⁵² GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 3.

⁸⁵³ Alexandra Xanthaki *Indigenous Rights and United Nations Standard: Self-Determination, Culture and Land* (Cambridge University Press, New York, 2007) at 131.

⁸⁵⁴ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 59.

⁸⁵⁵ See Alexandra Xanthaki, above n 853, at 131.

⁸⁵⁶ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 46 (1) “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”.

that was drafted with the right-holders themselves, the indigenous peoples.⁸⁵⁷

To date, the Declaration has been favoured by the majority of the UN member States, including four countries; Australia, America, Canada and New Zealand, who initially opposed the resolution.⁸⁵⁸ The Declaration laid down the legal framework for the realisation of indigenous people's claims, including the right to self-determination. Because the clause article 3 is based on the principle of 'equal right of self-determination' grounded in the common article 1 of the international covenants as a right of all peoples;⁸⁵⁹ the UN Charter, and the Vienna Declaration and Programme of Action (VDPA), which all affirmed the fundamental importance of the 'right to self-determination of all peoples.'⁸⁶⁰ The Declaration is therefore anchored in the complementary human rights of equality and self-determination. It affirms that indigenous peoples are equal to all other people,⁸⁶¹ and hence, like all others, indigenous peoples are entitled the same rights to self-determination under the condition of equality.⁸⁶² The Declaration is indeed, distinctively significant for indigenous people as the most oppressed community, as it provides protection for their rights in a more specific and formal way, in line with their particular characteristics and circumstances.⁸⁶³ It aims to recognise the historical denial of those rights, and provide the necessary conditions to provide a remedy.⁸⁶⁴

As discussed earlier, a number of international regimes recognized the rights of indigenous peoples, and required the States the duty to respect and protect those rights within the broader system of international instruments.⁸⁶⁵ In the Declaration, the States are encouraged to comply and effectively implement all the duties and obligations under International instruments, in particular those related to human rights.⁸⁶⁶ The Declaration's push for remedial acts and the State's recognition of the survival of indigenous people's rights has been interpreted as meaning the

⁸⁵⁷ See S James Anaya *International Human Rights and Indigenous Peoples*, above n 854, at 58.

⁸⁵⁸ At 57.

⁸⁵⁹ International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 993 UNTS 3; International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 [hereinafter "ICCPR"].

⁸⁶⁰ Declaration's Preamble para 15.

⁸⁶¹ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 2.

⁸⁶² See S James Anaya, above n 853, at 58.

⁸⁶³ At 7.

⁸⁶⁴ At 61.

⁸⁶⁵ The UN Charter Article 1 (2); ICCPR Article 2 (1, 3) and ICESCR Article 2 (2).

⁸⁶⁶ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], preamble, para 18.

implementation of these ‘inherent and inalienable rights’ that should not be delayed.⁸⁶⁷ Pursuant to article 38, the Declaration required that “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”⁸⁶⁸ Professor Erica-Irene Daes suggested:

“Self-determination entails a process, through which Indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.”⁸⁶⁹

The reasoning behind the Declaration’s push for remedy was built upon the recognition of the historical and systemic denial of indigenous people’s rights, and the need for the rectification of those crimes.⁸⁷⁰ The Declaration, apart from affirming the human rights of indigenous peoples which derived from human rights principles of equality and self-determination, also provides the duty of the States to comply with the Declaration, particularly the realisation of remedial trust.

In relation to West Papua, the Papuans are indigenous peoples.⁸⁷¹ Therefore, they are holders of the right to individual and collective human rights guaranteed by the Declaration, including the right to self-determination.⁸⁷² Indonesia is an administering power and endorsed the Declaration,⁸⁷³ and a State Party to other international human rights instruments reflected in the Declaration.⁸⁷⁴ Thus, it has an international obligation to promote respect for and full application and follow up the effectiveness of the Declaration.⁸⁷⁵ With this theory argument, the relevant form of self-determination is necessary for the restoration of historical and systemic denial of human rights of indigenous Papuans. Professor James Anaya describes:

“Self-determination as a ‘human right’ and when self-determination is denied, a breach occurs,

⁸⁶⁷ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], preamble, para 7.

⁸⁶⁸ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 38.

⁸⁶⁹ See S James Anaya, above n 837, at 61.

⁸⁷⁰ [The Declaration], preamble, para 7.

⁸⁷¹ Thesaurus.com, <www.dictionary.com>. “the natives or the Indigenous black peoples who occupied the Island of New Guinea, both eastern half (PNG) and the western half (West Papua), who characterised by a black or dark brown complexion and crisp, frizzled hair, nor any of unaffiliated languages to New Guinea”.

⁸⁷² GA Res 61/295, A/Res/61/295 (2007) [the Declaration], articles 1 and 3.

⁸⁷³ Indigenous Peoples in Indonesia - OHCHR UPR Submissions <<https://uprdoc.ohchr.org>>.

⁸⁷⁴ United Nations Human Rights Treaty Bodies: UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

⁸⁷⁵ GA Res 61/295, A/Res/61/295 (2007) [the Declaration], art 42.

requiring a remedy. This remedial form of self-determination is proportionate to the nature of the breach or violation.”⁸⁷⁶

Following this reasoning, external self-determination would only be invoked when the nature of the violation was so great that external self-determination is the only adequate remedy.⁸⁷⁷ West Papua, with its historical trajectory and ongoing nature of extreme human rights violations, external self-determination is considered as an adequately relevant remedy.

As discussed largely in the previous chapter, indigenous West Papuans had suffered greatly under the alien rules, including the denial of their sacred right to determine their own affairs.⁸⁷⁸ Thomas Musgrave analysis on the 1969 Act of Free Choice in West Papua concluded; “Indigenous West Papuan 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.”⁸⁷⁹ Narasimham commented that; “the 1969 vote was a ‘sham’ and a ‘whitewash’.”⁸⁸⁰ Other academics and historians, such as John Saltford and Pieter Drooglever had revealed that “the Act of Free Choice as a democratic travesty.”⁸⁸¹ Maire Leadbeater has criticised that:

“Once Indonesia was in charge, diplomats deemed it inappropriate to engage with West Papuan leaders or even to respond to their letters. The truth was always right there - the phoney Act of Free Choice, the deadly military operations, the displacement of the people for the sake of mines and migrants.”⁸⁸²

That denial of the right to self-determination, constitutes the very historical human rights violations that the Declaration seeks to address.⁸⁸³ In the end, indigenous Papuans had suffered greatly from historical and ongoing injustices, dispossession of the lands, territories and natural resources as the result of the alien imperialisms. These lingering breaches require appropriate

⁸⁷⁶ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009), at 189.

⁸⁷⁷ Valmaine Toki “Maori Seeking Self-Determination or Tino Rangatiratanga? A note” (2017) University of Auckland at 136.

⁸⁷⁸ Pacific Media Centre “Vanuatu Steps up UN bid for West Papua Rights, New Referendum” <www.asiapacificreport.nz>.

⁸⁷⁹ Christine C. F Baetens *Sovereignty, Statehood and State Responsibility: Essay in Honour of James Crawford* (2nd ed, Cambridge University Press, London, 2015) at 227.

⁸⁸⁰ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 81.

⁸⁸¹ Maire Leadbeater “See No Evil: New Zealand’s Betrayal of the People of West Papua” (2017) 27-39 at 160.

⁸⁸² At 241.

⁸⁸³ Declaration’s Preamble, para. 6.

remedy, including recognition and exercise of the right to self-determination as envisioned in the United Nations Declaration on the Rights of Indigenous Peoples (The Declaration).⁸⁸⁴ An international law professor, James Anaya points out:

“The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore-dominant sectors of society.”⁸⁸⁵

By alluding to this history at the outset, the Declaration reveals its character as essentially a remedial instrument, not to create new human rights for indigenous peoples. But to restore that they too are entitled to enjoy the same rights as other peoples and individuals enjoying theirs.⁸⁸⁶ Therefore, article 3 of the Declaration claims for indigenous peoples the same right of self-determination as, a right of all peoples that required a remedy. Indigenous people of West Papua are legitimately entitled, and therefore, they are in the position of beneficiaries to all human rights guaranteed in the UN Declaration on the Rights of Indigenous Peoples, including the indigenous Papuans claim for self-determination.

⁸⁸⁴ Declaration’s Preamble, para 19.

⁸⁸⁵ S James Anaya “Self-Determination as a Collective Human Right under Contemporary International Law” in Pekka Aikio and Martin Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Abo Akademi University, 2000) at 3–18.

⁸⁸⁶ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009), at 59.

3.4. Conclusion

This chapter responds to the gap in relevant international laws discussed in the previous chapter, and particularly vis-a-vie the notion of the right of self-determination. In terms of whether or not West Papuan people are entitled to self-determination, this chapter has delved into two pivotal legal regimes. Self-determination in a broader system of international human rights laws, and specific provision of international law that focuses on indigenous peoples rights. It has confirmed that both international human rights standards, while acknowledging some challenges, have affirmed that self-determination is ‘a right to all people under the condition of equality that should be beneficiary to all peoples.’⁸⁸⁷ Professor James Anaya argues that:

“Self-determination should be beneficial to all human beings for it is concerned with human beings.”⁸⁸⁸ Anaya further asserted “‘Peoples’ entitled to self-determination, including the aggregate population of independent states, as well as those of classical colonial territories. The proposition that self-determination is concerned with the ‘peoples’ of both states and colonial territories substantially approaches the concept of self-determination as a human rights principle benefiting all segments of humanity.”⁸⁸⁹

The Papuans are a people, a colonial people, an indigenous people and a minority group.⁸⁹⁰ They are legitimately entitled to exercise their rights of self-determination guaranteed in international human rights instruments.⁸⁹¹ Indonesia’s rule in West Papua today is legally invalid, and historically unjustified.⁸⁹² Given West Papua’s history, Indonesia’s administration is that of a colonising power over a people with a right to decolonise. Therefore, realisation of the

⁸⁸⁷ S James. *Anaya Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2000) at 78.

