

Why West Papua deserves another chance

The UN ballot in 1969 broke every rule for genuine self-determination ¹

Sam Blay ²

West Papua (Irian Jaya) is the oldest self-determination issue in Indonesia since independence. During decolonisation negotiations in 1949, the Dutch did not hand over this part of the former Netherlands East Indies to what is now the Republic of Indonesia. However, Indonesia continued to demand sovereignty over West Papua on two grounds: (a) that it succeeded to Dutch sovereignty over the whole of the Netherlands East Indies, including West Papua; (b) that there were historical ties between the rest of Indonesia and West Papua before the colonial era.

In 1962, Indonesia and the Netherlands reached agreement over West Papua under the New York Agreement. The Netherlands transferred sovereignty over West Papua to Indonesia, with an interim administration by the United Nations Temporary Executive Authority (Untea). Untea administered West Papua from October 1962 to May 1963, when Indonesia assumed total control and responsibility.

Indonesian sovereignty over West Papua was to be tentative because, under Article XVIII of the agreement, Indonesia undertook to ascertain the wishes of the people of West Papua through a consultation process to establish whether they wanted to remain part of Indonesia or to form an independent state. This consultation, the Act of Free Choice, took place in July 1969.

Right from the outset, considerable sections of the West Papuan population opposed the incorporation. Activists formed the Organisasi Papua Merdeka (OPM) in 1970. The movement aimed at independence for West Papua by way of armed struggle. In July 1972, the OPM enacted a provisional constitution and declared West Papua a republic.

The principal claim of West Papuan separatists is that the 1969 consultation process was not properly conducted and was therefore not valid. West Papuans demand the conduct of fresh consultations, as was the case in East Timor. OPM organisations argue that a consultation is now more urgent than ever because of continuous and increasingly gross human rights violations by Indonesia, and because Indonesia has attempted to change the population balance in West Papua through the transmigration of 'mainland' Indonesians.

A series of petitions to the UN on these human rights violations, and pleas for the UN Decolonisation Committee to investigate the conduct of the 1969 referendum and possibly recommend fresh consultations, have all so far failed.

The OPM is fragmented. Too poorly armed to mount any credible guerilla campaign and with no effective strategy, it relies mostly on non-governmental organisations. It lacks any real political support even in the South Pacific. In spite of these difficulties, the events in East Timor and the current focus on self-determination in Indonesia provide some optimism for West Papua's future. International political support would in part depend on the legal merits of their claims in international law.

Rules

As a rule, self-determination can be exercised in one of the following three ways: the establishment of an independent state; the association of the beneficiary territory with an existing state; or the integration of the beneficiary territory into an existing state. Whatever the outcome, democratic

¹ Source: Inside Indonesia, No. 61, Jan - Mar 2000

² **Professor Sam Blay** who gained his first law degree in Ghana, is the director of Post Graduate Law at the University of Technology, Sydney. Professor Blay's main teaching and research interests are International Law, the Law of Torts and International Trade Law. He has published extensively, and received major awards in his fields of specialisation. Professor Blay has developed and coordinated several short term capacity-building courses for senior lawyers and officials from China, Philippines and Vietnam. Professor Blay's main teaching and research interests are International Law, the Law of Torts and International Trade Law. He has published extensively, and received major awards in his fields of specialisation. Professor Blay has developed and coordinated several short term capacity-building courses for senior lawyers and officials from China, Philippines and Vietnam.

consultations are the necessary precondition for a valid exercise of the right. The 1969 consultations indicated that West Papuans opted for integration, but the issue is whether the option was validly exercised. According to UN rules, two conditions must be satisfied for a valid exercise of self-determination by integration:

(a) the integrated territory should have attained an advanced stage of self-government with free political institutions, so that its people would have the capacity to make a responsible choice through informed and democratic processes;

(b) the integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, conducted impartially and based on universal adult suffrage.

It is very doubtful whether the West Papuan integration in 1969 met these conditions. Before the Act of Free Choice, Indonesian authorities had made it quite clear that the consultations were only to be a formality. Indonesia indeed indicated that it was 'going through the motions of the act of free choice because of [its] obligations under the New York Agreement... But West [Papua] is Indonesian and must remain Indonesian. [Indonesia] cannot accept any alternative'. From the Indonesian point of view, the outcome of any consultation was irrelevant - integration was a foregone conclusion.

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

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

The *musyawarah* system involved consultations with tribal council representatives, who in turn were presumed to have had consultations with their tribesmen. Arguably, the system may have been a useful democratic machinery for tribal administration, but it was certainly not in conformity with the essential requirements of the UN's prescriptions on self-determination. By employing the *musyawarah* system throughout the territory, it would seem that Indonesia breached one of its obligations under the New York Agreement, and indeed, international law.

Indonesia itself admitted that the *musyawarah* system fell short of the UN requirement, but it justified the use of the system with the argument that 'in West [Papua] there exists... one of the most primitive and underdeveloped communities in the world', and that it was unrealistic to apply normal democratic methods to ascertain their wishes. This was a rather significant admission. If according to the Indonesian administration the West Papuans were so primitive that a single one man one vote adult suffrage was not appropriate for them, it may be argued that they were not sufficiently advanced to appreciate the complex implications of integration.

Some African states that opposed the Indonesian method summed up the general sentiment at the time with the observation that 'no society could be so primitive... in the modern world that the vital exercise of democratic government could be indefinitely denied to its peoples'. Some UN members also held the view that if the West Papuans were that primitive, the way to ensure their right to self-determination was not through the *musyawarah* system but through an accelerated economic development of the territory under the auspices of the UN to bring them up to a level that could enable them to exercise their right to self-determination meaningfully. Even though these criticisms and suggestions were ignored, they underscored the anomalies associated with West Papua's integration.

Defects

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

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

In the frenzy of decolonisation in the 1960s, Third World states at the UN were eager to terminate Dutch colonialism in West Papua. Indonesia enjoyed considerable support at the UN in its claims against the Netherlands for West Papua. Quite apart from its diplomatic advantage, Indonesia had also been preparing a military invasion of West Papua.

In the face of these difficulties, the Netherlands signed the New York Agreement. It was a face-saving measure that enabled the Netherlands to withdraw 'honourably'. For Indonesia, the Agreement had been a great diplomatic victory. After the signing, West Papua became a de facto integral part of Indonesia, despite the requirement of the so-called Act of Free Choice. At the UN, the incorporation seemed a *fait accompli*.

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

It is beyond doubt that the people of West Papua were denied their right to self-determination. Little noticed, separatist agitation in West Papua has persisted for over three decades. Every indication is that it will persist into the new century. After East Timor, the conditions appear right to re-examine the issue to help protect West Papuans rights. Legally there is no barrier for a re-examination of the issues. However as is usually the case in international law, the absence of legal barriers may not be enough.

West Papua needs support for the Decolonisation Committee to accept to investigate the case. Time is of the essence. The UN intends to disestablish the Decolonisation Committee by the year 2001. Given Australia's involvement and its commitment to stability in the region, it has a critical role to play in assisting West Papua.

Sam Blay (sam.blay@uts.edu.au) is professor of law at the University of Technology Sydney.