⁸⁸⁸ S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, USA - OSO, 1996) at 77.

⁸⁸⁹ See S James Anaya, above n 887, at 78.

⁸⁹⁰ Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov *Self-Determination and Secession in International Law*. (Oxford University Press, London, 2014) at 32.

⁸⁹¹ Charter of the United Nations, articles 1(2) and 55; [the Declaration], art 3; ICCPR art 1; GA Res 1514, XV (1960), art 2.

⁸⁹² Julian Mckinlay King and Andrew Johnson “West Papua Exposed: An Abandoned Non-Self-Governing or Trust Territory” (2019) 6, GJLHD, at 99.

decolonisation regimes affirmed in art 73 of the UN Charter,⁸⁹³ and the UNGA Res 1514 (XV),⁸⁹⁴ remain an applicable position, because West Papua is an item of an unfinished business for the decolonisation.⁸⁹⁵ It has also affirmed that West Papuans, as being an indigenous peoples, ultimately acquired the benefit of the provision of indigenous rights regime articulated in the UNDRIP, which guaranteed their individuals and collective rights, including their claim for self-determination.⁸⁹⁶

Given the relevant international human rights laws, affirming the states like Indonesia have a duty to guarantee, protect and uphold the human rights of its indigenous peoples. Indonesia must provide an adequate remedy for the historical violations that the indigenous West Papuans have experienced.⁸⁹⁷ Indonesia, as a state party to all international human rights instruments mentioned, including the UNDRIP, has a legal duty to acknowledge the historical breach they have done in taking over the territory,⁸⁹⁸ and has a legal obligation to provide an adequate remedy for that historical violation. Indonesia also has an obligation to recognise the interests of indigenous West Papua as a people. These include their claims to determine their own affairs, their rights to the lands, territories, natural resources and other collective rights guaranteed in the UNDRIP. Enacting law no. 21 of 2001, regarding the Special Autonomy for West Papua, cannot be regarded as a remedial measure, because of its ingenuine nature, political content and failed implementation.

The author argues that, indigenous West Papuans' claims for self-determination have a legitimate ground on the basis that - the treatment they have received from Indonesia, was, and is comparable to that of a colonised territory. This is to affirm Frank, Higgins and others statements that: "self-determination allows for independence only to colonial peoples or to those whose territory is the subject of foreign occupation."⁸⁹⁹ Overall, indigenous Papuans' claims for self-determination are well-grounded by both international human rights and indigenous rights regimes.

⁸⁹³ Charter of the United Nations, art 73.

⁸⁹⁴ GA Res 1514, XV (1960).

⁸⁹⁵ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 73.

⁸⁹⁶ [The Declaration], art 3.

⁸⁹⁷ ICCPR art 2 (1, 3) and ICESCR art 2 (2).

⁸⁹⁸ Christine C. F Baetens *Sovereignty, Statehood and State Responsibility: Essay in Honour of James Crawford* (2nd ed, Cambridge University Press, London, 2015) at 227.

⁸⁹⁹ Alexandra Xanthaki *Indigenous Rights and United Nations Standard: Self-Determination, Culture and Land* (Cambridge University Press, New York, 2007) at 141.

4. CHAPTER FOUR

APPLICATION OF LAW FOR INTERNATIONAL REMEDIES: MECHANISMS AND PROCEDURES WITHIN THE INTERNATIONAL HUMAN RIGHTS SYSTEMS

4.1. Introduction

Indigenous people of West Papua, have experienced a history of violence on their political, social and cultural institutions; the way of life; ongoing dispossession of their ancestral lands,⁹⁰⁰ including the denial of the legal right to self-determination.⁹⁰¹ The important relevant standards and policy of contemporary international laws applicable to West Papua outlined in chapter four include; broad principles of international human rights law (the human rights regime), and specific provision of international law focused on indigenous peoples' rights (the indigenous rights regime). These two legal regimes have slightly distinct allotments, but possess common grounds in their capacity for advancing human rights, including the right to self-determination.⁹⁰²

⁹⁰⁰ Peter Cane and Joanne Conaghan *The New Oxford Companion to Law* (Oxford University Press. London. 2008).

⁹⁰¹ Richard Chauvel. "West Papua: Indonesia's Last Regional Conflict." *Small Wars & Insurgencies* 32.6 (2021) 32 LJL 913 at 921.

⁹⁰² S James Anaya, and Robert A William "STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE: Indigenous Peoples Law and Policy Program. The University of Arizona, James E. Rogers College of Law" (2015), at 34.

Chapter 4 will discuss how both regimes may be applied to the situation of West Papuans. It will explore UN procedures and mechanisms which can be utilised by indigenous West Papuans to pursue redress, remedy and realisation of their rights, including self-government and independence as an ultimate legal remedy. Beginning with the United Nations decolonisation procedure; the mechanisms in the United Nations Human Rights Council UNHRC and other relevant procedures for obtaining a remedy within the international human rights systems. Including the international forums and spaces that are specifically designed to redress for indigenous peoples concerns and aspirations. This chapter concludes with some recommendations.

4.2. Relevant International Forums and Procedures Capable of Issuing Decisions to Pursue Remedies for Historical and Ongoing Violations of Human Right in West Papua

As the concerns of human rights guaranteed in international law remain unresolved by the state, the international systems provide certain avenues to respond to those concerns. Including the recommendations to the state party to promote action of the state to provide remedies as the fulfilment of international obligations.⁹⁰³ The relevant international forums and type of procedures that indigenous West Papuans could use to pursue remedies for historical and ongoing violations may include: the combined strategy of regional and international forums to exposes the human rights violations; use of international human right law to raise awareness as part of strategy; and mechanisms that are capable of issuing actual decisions and targeted specific recommendations to the state (Indonesia).

The following international mechanisms and procedures are considered to be capable and effective strategies, which indigenous West Papuans could use in obtaining international intervention. Particularly through consistent advocacy efforts, targeting the relevant bodies and their

⁹⁰³ ICCPR Article 2 (1, 3) and ICESCR Article 2 (2).

mechanisms within the United Nations. Such approaches are significantly important as it can bring awareness of alleged human rights violations committed by the Indonesian government. The ongoing advocacy at the international arena could also promote the goals and aspirations of West Papuan people, in pursuing international remedies for historical and ongoing violations of human rights outlined already.

4.2.1. The United Nations Decolonisation Procedure

As discussed early, self-determination of people subject to classical conditions of colonialism, promoted under the United Nations decolonisation regime.⁹⁰⁴ To achieve this goal, the UN has developed a number of supervisory bodies that oversee the decolonisation process for Non-Self-Governing Territories, listed under article 73 of the UN Charter. These include, the United Nations General Assembly Fourth Committee (UNGA-FC) of Special Political and Decolonisation Committee known as ‘the Fourth Committee’,⁹⁰⁵ and the Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, also known as, “the Special Committee on Decolonisation, or C-24.”⁹⁰⁶

West Papua’s legitimate chance for the implementation of decolonisation order began in December 1950, when it was implicitly considered as a Non-Self-Governing Territory by the UNGA,⁹⁰⁷ which was then formally listed as a NSGT, in 1960.⁹⁰⁸ However, it disappeared just instantly

⁹⁰⁴ Charter of the United Nations, chapters XI and XII. “The principles of the decolonization”

⁹⁰⁵ United Nations General Assembly: Special Political and Decolonization (Fourth Committee) <www.un.org/en/ga/fourth/>.

⁹⁰⁶ The United Nations and Decolonization: Special Committee on Decolonization <www.un.org/dppa/decolonization/en/c24/about>.

⁹⁰⁷ The United Nations General Assembly Resolution: A/Res/448 (V). <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/46/PDF/NR006046.pdf?OpenElement>>.

⁹⁰⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 180.

following its handover from the Netherlands to the UNTEA's administration in 1962.⁹⁰⁹ Since then, West Papua's legal status under the decolonisation regime was no longer seen on the UN list,⁹¹⁰ until Indonesia took complete control through the controversial Act of Free Choice in 1969.⁹¹¹ It affirms that the decolonisation process for West Papua that was legally entitled for - did not occur. It leaves open to argue that; West Papua is the unfinished business of decolonisation and therefore has a legitimate place to be re-inscribed on the UN decolonisation list for a proper application of plebiscite.

On the one hand, reinstatement of West Papua on the UN list for decolonisation however, would not be easy, and politically difficult.⁹¹² Particularly given Indonesia's membership of the Special Committee on Decolonisation since 2015,⁹¹³ making a solution through C-24 currently seems to be impossible. During the Pacific Regional Seminar that was organised by the UN Special Committee on Decolonisation (C-24), in May 2023, hosted by Indonesia itself, has emphasised that: "The decolonisation process must comply with international law and must not be exploited to disrupt the territorial integrity of any country".⁹¹⁴ Indonesia also consistently argues that the issue of West Papua is within its domestic jurisdiction.⁹¹⁵

On the other hand, the possibility for the re-inscription of West Papua on the UN decolonisation has a legitimate basis. Because legally it is justified and well-grounded, and historically well-supported and sufficient - that the historical violation of international order outlined above, did not legally place West Papua within Indonesia's domestic jurisdiction.⁹¹⁶ Also, the degree of human rights violations affecting Papuans is so great, and hence, it requires appropriate legal remedy

⁹⁰⁹ At 28.

⁹¹⁰ The United Nations and Decolonization: Lists of Former Trust and Non-Self-Governing Territories <<https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts>>.

⁹¹¹ Christine C. F Baetens *Sovereignty, Statehood and State Responsibility: Essay in Honour of James Crawford* (2nd ed, Cambridge University Press, London, 2015) at 220.

⁹¹² Muridan S Widjojo "Papua" (2012) 24 the Contemporary Pacific 398 at 404.

⁹¹³ The United Nations and Decolonization: Special Committee on Decolonization <<https://www.un.org/dppa/decolonization/en/c24/members>>.

⁹¹⁴ Ministry of Foreign Affairs 'Indonesia Emphasises Decolonisation Must Comply with International Law' <<https://kemlu.go.id/portal/en/read/4794/berita/indonesia-emphasises-decolonisation-must-comply-with-international-law>>.

⁹¹⁵ "Indonesia lashes out at Vanuatu over West Papua at the UN" *Radio New Zealand* (online ed, Wellington, 28 September 2020).

⁹¹⁶ Julian McKinlay King "A Soul Divided: The UN's Misconduct over West Papua" (2019) 16 UTS ePress 59 at 63. (General Assembly Plenary Meeting 1127: at 242-243).

within the international mechanisms.⁹¹⁷ Because even the claim of ‘within domestic jurisdiction’ however, is seen as incapable, and or insufficient to redress and fail to adequately provide remedy to indigenous Papuans' plight.⁹¹⁸

Furthermore, with the development of contemporary international human rights instruments, West Papua is gaining a more strategic place to achieve their ultimate aspiration. Particularly, the indigenous regimes of the United Nations Declaration on the Rights of Indigenous Peoples (the declaration - UNDRIP), that have guaranteed indigenous people’s human rights, including the right to self-determination and other collective rights.⁹¹⁹

From the historical ground and the provision of international human rights regimes, indigenous West Papuans can benefit as international human rights law exists to respond to the situations like in West Papua. These could serve as the legal rationalities for the re-inscription of West Papua to the United Nations decolonisation regime. In order to achieve this, West Papua Liberation Party, the United Liberation Movement for West Papua/ ULMWP,⁹²⁰ should elevate its effort to make appearances to the United Nations Committee on Decolonization (UNCD) more often to pay a particular focus on the human rights matters affecting the people of West Papua.

West Papua’s legal case is similar to what has occurred in French Polynesia, the islands of Tahiti.⁹²¹ The island was considered by the General Assembly as NSGT under Article 73 of the UN Charter.⁹²² After 1946 however, when the General Assembly issued its first resolution concerning the transmission of information under Article 73(e) of the Charter, the France government refused to comply with its reporting requirement vis-à-vis the islands.⁹²³ In 1947, French Polynesia unilaterally delisted from non-self-governing territories.⁹²⁴ In fact, it did not

⁹¹⁷ Richard Chauvel. “West Papua: Indonesia’s Last Regional Conflict.” *Small Wars & Insurgencies* 32.6 (2021) 32 LJI 913 at 921.

⁹¹⁸ See Muridan S Widjojo, above n 912, at 404.

⁹¹⁹ GA Res 61/295, A/Res/61/295 (2007) [the Declaration].

⁹²⁰ ULMWP is a Unifying Umbrella of various pro-independence parties established in December 2014 in Saralana, Vanuatu, where the Headquarter of ULMWP is located. <<https://www.ulmwp.org/ulmwp>>

⁹²¹ General Assembly Resolution 67/265 (May 1, 2013). The Resolution, which refers directly to articles 3 and 4 of the UN Declaration on the Rights of Indigenous peoples, affirms “the inalienable right of the people of French Polynesia to self-determination and independence ...”

⁹²² GA Res A/RES/66 (1) (14 December 1946). As a “French Establishment in Oceania.”

⁹²³ GA Res A/RES/67/265 (23 August 2013).

⁹²⁴ Lorenz Gonschor “Polynesia in Review: Issues and Events, 1 July 2012 to 30 June 2013” (2014) 26 CP 192 at 192.

return to the list for three-quarters of a century, during which time France conducted almost 200 nuclear tests at the Mururoa and Fangataufa atolls in the Tuamotu Archipelago. In 2013, at the urging of the majority Tahitian (or Maohi) indigenous people of the islands, and with the active backing by a number of Pacific island countries, sufficient votes within the General Assembly were mustered for French Polynesia to be relisted, despite the objections of France.⁹²⁵ In an official statement, the French Ministry of Foreign Affairs (FMFA) called the General Assembly's resolution a "flagrant interference."⁹²⁶ Nonetheless, UN supervision under the decolonisation regime, with particular attention to the territory's indigenous people, has been reinstated for French Polynesia, with the support of the majority of UN Member States.⁹²⁷

Whether such an outcome may be achieved for West Papua, in which the possibility is open, given the strategic alliances with the Pacific island nations. In fact, in an effort to gain the UN attention, the Chair of the Pacific Islands Forum (PIF) and Prime Minister of Tuvalu, Mr. Kausea Natano, in line with the Forum Leaders decisions in Tuvalu in 2019, has written to the United Nations High Commissioner for Human Rights (HCHR), Michelle Bachelet, requesting an update on the consultations with the Government of Indonesia concerning the invitation for a mission to West Papua.⁹²⁸ Consistent effort in building and strengthening regional and international alliances like this, may potentially lead to a path towards re-inscription of West Papua into the United Nations Decolonisation Committee for a new plebiscite.

⁹²⁵ Lorenz Gonschor "French Polynesia" (2014) 26 CP 192 at 193.

⁹²⁶ Ministry of Foreign Affairs, Résolution adoptée par l'Assemblée générale des Nations unies sur la Polynésie française (17 May 2013), <www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-et-les-nations-unies/evenements-et-actualites-lies-aux-nations-unies/actualites/article/resolution-adoptee-par-l-assemblee>.

⁹²⁷ See S James Anaya and Robert A. William, above n 902, at 34.

⁹²⁸ Letter from Kausea Natano (Chairperson of the Pacific Islands Forum) to Michelle Bachelet (the UN High Commissioner for Human Rights) Regarding the Invitation for a (mission to West Papua) 08 October 2020.

4.2.2. Procedures for Obtaining Recommendations for Redress within the International Human Rights Systems

4.2.2.1. The United Nations Human Rights Council

The Human Rights Council is an intergovernmental body within the UN system, responsible for strengthening the promotion and protection of all human rights around the world, and for addressing situations of human rights violations and making recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention.⁹²⁹ The Human Rights Council was established in 2006 by the General Assembly, through Resolution 60/251,⁹³⁰ replacing the Commission on Human Rights (CHR).⁹³¹

The Human Rights Council is made of 47 member states, which are elected by the majority of members of the UNGA through direct and secret ballot.⁹³² Indonesia has been re-elected for the fifth time on the membership of the Council for the period of 2020-2022.⁹³³ It means, Indonesia may be bolstering its own human rights image, and prevent the Human Rights Council being used as a platform for airing West Papua's historical and ongoing human rights violations that Indonesia itself had been committing. Nonetheless, with the adoption of resolution 60/251, being a member of the Council comes with a responsibility to uphold high human rights standards, the criteria insisted by the states themselves.⁹³⁴ Therefore, the continued effort is required utilising the Human

⁹²⁹ United Nations Human Rights Council <www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx>.

⁹³⁰ GA Res 60/251, A/Res/60/251 (2006) [Resolution adopted by the General Assembly on 15 March 2006].

⁹³¹ The Commission, established in 1946, is the main United Nations legislative body working to promote and protect human rights. The Commission provides overall policy guidelines, studies human rights problems, develops and codifies new international norms and monitors the observance of human rights around the world. The Commission provides a forum for States, civil society – through non-governmental organisations – and international organisations to voice their concerns about human rights issues.

⁹³² United Nations Human Rights Council: Membership of the Human Rights Council <<https://www.ohchr.org/en/hrbodies/hrc/membership>>.

⁹³³ Office of Assistant to the Deputy Cabinet Secretary for State Documents & Translation: Indonesia Wins Seat on the UN Human Rights Council <<https://setkab.go.id/en/indonesia-wins-seat-on-un-human-right-council/>>.

⁹³⁴ See GA Res 60/251, A/Res/60/251 (2006), above n 930.

Rights Council. Because, the Council has a number of subsidiary bodies and mechanisms, including the specific forums for indigenous peoples that can be used by indigenous West Papuans, along with indigenous peoples from around the world to advance their cause and raise awareness about transgression of their internationally recognised rights.⁹³⁵

Number of Council's mechanisms as the communications procedures that are capable to accommodate human rights issues include: the Council's Confidential Complaint Procedure (CCCP);⁹³⁶ the UN Special Rapporteur on the Rights of Indigenous Peoples (UNSRRIP);⁹³⁷ the UN Expert Mechanism on the Rights of Indigenous People (UNEMRIP)⁹³⁸ and the UN Permanent Forum on Indigenous Issues (UNPFII).⁹³⁹ These mechanisms are relevant to apply with the situations like in West Papua, and may hold the potential for obtaining a specific decision or recommendation for redress under the relevant international human rights standards.

4.2.2.2. Human Rights Council Confidential Procedure (Complaint Procedure)

In addressing human rights concerns, the Human Rights Council⁹⁴⁰ adopted resolution 5/1 entitled "Institution-Building of the United Nations Human Rights Council" in June 2007 - resulting in the creation of Human Rights Council Confidential Procedure (UNHRC-CP).⁹⁴¹ It was established to address consistent patterns of gross and reliably attested violations of all human rights, and all

⁹³⁵ Human Rights Council <www.ohchr.org/EN/HRBodies/HRC/Pages/Home.aspx>.

⁹³⁶ United Nations Human Rights Council Complaint Procedure <www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index>.

⁹³⁷ United Nations Human Rights Special Procedures: Special Rapporteur on the Rights of Indigenous Peoples <www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.

⁹³⁸ United Nations Expert Mechanisms on the Rights of Indigenous Peoples <www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples>.

⁹³⁹ Economic and Social Council Res 2000/22, E/RES/2000/22 (2000) [Establishment of a Permanent Forum on Indigenous Issues].

⁹⁴⁰ Economic and Social Council Res. 1503 (XLVIII), 48 UN ESCOR (No. 1A), UN Doc E/4832/ Add.1, at 8 (1970).

⁹⁴¹ United Nations Human Rights Council Complaint Procedure <www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index>.

fundamental freedoms occurring in any part of the world and under any circumstances. As the purpose of the complaint procedure is to address systemic ‘patterns’ of human rights violation with the ‘confidential procedure,’ the outcome is not made public because it is a Charter-based procedure - similar to the communications procedure of the Special Rapporteur on the Rights of Indigenous Peoples.⁹⁴² The names of the cases settled by the Human Rights Council are not made public and access to them is not available. It is supposed to be available under the guidelines regarding the availability of the confidential cases listed as derestricted.⁹⁴³

The Human Rights Council Complaint Procedure permits individuals, groups or organisations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations to submit complaints.⁹⁴⁴ It is not linked to State ratification of any particular treaty, but rather functions on the basis of any applicable human rights standards.⁹⁴⁵ West Papuans, as the human rights holders who have been victims under the state of Indonesia, could bring those infringements to the attention of the UN Human Rights Council through the complaint procedure that allows it.⁹⁴⁶

Prior to submitting a complaint to the Human Rights Council, this procedure should exhaust all domestic remedies. The complaint procedure requires confidentiality. This has led some advocates of human rights to question its efficacy, as the chance to show evidence of systemic violations of human rights can help focus the attention of the United Nations most important human rights body and its institutional mechanisms on a member state’s gross failures to protect the human rights of its own people (citizens), increasing international pressure and criticisms for reform and accommodation.⁹⁴⁷

⁹⁴² Robert A. William “Study on the International Law and Policy Relating to the Situation of the Native Hawaiian People: Indigenous Peoples Law and Policy Program. The University of Arizona, James E. Rogers College of Law” (2015) at 34.

⁹⁴³ See, Guidelines for Specific Types of UN documents and publications, <www.un.org/depts/dhl/unbisref_manual/undocs/lessanalysis.html#confidential>.

⁹⁴⁴ Human Rights Council Complaint Procedure <www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>.

⁹⁴⁵ At 35.

⁹⁴⁶ UN Human Rights Complain Procedure <www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx>.

⁹⁴⁷ Patrick J. Flood, “The UN Human Rights Council: Is Its Mandate Well-Designed,” 15 *ILSAJ. Int’l & Comp. L.* vol. 15 (2008-09), p. 471, 481.); Marisa Viegas Silva, “The United Nations Human Rights Council: Six Years On,” *SUR-Int. J. on Hum Rts*, vol. 18 (2013), p. 97, 105.

With over half a century of West Papua being under Indonesia since 1963,⁹⁴⁸ it has been difficult to obtain a proper remedy within the domestic jurisdiction. A number of attempts to open the pathway for remedial acts had been put forward by the team of Indonesian Institute of Science (LIPI),⁹⁴⁹ however, the government is consistently ignored. Including the failure to implement article 45 (2) of Special Autonomy law No. 21 of 2001, which required the formation of the Commission of Truth and Reconciliation or (KKR) to resolve the alleged human rights violations.⁹⁵⁰

The state's failure had led to a decades-long consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. Suggesting that, indigenous people of West Papua have credible cases which required the international attention, and thus compatible to use this avenue to submit the complaints to the council's communication procedure alongside with the historical record, and ongoing violations as the compelling evidence to obtain actual decision.

4.2.2.3. United Nations Special Rapporteur on the Rights of Indigenous Peoples (UNSRIP)

The Council established the mandate of Special Rapporteur on the Rights of Indigenous Peoples in 2001, in recognition of indigenous peoples across the world who are undergoing the consequences of historical colonisation and invasion of their territories.⁹⁵¹ Under the Human Rights Council's Special Procedures, the Special Rapporteur monitors, advises and publicly

⁹⁴⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at xxi.

⁹⁴⁹ Chris Ballard "Papua Road Map: Negotiating the Past, Improving the Present and Securing the Future" (2011) 2 APW at 145 at 146.

⁹⁵⁰ Special Autonomy Law for Papua Province 2001 (21), art 45 (2).

⁹⁵¹ Special Rapporteur on the Rights of Indigenous Peoples: Purpose of the Mandate. <www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>.

reports on human rights situations in specific countries or territories (country mandate) or on specific human rights concerns of global significance (thematic mandates). Among others, the Special Procedures, with the support of the Office of the United Nations High Commissioner for Human Rights OHCHR⁹⁵² ‘engage in advocacy, raise public awareness, and provide advice for technical cooperation’ on the human rights issues affecting indigenous peoples.⁹⁵³ Within that support, the special procedures also undertake country visits to assess the situation of human rights at the national level: at the request of a mandate-holder, the government will send an invitation for a fact-finding mission.⁹⁵⁴ The Special Rapporteur, in the capacity of an independent human rights expert, examines the human rights situations of indigenous peoples around the world, and promotes best practices, and conducts thematic studies on specific topics of special importance to protecting the rights of indigenous peoples.⁹⁵⁵

Responding to specific allegations of indigenous people’s human rights violations is a pivotal part of the Special Rapporteur’s mandate. The Human Rights Council has authorised the Special Rapporteur to “gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organisations, on alleged violations of their rights.”⁹⁵⁶ The Special Rapporteur’s communications procedure accepts complaints and inquiries from indigenous peoples and organisations. Where those communications raise serious concerns of human rights violations, the Special Rapporteur can intervene by drawing the attention of the government concerned or by attempting to prompt relevant authorities into corrective action. The Special Rapporteur may formally contact the concerned authority asking for information, and when adequate information has been received, possibly comment on the allegations and issue recommendations for preventive or remedial actions.⁹⁵⁷

⁹⁵² United Nations Human Rights: Office of the High Commissioner <www.ohchr.org/EN/Pages/Home.aspx>.

⁹⁵³ Special Procedures of the Human Rights Council <www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

⁹⁵⁴ Country and Other Visits of the Special Procedures <www.ohchr.org/EN/HRBodies/SP/Pages/CountryandothervisitsSP.aspx>.

⁹⁵⁵ Human Rights Council Resolutions 15/14 (2010) and 29/9 (2013); <www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Mandate.aspx>.

⁹⁵⁶ Human Rights Council Resolution 15/14, para. 1(b).

⁹⁵⁷ S James Anaya, and Robert A William “STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE: Indigenous Peoples Law and Policy Program. The University of Arizona, James E. Rogers College of Law” (2015), at 34.

West Papuans as indigenous peoples who have been the victims of oppression, may utilise the Special Rapporteur communication procedures to submit their credible and detailed information on the alleged violations of the; ‘past human rights violations’ which can be the object of a letter of allegation; and ‘ongoing or potential human rights violation’ which can be the object of an urgent appeal.⁹⁵⁸ In 2019, the Pacific Islands Forum (PIF) as the regional forum strongly urged Indonesia to allow the UN High Commissioner for Human Rights to visit West Papua to investigate the alleged violations of human rights, however this request remains outstanding.⁹⁵⁹ Such a call may put additional credibility on an appeal for a visit by the UN Special Rapporteur on the Rights of Indigenous Peoples into West Papua to carry out its mandate.

4.2.2.4. United Nations Expert Mechanism on the Rights of Indigenous People (UNEMRIP)

The Human Rights Council, as the UN’s main human rights body, also established the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in 2007.⁹⁶⁰ The mandate was then revised by the Human Rights Council in 2016 with the Resolution 33/25.⁹⁶¹ The amendment has expanded its focus from the Global Thematic Issues (GTI) to include new Country Specific Procedures, such as providing technical advice on domestic legislation, implementing

⁹⁵⁸ Communication Procedures of the Special Rapporteur on the Rights of Indigenous Peoples <www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>.

⁹⁵⁹ Kate Lyons and Ben Doherty “West Papua: Pacific Leaders Urge UN Visit to Region's 'Festering Human Rights Sore': Regional forum in Tuvalu ‘strongly encourages’ Indonesia to finalise UN visit to troubled province” *The Guardian* (Online ed, Funafuti, 16 August 2019).

⁹⁶⁰ Resolution 6/36. Human Rights Council: Expert Mechanism on the Rights of Indigenous Peoples <https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_36.pdf>.

⁹⁶¹ Human Rights Council Res. A/HRC/Res/33/25. Revised Mandate of the Expert Mechanism on the Rights of Indigenous Peoples, (September 30 2016). Human Rights Council Thirty-third session. Agenda Item 5.

recommendations arising from human rights mechanisms, and facilitating dialogue between the different stakeholders.⁹⁶²

The mandate given to the Expert Mechanism is to provide the Human Rights Council with expertise and advice on indigenous peoples' rights, and assists member States in implementing the UNDRIP.⁹⁶³ In order to advance the promotion and protection of indigenous peoples, the Expert Mechanism carries out studies by clarifying the implications of key principles, such as self-determination and free, prior and informed consent, and suggesting measures that States can adopt at the level of laws, policies and programmes.⁹⁶⁴ Given that indigenous forums have some limitations on their respective institutional mandates, the Expert Mechanism, as part of its work, had proposed to the Council to include the indigenous participation in the Human Rights Council in compliance with the UNRIP.⁹⁶⁵ The Expert Mechanism also put forward the proposal without prejudice to the ongoing consultative process referred to in General Assembly resolution 71/321, aimed at enhancing the participation of the representatives and institutions of indigenous peoples in United Nations meetings.⁹⁶⁶

With a great avenue of EMRIP provided, indigenous West Papuans as one of the wider stakeholders can submit the complaints under the thematic study. Such procedures can be pursued through the Expert's call for written submissions in November through the OHCHR webpage and the UN Human Rights Weekly Update List Serve (HRWULS).⁹⁶⁷ The indigenous Papuans Advocates can also deliver the content of their reports under the limited five minutes oral interventions during EMRIP's annual sessions where a draft of the report is presented.⁹⁶⁸ Like the recent report on the impact of militarisation on the rights of indigenous people of West Papua, that

⁹⁶² Connie de la Vega and Alen Mirza *A Practical Guide to Using International Human Rights and Criminal Law Procedures* (Online ed, Edward Elgar Publishing, Cheltenham, 2019) at 24.

⁹⁶³ United Nations Declaration of the Rights of Indigenous Peoples (the Declaration) <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

⁹⁶⁴ UN Expert Mechanism of the Rights of Indigenous Peoples <www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx>.

⁹⁶⁵ UN Expert Mechanism on the Rights of Indigenous Peoples: Proposals for the Human Rights Council (July 2020) Proposal 1 at 1. <www.ohchr.org/Documents/Issues/IPeoples/EMRIP/ProposalsHRCChairsProposal.pdf>.

⁹⁶⁶ At 2.

⁹⁶⁷ OHCHR's posts calls for submissions on its website. See Study on Free, Prior and Informed Consent, OHCHR, <www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx>.

⁹⁶⁸ See Connie de la Vega and Alen Mirza, above n 961, at 25.

has been presented at the EMRIP seminar in Geneva, in December 2022.⁹⁶⁹ The Expert Mechanism with its institutional limitation, however, has in indigenous people's issues, and therefore, indigenous Papuans and their advocacy groups can use the forum and mechanism it offers to raise awareness through their participation at the Expert Mechanism's sessions, contributing to reports, and engaging in the new Country Engagement Procedures (CEP).⁹⁷⁰

4.2.2.5. United Nations Permanent Forum on Indigenous Issues (UNPFII)

The United Nations Permanent Forum on Indigenous Issues (UNPFII) was established in 2000 by the UN Economic and Social Council (ECOSOC).⁹⁷¹ The Permanent Forum is one of three UN bodies that is mandated to deal specifically with indigenous peoples' issues. The other two are the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Special Rapporteur on the Rights of Indigenous Peoples, discussed above.⁹⁷² The Permanent Forum does not report directly to the council like the Expert Mechanism and Special Rapporteur, the Permanent Forum advises ECOSOC across six thematic areas: economic and social development; culture; environment; education; health; and human rights.⁹⁷³ The Permanent Forum has a mandate to: provide expert advice and recommendations on indigenous issues to the Council, as well as to

⁹⁶⁹ Kerry R. Wendanak. *UN Expert Seminar on the Impact of Militarisation on the Rights of Indigenous Peoples - Concept Note: Violence and other crimes against the physical and cultural survival of Indigenous Peoples as a result of militarization* [2022] EMRIP.

<<https://www.ohchr.org/sites/default/files/documents/issues/indigenouspeoples/emrip/seminars/undrip/kerry-written-intervention-1.docx>>.

⁹⁷⁰ Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Methods of work for Reports to the Human Rights Council and Country Engagement, at 2,

<www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session10/EMRIP_MethodsofWork.pdf>.

⁹⁷¹ Resolution 2000/22 at 49. Establishment of a UN Permanent Forum on Indigenous Issues: Economic and Social Council.

<www.un.org/en/ga/search/view_doc.asp?symbol=E/RES/2000/22&referer=http://www.un.org/en/documents/index.html&Lang=E>.

⁹⁷² United Nations Permanent Forum on Indigenous Issues
<www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>.

⁹⁷³ ECOSOC Res 2000/22, 2, UN Doc E/RES/2000/22 (July 28, 2000) [hereinafter ECOSOC Res. 2000/22].

programmes, funds and agencies of the United Nations, through the Council; raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system and; prepare and disseminate information on indigenous issues.⁹⁷⁴

Although the permanent forum is not a complaint mechanism,⁹⁷⁵ the advocates for indigenous West Papuans can engage this forum through oral interventions, written statements, and by organising side events during its annual session. Given that its sessions convene over a thousand people from around the world, the permanent forum also serves as a networking space for advocates to meet and exchange information.⁹⁷⁶ These types of meetings could be maximised by indigenous West Papuans, to raise awareness about the historical human rights violations and ongoing human rights situation in West Papua, and building strategic alliances with other indigenous communities from around the world.

4.2.3. The United Nations Treaties Monitoring Procedures

The United Nations human rights framework consists of ten core human rights treaties (HRT).⁹⁷⁷ Each of these instruments has established a committee of experts to monitor implementation of the treaty provisions by its States parties.⁹⁷⁸ As mentioned in Chapter 4, Indonesia has ratified the

⁹⁷⁴ United Nations Department of Economic and Social Affairs Indigenous Peoples: Indigenous Peoples at the United Nations <www.un.org/development/desa/indigenouspeoples/about-us.html>.

⁹⁷⁵ Fact Sheet on the Permanent Forum on Indigenous Issues, Indigenous Peoples' Centre for Documentation, Research and Information – Docip, at 1, <www.docip.org/fileadmin/documents/Docip/Fiches_pratiques/Fiches_UNPFII/EN/final_PFII_fact_sheet_EN_2018_2.pdf>. [Hereinafter Permanent Forum Fact Sheet].

⁹⁷⁶ See Connie de la Vega and Alen Mirza, above n 961, at 47.

⁹⁷⁷ The Core International Human Rights Instruments and Their Monitoring Bodies <www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>.

⁹⁷⁸ Symonides Janusz *Human Rights: International Protection, Monitoring, Enforcement* (Routledge, London, 2003) Online ed: 2017, at 31.

ICCPR, monitored by the Human Right Committee,⁹⁷⁹ the ICESCR, monitored by the Committee on Economic, Social and Cultural Rights,⁹⁸⁰ and the International Convention on the Elimination of All Forms of Racial Discrimination, which is monitored by the UN Committee on the Elimination of Racial Discrimination (CERD).⁹⁸¹ These committees, apart from regularly considering human rights concerns affecting indigenous peoples, also provide complaint procedures to individuals' inter-state complaints, and have enquiry procedures.⁹⁸²

Although Indonesia is bound by the substantive terms of these treaties, including the requirement to submit Periodic Reports to each committee, it has not accepted the optional complaint procedures of the ICCPR or the ICESCR and has not made the necessary declaration under art 14 of the CERD in recognizing its competence to receive and adjudicate human rights complaints.⁹⁸³ However, individuals and indigenous Papuans may be able to use the early warning and urgent action procedures established by CERD,⁹⁸⁴ to draw attention to alleged violations of human rights and the escalating conflict affecting them, such as: the pattern of escalating racial hatred and violence, or racist propaganda or racial intolerance by persons, groups or organisations. (example what happened in Surabaya in 2019),⁹⁸⁵ notably by elected or other officials; a significant pattern of racial discrimination evidenced in social and economic indicators,⁹⁸⁶ and significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities.⁹⁸⁷

⁹⁷⁹ Human Rights Committee: Monitoring Civil and Political Rights <www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

⁹⁸⁰ Committee on Economic, Social and Cultural Rights <www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>.

⁹⁸¹ The UN Committee on the Elimination of Racial Discrimination CERD <www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>.

⁹⁸² Human Rights Bodies - Complaint Procedures <[www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individual comm](http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individual%20comm)>.

⁹⁸³ United Nations Human Rights Treaty Bodies: Ratification of CERD. <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

⁹⁸⁴ Committee on the Elimination of Racial Discrimination: Early-Warning Measures and Urgent Procedures <www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx#about>.

⁹⁸⁵ Amnesty International Indonesia "Racism and Human Rights": Indonesian Militant Group attacked West Papuan Student Dormitory with the Racial Slur directed at them who are studying in Surabaya Indonesia in August 2019. Reported by Amnesty International Indonesia (April 5, 2021) <www.amnesty.id/rasisme-dan-ham/>.

⁹⁸⁶ Toru Hisada "Indigenous Development and Self-determination in West Papua: A Case Study of the Socio-Political and Economic Impacts of Mining upon the Amungme and Kamoro Communities of West Papua" (2007) at 43.

⁹⁸⁷ Committee on the Elimination of Racial Discrimination, Report of the Committee on the Elimination of Racial Discrimination, annex III 12, UN Doc A/62/18 (2007).

Such flow of refugees or displacement had been ongoing since Indonesia's occupation in the 1960s,⁹⁸⁸ until the most recent one in 2021, in several regions in West Papua including Nduga, Puncak Jaya, Intan Jaya, Maybrat and Star Mountains, and other places across the region.⁹⁸⁹ These ongoing human rights issues meet the criteria of early warning and urgent action procedures, indigenous Papuans can utilise this mechanism to acquire the UN intervention to prevent further threat, and may be utilised to raise consciousness of an underlying-root cause of ongoing issues.

Furthermore, the International Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment CAT, which Indonesia has endorsed the complaint procedure under article 20 with no declaration under article 22 of the convention.⁹⁹⁰ This procedures could be maximized by West Papuans to make a complaint, indicating that torture is being systematically practiced by Indonesia through its arm-forces in West Papua, as described in chapter Three.⁹⁹¹ Through this procedure, the Papuans could provide evidence and depositions to obtain the actual recommendation of the United Nations.

⁹⁸⁸ Tracey Banivanua-Mar "A Thousand Miles of Cannibal Lands: Imagining a Way Genocide in the Re-colonization of West Papua" (2008) 10 JGR 583 at 589.

⁹⁸⁹ Warga 4 Distrik di Pegunungan Bintang Mengungsi Hingga ke PNG (The Communities from Four Districts of the Star Mountain Seeking Refugee to PNG). Taken from the Local Leading Media of Jubi or Honest Talk Own by Indigenous Papuan <<https://jubi.co.id/warga-4-distrik-di-pegunungan-bintang-mengungsi-hingga-ke-png/>>.

⁹⁹⁰ UN Treaty Body Database: Acceptance of Inquiry Procedure for Indonesia <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN>.

⁹⁹¹ Nadhya A Abrar "West Papuan Journalists Today: An Alternative Human Rights Perspective from Indonesia" (2020) 26 PJR 123 at 130.

4.3. Conclusion

For fifty nine years, since 1963, indigenous West Papuans have experienced a history of violence on their political, social and cultural institutions, the way of life, ongoing dispossession of their ancestral lands, and the denial of their fundamental right as a people to self-determination.⁹⁹²

Persistence of these human rights violations and aggressions demonstrate Indonesia's inability to rectify existing human rights concerns. Thus, the government of Indonesia fails to uphold its international treaty obligations to promote, protect, and facilitate the recognition of human rights of indigenous people of West Papua.

In order to redress historical and ongoing human rights concerns, this chapter has suggested a number of relevant international forums and procedures that are considered to be an effective strategy for advancing the claims and aspirations of indigenous West Papuans. It has outlined both the general mechanisms under the UN Charter and the UN Treaties-based procedures, and the specific mechanisms through the indigenous people's forums that are capable of issuing decisions and recommendations. Through these various models, indigenous West Papuans can effectively maximise, in a compelling way, using the language of human rights to advocate at the global level.

As part of the way in which West Papuans raise awareness utilising international mechanisms, can be seen in the Universal Periodic Review of Indonesia before the Human Rights Council, in November 2022.⁹⁹³ In the fourth UPR review of Indonesia concluded in March 2023, there were ten recommendations from other states, including a number of major states (America, Canada, Australia and New Zealand) which specifically referenced West Papua,⁹⁹⁴ including one from the Marshall Islands which mentioned self-determination.⁹⁹⁵ Although UPR recommendations are not

⁹⁹² United Nations General Assembly: Twenty Fourth Session - 1812th Plenary Meeting. AGENDA ITEM 98: Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian): report of the Secretary-General regarding the act of self-determination in West Irian

⁹⁹³ *Human Rights Council: Universal Periodic Review - Indonesia (Fourth Circle) [2022] UPR*, <<https://www.ohchr.org/en/hr-bodies/upr/id-index>>.

⁹⁹⁴ *Human Rights Council 4th Circle of Universal Periodic Review of Indonesia: Thematic Lists of Recommendations 41st Session A/HRC/WG.6/41/IDN/2 (2022)* at 33.

⁹⁹⁵ At 51.

binding on states, they do serve the purpose of raising awareness, and may eventually lead to more robust Human Rights Council action, such as establishing a county mandate on Indonesia.

Raising awareness and consciousness about the historical and ongoing violations of human rights, in which admittedly committed by Indonesia, aiming to obtain an adequate remedy upon the harms and threats the state poses to the Papuans cultural personality, integrity, and survival, and to secure the legal right to self-determination, and other collective rights guaranteed by international law.

5. CHAPTER FIVE

CONCLUSION

5.1. Introduction

This thesis has observed the historical and ongoing human rights violations in West Papua, rooted by the denial of the right to self-determination. It has examined the historical tales of the New York Agreement which was signed in 1962,⁹⁹⁶ and set out its strong effects on indigenous Papuans' human rights. This thesis has also traced the engagement of international law on the decolonisation process, affirming that the indigenous West Papuans have experienced a history of violence on their way of life, political, social and cultural institutions; and ongoing dispossession of their lands, including the denial of their right to self-determination.

The thesis has critically examined the legal question of whether or not the legal requirements of international law (decolonisation regimes) were applied sufficiently in determining the political status of West Papua. To provide an adequate legal response, the research has examined the implementation of the legal requirements of decolonisation in two historical events. First, it considered the engagement of decolonisation regime in the 1950s,⁹⁹⁷ in compliance to art 73 of the

⁹⁹⁶ Resolution A/RES/1752/ (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

⁹⁹⁷ Leontine Visser *Governing New Guinea: An Oral History of Papuan Administrators, 1950-1990* (1st ed, KITLV Press, the Netherlands, 2012) at 3.

UN Charter⁹⁹⁸ and other international regimes that required the end of colonial yokes,⁹⁹⁹ and secondly, it examined the implementation of the legal and procedural requirements of art XVIII (d) of the New York Agreement, in the 1969 Act of Free Choice.¹⁰⁰⁰ These historical trajectories undertaken indicate that the decolonisation regimes have not been applied in the way they should have been.

With those accounts, a significant objective has been to develop the legal frameworks, under the relevant international human rights regimes that are favourable to the notion of West Papuan self-determination. The legal mechanisms and procedures capable of generating recommendations for the attainment of self-government have also been constructed. To accommodate this objective, the thesis has stood on three legal grounds: firstly, the historical-based arguments; secondly, the ongoing human rights situations; and lastly, the legal arguments based on the provision of international law, particularly the development of international human rights regimes, including the international law on indigenous peoples. These legal instruments affirmed and guaranteed the right to self-determination and related human rights.

⁹⁹⁸ Charter of the United Nations. Chapter XI articles 73 & 74.

⁹⁹⁹ GA Res. No 1514 (XV) 1960: Declaration on the Granting Independence to Colonial Countries and Peoples; and GA Res. No 1541 (XV) 1960: Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under art 73e of the Charter

¹⁰⁰⁰ United Nations Treaty Series No. 6311: The New York Agreement 1962. Articles XIV, XV and XVIII at 278.

5.2. Conclusion

5.2.1. Historical-Based Arguments

Historical-legal arguments were supported by investigating the history of foreign invasions through colonisation, decolonisation and recolonisation. The colonial history began in 1824 when the Dutch claimed the Western half of New Guinea Island.¹⁰⁰¹ The territory formally became Dutch New Guinea in 1828, and remained under the Dutch colonial title until the early 1900s.¹⁰⁰² This study has confirmed that during the periods from the 1820s to the early 1900s, the territory was not provided with infrastructure developments because it had not yet made much impression on the Dutch as a colonial power.¹⁰⁰³ Therefore, indigenous people of West Papua were free from colonial treatment and their human rights were not challenged.¹⁰⁰⁴

The thesis has traced the decolonisation process, which began after the Dutch relinquished its sovereignty of the Dutch East Indies in 1949 through the Round Table Conference.¹⁰⁰⁵ From the 1950s-1960s, the Dutch, in compliance with art 73 of the UN Charter,¹⁰⁰⁶ initiated to implement the decolonisation mandate, including reporting information on the political development of indigenous Papuans to the UN, as required under art 73(e).¹⁰⁰⁷ The Dutch were also bound to comply with the procedural requirements to eliminate its colonial status, with the territory being

¹⁰⁰¹ Kylie McKenna “Corporate Security Practises and Human Rights in West Papua” (2015) 15 CSD 359-385.

¹⁰⁰² Maire Leadbeater “See No Evil: New Zealand’s Betrayal of the People of West Papua” (2017) 27-39 at 33.

¹⁰⁰³ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009), at 3.

¹⁰⁰⁴ Jan Pouwer “The Colonisation, Decolonization, and Recolonization of West New Guinea” (2008) 34 JPH 157 at 162.

¹⁰⁰⁵ *United Nations Security Council: United Nations Commission for Indonesia, Appendices to the Special Report to the Security Council on the Round Table Conference S/1417/Add1*, (1949).

¹⁰⁰⁶ Charter of the United Nations, art 73.

¹⁰⁰⁷ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (Springer Singapore Pte, Singapore, 2021) at 83.

named in the UN list of NSGT in 1960.¹⁰⁰⁸ Ultimately, these efforts led to the formation of an embryonic state of West Papua, which was rudimentary declared on the 1st December 1961.¹⁰⁰⁹ While acknowledging the Netherlands' genuine commitment to decolonise West Papua, this thesis has emphasised Drooglever's criticisms that, "the uncompleted mission of decolonisation suggests the Netherlands' inefficacy to finish the good job they had started."¹⁰¹⁰ That abandonment certainly left a legal and moral debt on the Netherlands' Government in the history of its overseas colony, because it has created an unpleasant-tormenting memory to the Papuans. With that historical ground, this thesis argues that the Netherlands has a legal, moral and political obligation to undertake necessary steps to address its failure to ensure the human rights and the right to self-determination of the West Papuan people.

The decolonisation process of West Papua was disrupted by Indonesia's military infiltration into the territory in 1960.¹⁰¹¹ The decolonisation process was further deflected by the American intervention with the UN backed-New York Agreement in hands in 1962,¹⁰¹² fearing southeast Asia drifting to the Eastern Bloc during the Cold War. The New York Agreement must undoubtedly be seen as a Western device that validated further colonisation under a non-European power, namely Indonesia, resulting in re-colonisation. This thesis, therefore, has contended that the international regime for decolonisation was violated by Indonesia and the United States. Consequently, the people (of West Papua as the human rights holders) were disadvantaged from international law. Given this historical fact, West Papua's legal status as an unfinished business of decolonisation under the UN Charter remains stand, and as such, article 73 of the UN Charter is legally applicable.

The thesis also investigated the re-colonisation process through the 1962 New York Agreement¹⁰¹³ and critically examined "substantial and procedural requirements" for self-determination in the

¹⁰⁰⁸ John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 180.

¹⁰⁰⁹ See Pieter J Drooglever, above n 1003, at 560.

¹⁰¹⁰ At 591.

¹⁰¹¹ David Easter "Western Intelligence and Covert Soviet Military Aid to Indonesia During the 1962 West New Guinea Crisis" in Floribert Baudet and others (eds) *Perspectives on Military Intelligence from the First World War to Mali: Between Learning and Law* (Asser Press, The Hague, 2017) at 79.

¹⁰¹² See Jan Pouwer, above n 1004, at 166-171.

¹⁰¹³ Resolution A/RES/1752/ (XVII) Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) <[https://undocs.org/en/A/RES/1752\(XVII\)](https://undocs.org/en/A/RES/1752(XVII))>.

1969 Act of Free Choice.¹⁰¹⁴ The Agreement guaranteed Papuans the right to determine their political destiny. This right was affirmed in art XVIII (d), which stated, “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.”¹⁰¹⁵ This provision contained substantial requirements, which affirmed that, “all adults, men and women were entitled their right to vote.”¹⁰¹⁶ Another pivotal point is the procedural requirement which affirmed, “The Act of Self-Determination must be carried out in accordance with international practice.”¹⁰¹⁷ With the signing of the Agreement, Indonesia, including the United Nations were bound to the terms of the Agreement. However, these entire legally agreed requirements were deliberately violated by Indonesia, and consciously tolerated by the UN. In the end, West Papua’s universally acknowledged rights were denied ever since. Given the nature of the historical breach of international law, and its continuing impact on the current human rights situation of West Papuan people, this thesis argues that the external self-determination should be considered as a necessary through proper application of a plebiscite as an adequate legal remedy.

¹⁰¹⁴ Art XVIII of the New York Agreement 1962. Indonesian Administration and Self-Determination.

¹⁰¹⁵ The New York Agreement 1962, art XVIII (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”

¹⁰¹⁶ Danilyn Rutherford “An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua” (2010) 90 IND 173 at 180.

¹⁰¹⁷ See The New York Agreement, art XVIII (d), above n 1015.

5.2.2. Legal Arguments

5.2.2.1. The New York Agreement 1962

First of all, there is no strong legal standing for the New York Agreement. While the Agreement is recorded in the UN Treaty Series Volume 437,¹⁰¹⁸ a disclaimer of the UN Secretariat stated: “the terms ‘Treaty’ and ‘International Agreement’ have not been defined either in the Charter or in the regulations, and the secretariat follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration.”¹⁰¹⁹ This note suggests the legal status of the New York Agreement remains undefined, and thus Indonesia’s narrative of a territorial claim also remains invalid.

Secondly, the Agreement should not have eventuated, because West Papua was legally considered by the UNGA in 1960 as a NSGT, and its inhabitants were dependent.¹⁰²⁰ On that ground, the only legal regimes to determine final status of the territory should have been through art 73 of the UN Charter,¹⁰²¹ and the 1960’s followed-up adoption of the UNGA resolutions 1514 (XV)¹⁰²² and 1541 (XV).¹⁰²³ In addition, the Indonesian military aggression in 1962,¹⁰²⁴ can be regarded as an

¹⁰¹⁸ Treaty Series of the United Nations, Vol. 437 at 273. Agreement (with annex) concerning West New Guinea (West Irian). Signed at the Headquarters of the United Nations, New York, on 15 August 1962.

¹⁰¹⁹ ‘Note by the Secretariat’, Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations <<https://treaties.un.org/doc/Publication/UNTS/Volume%20437/v437.pdf>>.

¹⁰²⁰ GA Res A/Res/448 (V).

¹⁰²¹ Charter of the United Nations, art 37.

¹⁰²² GA Res 1514 (XV).

¹⁰²³ GA Res 1541 (XV).

¹⁰²⁴ Stephanie R Lawson “Regionalism and Colonialism in Contemporary Oceania” (2017) 106 RTL 143 at 146.

act of invalidating the Agreement, because its armed action was against the principle of art 103 of the UN Charter,¹⁰²⁵ and contrary to art 53 of the Vienna Convention.¹⁰²⁶

Moreover, America had no authority to modify the international status of West Papua as a NSGT, it should have been through an Advisory Opinion of the International Court of Justice (ICJ), and the UN regulations that imposed decolonisation under the UN Charter. The UN member states should have opposed the ‘taking note’ process of the New York Agreement, in line with the Vienna Convention and ICJ’s Opinion.¹⁰²⁷ In addition, the indigenous inhabitants of the territory (West Papuans) as the central party of the dispute, should have been involved in the treaty making process. Their deliberate exclusion can serve as a normative evidence to argue that the Agreement is illegitimate. In protest, many of the UN member states have questioned the legitimacy of the New York Agreement and its legal standing.¹⁰²⁸ Furthermore, the UN-Secretary General did not present the treaty draft to the General Assembly for approval, as required under art 102 of the UN Charter.¹⁰²⁹ As a consequence, resolution 1752 (XVII) did not seek approval by the General Assembly, instead only ‘take note’, which legally neither approves nor disapproves.¹⁰³⁰ Therefore, it is adequately convincing to argue that these historical breaches provide a valid ground to justify indigenous West Papuans' claim for international legal remedy.

¹⁰²⁵ Charter of the United Nations, art 103; "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. (UN Charter)"

¹⁰²⁶ Vienna Convention, art 53 on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. "Treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law".

¹⁰²⁷ Eileen Hanrahan *West Papuan Decolonisation: Contesting Histories* (1st ed, Springe Singapore Pte, Singapore, 2021) at 84.

¹⁰²⁸ Julian McKinlay King "A Soul Divided: The UN’s Misconduct over West Papua" (2019) 16 UTS ePress 59, at 65.

¹⁰²⁹ Charter of the United Nations art 102. (1) *Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it;* (2) *No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.*

¹⁰³⁰ Julian McKinlay King "A Soul Divided: The UN’s Misconduct over West Papua" (2019) 16 UTS ePress 59, at 64.

5.2.2.2. Act of Free Choice in 1969

Firstly, in the breach of the substantial requirement of art XVIII of the Agreement, Indonesia - out of a population of nearly one million - selected only 1025 persons from the whole regional councils to vote under the extreme threat.¹⁰³¹ Prior to voting, these members were isolated and not allowed to have any contact with the outside world, including their relatives.¹⁰³² Secondly, in the breach of the procedural requirement of the Agreement, Indonesia deliberately refused to apply the “universally accepted practice of One Man, One Vote” system, for self-determination;¹⁰³³ instead they imposed ‘Musyawarah through representatives’ which was completely outside of legally agreed terms.¹⁰³⁴ Furthermore, even in the implementation of Musyawarah, the assembly members were selected by Indonesia with the majority of them having been the members of the pro-Indonesian movement.¹⁰³⁵ Moreover, from the 1025 Papuans who were selected to vote, Indonesia only appointed 175 members to speak (read out) on behalf of the rest of the members.¹⁰³⁶ These speakers were carefully trained on what to say, and those who were not had also been instructed to stand up to indicate their approval. Mama Rosa Tambaib, expressed; “I was coerced to memorise the written text for weeks to vote for Indonesia. We were intimidated on 14 July 1969 in Merauke.”¹⁰³⁷

¹⁰³¹ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (1st ed, Otago University Press, Dunedin, 2018) at 154.

¹⁰³² John Saltford *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of Betrayal* (2nd ed, Taylor & Francis Group, London, 2003) at 164.

¹⁰³³ Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) at 219.

¹⁰³⁴ Danilyn Rutherford “An Act of Free Choice: Decolonization and the Right to Self-Determination in West Papua” (2010) 90 IND 173 at 180.

¹⁰³⁵ See John Saltford, above n 1032, at 164.

¹⁰³⁶ See Julian McKinlay King, above n 1029, at 72.

¹⁰³⁷ Mama Rosa Tambaib and Bapak Tambaib. Two of the members of the Assembly who took part in the act of free choice in Merauke, on the 14 July 1969. Testimony: Indonesia intimidated us during the act of free choice or pepera in 1969. Taken from the documentary record. <<https://www.youtube.com/watch?v=W-FHiQ1zRnI>>.

This similar procedure went on throughout the whole eight consultative regions. It was in this method that indigenous West Papuans forced to be part of Indonesia,¹⁰³⁸ through heavy military pressure, intimidation, coercion, bribery and indoctrination.¹⁰³⁹ This thesis contends that the internationally recognised right of indigenous Papuans reflected in art XVIII (d) of the New York Agreement was deliberately violated by Indonesia in the 1969 Act of Free Choice. Therefore, Jakarta's claim of a done deal integration process of West Papua into the republic has no sufficient ground, suggesting that Indonesia's rule in West Papua cannot be justified under international law, and its presence is an alien rule that requires a decolonisation regime to be implemented.

5.2.2.3. The UN Role

Finally, in the report to the General Assembly in November 1969, the Secretary General used one sided language with his representative Ortiz Sanz, to make no mention of the deliberate breach of international law discussed.¹⁰⁴⁰ However, in the UNGA's plenary meetings in 1969,¹⁰⁴¹ some General Assembly members (mostly African countries) rejected the report with great concern over the numerous breaches of the terms of the Agreement, and proposed an amendment to carry out the plebiscite appropriately according to international practice.¹⁰⁴² Davidson Nicol, one of the representatives from Sierra Leone argued: "No society can be said to be so primitive and no terrain so geographically difficult in the modern world that the vital exercise of democratic government

¹⁰³⁸ Pieter J Drooglever *An Act of Free Choice: Decolonisation and the Right to Self-determination in West Papua* (Oxford/ New York: Oneworld, New York, 2009) at 722.

¹⁰³⁹ Maire Leadbeater *See No Evil: New Zealand's Betrayal of the People of West Papua* (Otago University Press, Dunedin, 2018) at 157.

¹⁰⁴⁰ See John Saltford, above n 1032, at 172.

¹⁰⁴¹ United Nations General Assembly Plenary Meeting 1810, 1969: Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian): report of the Secretary-General regarding the act of self-determination in West Irian (A/1723 and Corr.1)

¹⁰⁴² Julian McKinlay King "A Soul Divided: The UN's Misconduct over West Papua" (2019) 16 UTS ePress 59, at 74.

should be indefinitely denied to its peoples”.¹⁰⁴³ Nonetheless, at UNGA's plenary meeting 1813 of 19 November 1969, the General Assembly adopted Resolution 2504 (XXIV), which ‘takes note’ of the report of the Secretary-General and acknowledges with appreciation the fulfilment of the tasks entrusted to the Secretary-General and his representative under the Agreement.¹⁰⁴⁴ Similar to resolution 1752 (XVII) of 1962 concerning the New York Agreement, resolution 2504 (XXIV) concerning the Secretary-General's report on the Act of Free Choice never received General Assembly's approval, and as defined by the United Nations Secretariat, the wording ‘takes note’ is undefined, which means neither approval or disapproval, suggesting that the legality of both the New York Agreement and its implementation in the Act of Free Choice remain invalid under the international law.

With the overwhelming evidence historians, academics, professional legal practitioners including the indigenous West Papuans themselves conclude that the ‘genuine Act of Self-Determination did not take place in 1969 Act of Free Choice.’¹⁰⁴⁵ To the legal question of, ‘to what extent Indonesia and the United Nations have succeeded in satisfying the legal requirements set out in the New York Agreement, especially the provision of art XVIII?’ The legal response is simply “the binding principles had been intentionally violated by the Indonesian authority, and consciously tolerated by the UN representatives”. On this basis, the research contends that the re-inscription of West Papua on the UN decolonisation list is legally justified and historically well-grounded for a proper implementation of a plebiscite.

¹⁰⁴³ Davidson Nicol, UN Representative for Sierra Leone, United Nations General Assembly, 24th Session. 1812 Plenary Meeting, 19 November 1969. Agenda Item 98, ‘Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) Report of the Secretary - General regarding the act of self-determination in West Irian’ <<https://www.undocs.org/A/PV.1812>>.

¹⁰⁴⁴ See Julian McKinlay King, above n 1042, at 75.

¹⁰⁴⁵ Annette Culley *State Responsibility in International Law* (Print Express, Victoria, 2017) at 85.

5.2.3. Current Human Rights Issues

This thesis has endeavoured to provide extensive discussion on the legal consequences of laws on: civil and political rights; economic, social and cultural rights; and other human rights issues affecting indigenous people of West Papua. The thesis clearly indicated that the failures to the binding principles of international laws have resulted in misery and affliction towards West Papuans' lives, including decades of instances of torture, summary executions, disappearances and killings, land seizures and ecological disaster, cultural appropriation and denigration, unlawful imprisonment, economic exploitation and marginalization, racism, ongoing displacement of civilians due to military operations, intimidation and political oppression inflicted on indigenous West Papuans.¹⁰⁴⁶

These gross human rights violations are great, constituting genocide.¹⁰⁴⁷ When gross human rights violations occur, the application of external self-determination cannot go away. As law Professor, James Anaya argues: “self-determination as a human right and the remedial form of self-determination is proportional to the nature of the violation.”¹⁰⁴⁸ Following this reasoning, external self-determination would only be invoked when the nature of the violation was so great that external self-determination is the only adequate remedy.¹⁰⁴⁹ This legal theory argument and the ongoing deterioration of the human rights situation in West Papua only provides the route to self-determination.

¹⁰⁴⁶ Camellia Webb-Gannon and others “What can Australia do to Prevent Human Rights in West Papua” (2021) *Asia Pacific Journal Focus*.

¹⁰⁴⁷ Camellia Webb-Gannon “Merdeka in West Papua: Peace, Justice and Political Independence.” (2014) 56 *Anthropological* (Ottawa) 353 at 354.

¹⁰⁴⁸ James S. Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 189.

¹⁰⁴⁹ Valmaine Toki “Maori Seeking Self-Determination or Tino Rangatiratanga? A note” (2017) University of Auckland at 136.

5.2.4. International Legal Framework

The thesis has argued that the indigenous West Papuans are the rights holders under international law, and therefore entitled to self-determination. The argument is established under two legal regimes: broad principles of international laws (human rights regimes), and a specific regime that exclusively focuses on indigenous peoples rights (indigenous human rights regime).¹⁰⁵⁰

Right to self-determination is inclusively guaranteed under the general principles of human rights, beginning from the UN Charter art 1(2) and art 55,¹⁰⁵¹ and the principle of decolonisation which articulated in Chapters XI and XII of the UN Charter.¹⁰⁵² The thesis is also affirmed under international human rights treaties of ICCPR and ICESCR as multilateral treaties.¹⁰⁵³ The treaties affirmed that self-determination is a ‘right of all peoples’.¹⁰⁵⁴ These human rights regimes explicitly required the state parties to take appropriate measures to promote realisation of the ‘right to self-determination’, and respect that right in conformity with the provisions of the UN Charter.¹⁰⁵⁵ Indonesia as a state party to these treaties has a legal obligation to comply with them. West Papuans claim for self-determination and other related human rights, also legally guaranteed under international human rights law that specifically focuses on indigenous peoples. The indigenous human rights are articulated in the UNDRIP, including a right to self-determination.¹⁰⁵⁶

Therefore, this thesis argues that West Papuans are legally entitled to self-determination, on the legal notion of: “a peoplehood, an indigenous peoples, a colonial people, a minority group and

¹⁰⁵⁰ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)

¹⁰⁵¹ Charter of the United Nations art 1 (2).

¹⁰⁵² Thomas D. Musgrave “An Analysis of the 1969 Act of Free Choice in West Papua” 109 at 210.

¹⁰⁵³ GA Res A/RES/2200A (XXI).A/RES/2200A(XXI)

¹⁰⁵⁴ Art 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. In part I art 1, both treaties affirmed; “*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*”.

¹⁰⁵⁵ ICCPR, art 2 (1, 3) and ICESCR, art 2 (2).

¹⁰⁵⁶ United Nations Declaration on the Rights of Indigenous Peoples, art 3 “Indigenous peoples have the rights to self-determination, by virtue of that right they freely determine their political rights and cultural development.

West Papuans as the human rights holders, a principle of self-determination must be beneficial to them.”¹⁰⁵⁷ As James Anaya argues:

“Self-determination should be beneficial to all human beings for it is concerned with human beings.¹⁰⁵⁸ Anaya also asserted “peoples” entitled to self-determination, including the aggregate population of independent states, as well as those of classical colonial territories. The proposition that self-determination is concerned with the “peoples” of both states and colonial territories substantially approaches the conception of self-determination as a human rights principle benefiting all segments of humanity.”¹⁰⁵⁹

¹⁰⁵⁷ S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, USA - OSO, 1996) at 77.

¹⁰⁵⁸ At 78.

¹⁰⁵⁹ S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, New York, 2000) at 78.

5.3. Overall Conclusion

The author views that an adequate solution to West Papua's legal issues can be re-inscription to the UN decolonisation list, to be a NSGT for a proper plebiscite. It may also simply be the de-occupation of Indonesia's rule. These resolutions are made under three sufficient legal arguments that have already been discussed: the historical breach of international laws and other human rights violations; the nature of great ongoing human rights violations towards indigenous West Papuans; and the provision of broad international laws and the specific indigenous rights regime that guarantee indigenous people's claim to self-determination and other collective rights.

This thesis rejects, that Indonesia's consistent reliance on the principle of territorial integrity and non-interference in the internal affairs,¹⁰⁶⁰ under the UNGA Res 1514 (XV), is a complete misplacement and misinterpretation of the principle of international law. It is legally and historically implausible, because resolution 1514 (XV) was adopted in 1960,¹⁰⁶¹ and West Papua existed outside the boundary of Indonesia's territory at that time. Moreover, the ultimate objective of resolution 1514 (XV) was to eliminate the alien rules, therefore, it is inapplicable to West Papua, and Indonesia cannot rely on it.

In order to pursue the views mentioned above, this thesis has sufficiently provided legal frameworks to secure the indigenous Papuans' claim for self-determination and other collective rights. However, the thesis also observes that the legal approach alone is insufficient, on the fact that Indonesia is sitting on a fantasy of 'international recognition of its sovereignty over West Papua'. This thesis, therefore, proposes a combined strategy of both legal and political actions as a necessary and a strategic approach to achieve the claim for statehood. It can be pursued through two practical and realistic ways, domestic and international approaches. Domestic approach may include the legal process of litigation of the Papuans' claim for self-determination, and put more pressure on the Indonesian government. Other domestic political actions may include civil

¹⁰⁶⁰ GA Res 1514 (XV) 1960 (paragraphs 6 and 7)

¹⁰⁶¹ GA Res 1514(XV), UN Doc A/RES/1514 (20 December 1960). Declaration on the Granting of Independence to Colonial Countries and Peoples,

disobedience; peaceful movement, and even militant activities in which the West Papua Liberation Army has employed to create momentum to gain international pressure on Indonesia. Creating more escalation could influence the UN to intervene. Building strategic alliances of regional and international governmental bodies through a unified political party such as the United Liberation Movement for West Papua (ULMWP) to manoeuvre the struggle towards the UN decolonisation regime, including making regular appearances through the relevant forums in the United Nations, are also significantly important as international strategies.

With evolving contemporary international laws, the odds are overwhelmingly in favour of indigenous West Papuans' legal claim for self-determination. Especially with the development of the international human rights regime - the UNDRIP - that focuses on the rights of indigenous peoples. This legal regime is particularly significant for the claims of the indigenous people of West Papua, because it has legal capacity to influence in a situation such as that of West Papua who claim themselves as indigenous people.

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